THE MOVING GOALPOSTS OF PUBLIC-EMPLOYEE SPEECH: *KENNEDY V. BREMERTON SCHOOL DISTRICT* AND DEMONSTRATIVE PRAYER

Jared M. Hirschfield *

* Law Clerk, Hecker Fink LLP; JD, Yale Law School. I am deeply indebted to Robert Post, who encouraged me to embark on this project and offered insights and feedback that improved the Article immeasurably. I would also like to thank Eugene Volokh, Emily Gold Waldman, Ashutosh Bhagwat, Katherine Salinas, Sarah Burns, Yael Sheinfeld, Chad Borgman, and Jamie Piltch for their comments and help in shepherding this piece to publication. This Article expresses my views and does not necessarily reflect those of Hecker Fink LLP.

Introduction

Over the past decade, the Roberts Court has sought to disrupt two major domains of the First Amendment: the Religion Clauses[1] and free speech.[2] These interests have recently merged to yield a flurry of cases[3] raising complex questions at the intersection of free speech and religious liberty.[4] This Article argues that the Court's emerging approach to such cases threatens to unravel longstanding free-speech doctrine and the core values underlying it.[5]

These dangers are on full display in the Court's analysis of a recent case addressing the constitutional quandary posed by the religious speech of public employees.[6] *Kennedy v. Bremerton School District* involved Joseph Kennedy, a high-school football coach and devout Christian who, after each game, knelt in prayer at midfield, joined by players, adult community members, and the media. After repeatedly requesting that Kennedy refrain from this so-called "demonstrative prayer,"[7] Bremerton School District placed Kennedy on administrative leave due

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[1] *See generally* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315 (documenting the prevalence and prominence of religion cases under the Roberts Court); Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208 (2022) (surveying the Court's recent cases expanding religious liberty in the public-school context).

[2] *See* Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005–2021*, 87 BROOK. L. REV. 5, 14 (2021) (referring to the Roberts Court's "free speech rulings" as "one of the mainstays (perhaps *the* pillar)" of its "constitutional jurisprudence"); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016) (characterizing the Roberts Court as "the most free speech-protective Supreme Court in memory"); Joseph Pace, *The Roberts Court Has Turned the First Amendment Into a Wrecking Ball*, SLATE (July 1, 2023, 8:00 AM), https://perma.cc/8KAY-ATEF.

[3] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); 303 Creative LLC v. Elenis, 600 U.S. 570 (2022).

[4] *See* TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 105–35 (2018).

[5] *See* Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech,"* 2023 SUP. CT. REV. 251, 270–71, 301 (critiquing the Court's religious-speech decision in *303 Creative* as smuggling free-exercise values into free-speech doctrine).

[6] 597 U.S. 507 (2022).

[7] Defendant Bremerton School District's Response to Plaintiff's Motion for Preliminary Injunction at 13, Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223 (W.D. Wash. 2016) (No. 3:16-

to its concerns about the consequences of his behavior, including the difficulty of ensuring security at the games and the risk that the District would be violating the Establishment Clause by allowing Kennedy to continue. Kennedy refused to reapply for his coaching job and alleged that the District had violated his free-speech and free-exercise rights.

The Supreme Court has long recognized that public employees like Kennedy enjoy some degree of free-speech protection.[8] In recognizing this qualified protection, the Court seeks to strike a careful balance. On one hand, employee-speech doctrine vindicates public employees' free-speech rights. On the other, it aspires to vest in school districts, government agencies, and other public institutions the leeway[9] to manage themselves—and their workforces—effectively. To negotiate this fundamental tension, for public-employee speech, the Court has eschewed the stringent review typical of other areas of free-speech doctrine in favor of a more flexible balancing test: When a public employee speaks as a citizen on a matter of public concern, the Court balances the "interests of the [employee] . . . in commenting upon matters of public concern" against "the interests of the State . . . in promoting the efficiency of the public services it performs through its employees."[10] However, when an employee speaks as part of her public employment, the

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CV-05694-RBL) [hereinafter Response to PI Motion] ("No federal appellate court has ever held that teachers or coaches have a free speech right to engage in *demonstrative prayer* while teaching or supervising students . . . ." (emphasis added)).

[8] Pickering v. Bd. of Educ., 391 U.S. 563 (1968); *see also* Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 1987 (2012) (explaining that *Pickering*'s qualified free-speech protection for employee speech constituted a reversal from the Court's previous "right-privilege" approach to public employment, which precluded protection for any employee speech).

[9] *Cf.* Mary-Rose Papandrea, Mahanoy v. B.L. *&* *First Amendment "Leeway,"* 2021 SUP. CT. REV. 53 (discussing the Court's maintenance of "special First Amendment leeway" for public schools to regulate student speech).

[10] *Pickering*, 391 U.S. at 568; *see also* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.").

employee is owed no free-speech protections at all because it is, in effect, the government—not the employee—speaking.[11]

Kennedy appreciated little of this fragile détente.[12] Taking up both Kennedy's free-speech and free-exercise claims, the Court granted certiorari on the questions of "whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection" and "whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it."[13] Justice Gorsuch authored an opinion for a six-Justice majority holding that the District's actions violated Kennedy's free-speech and free-exercise rights, and that the District's Establishment Clause interest failed to save its otherwise unconstitutional action.

Rather than evaluate Coach Kennedy's claims on their own merit and according to the doctrine applicable to each, Justice Gorsuch flattened the claims into a zero-sum, culture-war battle over religious liberty. For Gorsuch, *Kennedy* was no tough case. It was, boiled down, a "government entity [seeking] to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment."[14] As Gorsuch saw it, in disciplining Coach Kennedy, the school district had flouted the principle that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field,

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[11] *Garcetti*, 547 U.S. at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

[12] I borrow the term "détente" here from Professor Justin Driver, who has argued that *Kennedy* and another recent school-related religion case "unmistakably fracture[d]" the Court's "improbable détente" on the charged issue of religion in public schools. Driver, *supra* note 1, at 213.

[13] Petition for Writ of Certiorari at i–ii, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (No. 21-418) [hereinafter Petition for Certiorari]. It is noteworthy that, rather than cleanly distinguishing between Kennedy's free-speech and free-exercise claims, the Court lumped them together as "First Amendment" protections.

[14] *Kennedy*, 597 U.S. at 543.

and whether they manifest through the spoken word or a bowed head."[15] Religious expression is religious expression, Gorsuch told us—"form" and "context" be damned.[16]

And yet, Gorsuch's creative deviations in *Kennedy* notwithstanding,[17] the Court's well-established precedents provide a relatively tidy doctrinal framework for each of Kennedy's claims. Neither of those frameworks prescribes the analysis Gorsuch performs in *Kennedy*.

On the free-speech front, the Court has held that public employees receive free-speech protections only when speaking "as citizens."[18] Public employees who instead speak "pursuant to their official duties" speak not as citizens but as employees and are not "insulate[d] . . . from employer discipline" at all.[19] Further, a public employee may receive protection only for "speech on a matter of *public* concern"—not for speech on "private matters."[20] This distinction "must be determined by the content, form, and context of a given statement, as revealed by the whole record."[21] Fifty years of precedent can thus be synthesized into a (deceptively) straightforward rule:[22] A public employer's disciplinary actions trigger the First Amendment only

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[15] *Id.*

[16] Connick v. Myers, 461 U.S. 138, 147–48 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, *form*, and *context* of a given statement, as revealed by the whole record." (emphasis added)); *see infra* Section II.B (illustrating how Gorsuch's majority opinion in *Kennedy* fails to adequately consider the content, form, and context of Coach Kennedy's speech act, as required by the Court's public-concern test).

[17] *See infra* Part III (discussing how *Kennedy* deviates from the traditional balancing test used to analyze public-employee speech).

[18] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[19] *Id.*

[20] *Connick*, 461 U.S. at 146–47 (emphasis added). This requirement is grounded in "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143; *see also id.* at 154 ("For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.").

[21] *Id.* at 147–48.

[22] *See* Kozel, *supra* note 8, at 1991 ("Despite the complexities in their application, the general principles that shape the modern doctrine of employee speech can be identified with relative ease.").

when an employee speaks (1) as a *citizen* (2) on a matter of *public* concern.[23] If both conditions are satisfied, the Court then conducts "particularized balancing," weighing the employee's particular speech act against the government's particular interests in regulating it.[24]

The free-exercise framework is similarly streamlined.[25] If a rule or action that burdens free exercise is neutral and generally applicable, it is subject only to rational-basis review.[26] However, if the rule or action is either not neutral or not generally applicable, it is subject to strict scrutiny and likely fails.[27] A government policy is not neutral if it is "specifically directed at . . . religious practice," is "discriminat[ory] on its face," or otherwise has "religious exercise" as its "object."[28] And a government policy fails the "generally applicable" requirement if the state allows

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[23] *See Garcetti*, 547 U.S. at 418 ("*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises." (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); and *Connick*, 461 U.S. at 147)).

[24] *Connick*, 461 U.S. at 150.

[25] This Article sets aside Kennedy's free-exercise claim to focus on his free-speech claim. However, for religious-expression cases, the free-exercise doctrine remains relevant insofar as it dictates the remedies available to plaintiffs where free-speech protection is not available. *See infra* notes 176–177 and accompanying text. Perceived deficiencies in this doctrine, such as *Smith*'s protection of neutral rules of general applicability, might also help explain why the Court's conservative majority is keen to push religious-expression cases toward the domain of free speech. *See infra* note 69 (detailing Justice Alito's gripes with elements of modern free-exercise doctrine). In this respect, *Kennedy* is of a piece with other religious-expression cases, including *303 Creative LLC v. Elenis*, 600 U.S. 570 (2022), that engage in a sort of "*Smith* avoidance." Rather than confront the free-exercise issue head-on, the Court has evaded the issue by channeling disputes into the realm of free speech. *See* Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO ST. L.J. 839, 854 (2017) ("Prayer and worship are of course within the coverage of the Free Exercise Clause, but given the Court's eviscer-ation of Free Exercise protections in [*Smith*], that does not buy plaintiffs much—which is no doubt the reason why the Free Speech Clause has become the primary source of constitutional protection for religious activities."). This development promises devastating consequences for the integrity of free-speech doctrine.

[26] Emp. Div. v. Smith, 494 U.S. 872 (1990).

[27] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

[28] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022) (internal quotation marks omitted) (quoting *Smith*, 494 U.S. at 878; and *Lukumi*, 508 U.S. at 533).

for individualized exemptions from the policy but denies a religious exemption, or exempts comparable secular conduct.[29]

Perhaps blinded by a reflexive desire to defend religious speech, the *Kennedy* majority glossed over the many tensions latent in the First Amendment's clauses, opting instead to focus only on their supposed synergies. Justice Gorsuch declared that free speech and free exercise "work in tandem" to "provide[] overlapping protection for expressive religious activities."[30] But from that alluringly simple proposition flow two unavoidable problems. The first bears on the scope of this supposed "overlapping protection" in the realm of public employment: How far does the public employee's bundle of First Amendment protections extend before it crashes

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[29] *Id.* (citing Fulton v. City of Philadelphia, 593 U.S. 522, 533–34 (2021)). The doctrine outlined in this paragraph is a coarse recounting of the general, trans-substantive framework for free-exercise claims, but the contours of religious protections for public employees specifically remain severely underdefined. While there is a distinct free-speech framework for employee speech (*Pickering-Connick-Garcetti*), there is no analogous framework for non-speech religious exercise. *See* Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1196 (2017); Nicholas J. Grandpre, Note, *The Primacy of Free Exercise in Public-Employee Religious Speech*, 98 NOTRE DAME L. REV. 1767, 1775 (2023) (documenting that "the Supreme Court has never applied *Pickering* balancing to expression deemed protected by both the Free Exercise and Free Speech Clauses or to a sole free exercise claim"). Some courts apply *Pickering-Connick-Garcetti* to government employees' First Amendment claims, regardless of whether they sound in free speech or free exercise. *See, e.g.*, Brown v. Polk Cnty., 61 F.3d 650, 658 (8th Cir. 1995) (applying the *Pickering-Connick-Garcetti* framework to a free-exercise claim by a government employee).

[30] *Kennedy*, 597 U.S. at 523. Gorsuch does not clearly explain which doctrine governs such cases. Is religious expression like Kennedy's properly analyzed under free-speech and free-exercise doctrine independently, or is Gorsuch arguing that these so-called "hybrid" claims instead warrant some special—even supercharged—hybrid doctrine?

into the constitutional bar on government establishment of religion? Justice Sotomayor's dissent[31] and a growing body of literature[32] respond forcefully to this question. Largely missing from that discussion, though, is an acknowledgment and exploration of *Kennedy*'s incompatibility with, and devastating consequences for, free-speech doctrine.[33]

This Article seeks to tease out this second conflict. For all its high-soaring rhetoric about the Free Speech and Religion Clauses operating in tandem, *Kennedy* simply does not fit within the Court's existing free-speech doctrine.[34] This Article

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[31] Setting Kennedy's free-speech claim aside, Justice Sotomayor homed in on the case's consequences for religious-liberty doctrine. Sotomayor's impassioned dissent took the majority to task for "misconstru[ing] the facts" in its mission to overturn longstanding Establishment Clause precedent, eliding Kennedy's years-long "history" of "invit[ing] others to join his prayers and . . . le[ading] student athletes in prayer at the same time and location." *Id.* at 546 (Sotomayor, J., dissenting). Interwoven with photographs of a kneeling Kennedy surrounded by players, press, and members of the public (including a state representative), *id.* at 549, 553, 555, the dissent reframes the case from one "about the limits on an individual's ability to engage in private prayer at work" into a dispute about a school district's constitutional responsibility to "incorporate a public, communicative display of [an] employee's personal religious beliefs into a school event." *Id.* at 558. In gutting the Establishment Clause's ability to "protect[] the separation between church and state," Sotomayor lamented, *Kennedy* was "no victory for religious liberty." *Id.* at 579.

[32] The vast majority of literature on *Kennedy* has focused either exclusively or disproportionately on its Establishment Clause holding. *See, e.g.*, Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQUESNE L. REV. 40 (2023); Andrew Koppelman, *Religious Liberty as a Judicial Autoimmune Disorder: The Supreme Court Repudiates Its Own Authority in* Kennedy v. Bremerton School District, 74 HASTINGS L.J. 1751 (2023); Daniel L. Chen, Kennedy v. Bremerton School District*: The Final Demise of* Lemon *and the Future of the Establishment Clause*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, No. 21.

[33] To date, only a couple full-length scholarly articles attempt to explain how *Kennedy* fits into existing employee-speech doctrine—or doesn't. *See* Emily Gold Waldman, *From* Garcetti *to* Kennedy*: Teachers, Coaches, and Free Speech at Public Schools*, 11 BELMONT L. REV. 239 (2024); J. Israel Balderas, *Beyond Prayer: How* Kennedy v. Bremerton *Reshapes First Amendment Protections for Public Employee Speech*, 23 FIRST AMEND. L. REV. 203 (2024). Neither of these articles traces how the Court's outsized attention to Coach Kennedy's free-exercise claim distorted its analysis of his free-speech claim nor explores the Court's failure to ask whether Kennedy's speech was on a matter of public concern.

[34] *Kennedy* does, however, fit comfortably within this Court's emerging tendency to silently import the logic of the Religion Clauses into free-speech doctrine. *See* Post, *supra* note 5, at 301; *infra* notes 174–178 and accompanying text. This phenomenon promises devasting consequences for the integrity of free-speech doctrine and the vitality of its protections. *See* Post, *supra* note 5, at

illustrates how Justice Gorsuch's blurry conception of Coach Kennedy's expression runs afoul of the Court's own employee-speech doctrine and threatens to distort it into an inactionable muddle.

I. COACH KENNEDY'S PATH TO THE COURT

In 2008, Coach Kennedy began coaching varsity and junior-varsity football at Bremerton High School in Bremerton, Washington.[35] As an assistant coach, Kennedy was tasked with assisting the head coach with his supervisory responsibilities in addition to "[o]bey[ing] all . . . Rules of Conduct before players and the public" and "maintain[ing] positive media relations."[36] Broadly, Kennedy was given the responsibility to serve as "a coach, mentor and role model for the student athletes in the Bremerton School District."[37]

Kennedy is a devout Christian. Ever since he started working at Bremerton High School, Kennedy incorporated elements of his faith into his job as assistant coach.[38] At the end of each game, immediately after players and coaches shook hands, he knelt silently in prayer for fifteen to thirty seconds on the field's fifty-yard line. Kennedy asserted that these prayers were "part of the covenant [he] made with God before [he] started coaching" and that his sincerely held religious beliefs required him to "give thanks through prayer . . . for what the players had accomplished and for the opportunity to be part of their lives through the game of football."[39] His religious beliefs specifically required him "to pray on the field where the

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270 ("[C]onfusing free speech and Free Exercise doctrine in this way makes hash of basic First Amendment principles. Within the logic of a Free Exercise right, claims of conscience can be lodged against any compelled action. Claims of free speech, by contrast, can be asserted only against mandated speech, as speech is defined by relevant First Amendment doctrine."). Given the massive social footprint of religious exercise, the Court's trend threatens to sweep far beyond employee speech to unsettle almost all facets of free-speech doctrine.

[35] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020).

[36] Joint Appendix at JA 30, JA 56, *Kennedy*, 597 U.S. 507 (No. 21-418).

[37] *Id.* at JA 56.

[38] In addition to the on-field prayer described here, Kennedy led pre- and post-game locker room prayers for many years. He conceded, however, that those prayers were not compelled by his religion. *Kennedy*, 443 F. Supp. 3d at 1228.

[39] Joint Appendix, *supra* note 36, at JA 168–69.

game was played"[40] but did not require him to lead anyone in prayer.[41] These prayers were, according to Kennedy, "private communications with God."[42]

Early in his tenure, Kennedy prayed on the field alone, but over the years, players from both Bremerton High and opposing teams began to join him. Eventually, a majority of the Bremerton team participated in Kennedy's post-game ritual.[43] After learning of the ritual in September 2015,[44] the District informed Kennedy that his "demonstrative" prayer alongside students likely violated District policy and directed him to stop.[45] For several weeks after, Kennedy attempted to comply with the policy and, in one instance, allegedly waited an hour after a game, until the stadium lights went out, to pray on the field alone.[46] During this period, Kennedy expressed frustration with the District's directive publicly, posting on Facebook after one game that he might be fired for praying.[47]

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[40] *Id.* at JA 169 (Declaration of J. Kennedy in Support of Motion for Preliminary Injunction). The District later offered Kennedy an accommodation that would have allowed him, before or after each game, to pray "within the school building, athletic facility or press box," *id.* at JA 94 (Letter from A. Leavell to J. Kennedy (Oct. 23, 2015)), somewhere "not front and center in front of students and [the] community," *id.* at JA 214 (Transcript Excerpts from Deposition of A. Leavell (July 11, 2019)). Kennedy refused that accommodation.

[41] *Id.* at JA 150.

[42] *Kennedy*, 443 F. Supp. 3d at 1228.

[43] *Id.*

[44] *Id.* at 1228–29 (explaining that the District learned about Kennedy's ritual when an opposing coach notified Bremerton High's principal that Kennedy had invited his team to join Kennedy's post-game prayer).

[45] *Id.* at 1229. The District explained to Kennedy that his conduct likely violated Board Policy 2340, which sought "to avoid violations of the Establishment Clause by requiring that school staff neither encourage nor discourage students from engaging in religious activity." *Id.*

[46] Joint Appendix, *supra* note 36, at JA 53.

[47] *Kennedy*, 443 F. Supp. 3d at 1229. This Facebook post "went viral and started a large controversy," Joint Appendix, *supra* note 36, at JA 361–62, with "thousands of people saying they were going to attend and storm the field with [Kennedy] after the game," *id.* at JA 236. This Facebook post also "may have . . . triggered" a "large amount of emails, letters, and phone calls" to the District, "many of which were hateful or threatening." *Kennedy*, 443 F. Supp. 3d at 1230.

In October, Kennedy notified the District that he planned to begin praying again and publicized his plans in various media appearances.[48] After a game on October 16, 2015, a crowd of people rushed onto the field to join Kennedy, knocking down cheerleaders and band members.[49] On that evening, Kennedy was "surrounded by [news] cameras" and was even joined in prayer by a state representative.[50] In response, the District was forced to increase security at subsequent games and called parents to remind them that there was no public access to the field after games.[51] Kennedy continued praying at the center of the field—joined by students and adults—until the District placed him on paid administrative leave.[52] While the District had previously cited additional reasons for its concern about Kennedy's prayers, such as "distract[ion] . . . from his supervisorial duties," the District ultimately placed Kennedy on leave because of the "risk of constitutional liability."[53]

But Kennedy was not yet done. Despite no longer being allowed to participate in games as a coach, Kennedy could still attend as a member of the public. He attended at least one game after being placed on leave, at which he prayed in the bleachers before local news cameras there to document his story.[54] After refusing to reapply for his coaching job and filing a complaint with the Equal Employment Opportunity Commission, Kennedy sued the District, alleging violations of his free-speech and free-exercise rights.[55]

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[48] *Kennedy*, 443 F. Supp. 3d at 1230. One of Kennedy's coaching colleagues remembered seeing Kennedy on a range of national television programs, including *Fox & Friends*, *The O'Reilly Factor*, and *Good Morning America*. Joint Appendix, *supra* note 36, at JA 190.

[49] *Kennedy*, 443 F. Supp. 3d at 1230; *see also* Joint Appendix, *supra* note 36, at JA 181 (Declaration of A. Leavell in Opposition to Motion for Preliminary Injunction) ("There were people jumping the fence and others running among the cheerleaders, band and players. Afterwards, the District received complaints from parents of band members who were knocked over in the rush of spectators on to the field."); *supra* note 47 (explaining that the crowds storming the field were activated by Kennedy's public Facebook post foreshadowing potential discipline by the District).

[50] *Kennedy*, 443 F. Supp. 3d at 1230.

[51] *Id.*

[52] *Id.* at 1230–31.

[53] *Id.* at 1231.

[54] *Id.*

[55] Joint Appendix, *supra* note 36, at JA 143 (Complaint). Kennedy's Complaint also included several Title VII claims. *Id.* at JA 162–64.

What ensued was a long and winding journey through the federal judiciary that took Kennedy to the Supreme Court twice.[56] The district court denied Kennedy's motion for a preliminary injunction,[57] holding that Kennedy spoke as an employee, not as a citizen, and thus his expression was unprotected. Kennedy possessed "all the accoutrements, all of the attention, all of the authority, by virtue of his coachhood," which made his post-game prayer categorically different from, say, that of a teacher "at a table in the cafeteria . . . invoking the Lord's blessing for the food."[58] The court also accepted as undisputed Kennedy's proposition that his speech was "unquestionably of inherent public concern" because it "concern[ed] religion."[59]

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[56] In this Part, I recount only the lower-court holdings relevant to Kennedy's free-speech claim.

[57] Kennedy's motion for preliminary injunction requests relief from the District's free-speech and free-exercise violations, but argues only under the Ninth Circuit's "refine[ment]" of the Supreme Court's *Pickering-Garcetti* framework. Plaintiff's Motion for a Preliminary Injunction and Supporting Memorandum of Law at 8–22, *Kennedy*, 443 F. Supp. 3d 1223 (No. 3:16-CV-05694-RBL) [hereinafter PI Motion] (applying the five-step test from *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009)). No purely free-exercise arguments were made at this stage of the litigation.

[58] Preliminary Injunction Hearing, *in* Petition for Certiorari, *supra* note 13, at App-288–89 [hereinafter PI Hearing]. However, in distinguishing between Kennedy and the hypothetical teacher praying in the lunchroom, Judge Leighton focused on the establishment implications of the respective expressions, not the free-speech implications. Here, we can start to observe the bleeding of the Religion Clauses into what ought to be a distinct free-speech analysis:

> Is there a difference between the speech if it is religious in nature? The trip wire is very taut for most speech that does not have a religious overtone, because we guard our liberties jealously for political discussion and the like. But there is a push me/pull you on religion. It is the uprights. It is not Scylla, it is not Charybdis. I mean, we don't need a geography test for the Italian peninsula and Sicily, just the goalposts. You've got to thread the needle, so to speak, between establishment and free exercise. And that, I think, makes the trip wire a little slack.

Id. at App-272.

[59] PI Motion, *supra* note 57, at 9 ("Because Coach Kennedy's speech concerns religion, it is 'unquestionably of inherent public concern.'" (quoting Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011))); *see also* PI Hearing, *supra* note 58, at App-302 (reflecting the district court's holding, for the purposes of Kennedy's preliminary-injunction motion, that his expression constituted a matter of public concern); *id.* at App-275 (Kennedy arguing that "the Ninth Circuit has adopted a very expansive definition of public concern to incorporate any speech or expression that touches on religion").

Kennedy appealed, and the Ninth Circuit affirmed that Kennedy, when "kneeling and praying on the fifty-yard line *immediately* after games *while in view of students and parents*," spoke as a "public employee, not as a private citizen, and his speech was therefore unprotected."[60] The circuit court started by characterizing Kennedy's speech as public and demonstrative. Kennedy's refusal of the District's accommodations for him to pray after the stadium had emptied or out of public view, the court concluded, "indicate[d] that it [was] essential" to him that his speech be public.[61] Further, Kennedy's speech was "not solely speech directed to God," but rather was "*directed* at least in part to the students and surrounding spectators."[62] Because Kennedy's official duties included such demonstrative, public expression—that is, "speaking demonstratively to spectators at the stadium after the game through his conduct"[63]—his post-game prayers occurred "'while performing a function' that fit 'squarely within the scope of his position.'"[64] The Ninth Circuit did not revisit the parties' stipulation that Kennedy's speech was on a matter of public concern because it was "religious speech."[65] Given that Kennedy speaking

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[60] Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 825, 827 (9th Cir. 2017).

[61] *Id.* at 825.

[62] *Id.*

[63] *Id.* at 827; *see also id.* at 828 ("All told, by kneeling and praying on the fifty-yard line immediately after games, Kennedy was fulfilling his professional responsibility to communicate demonstratively to students and spectators."). The court arrives at this conclusion by synthesizing Kennedy's formal job responsibilities, including:

> To "be a coach, mentor and role model for the student athletes";
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> To "exhibit sportsmanlike conduct at all times";
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> To "communicate effectively with parents";
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> To "maintain positive media relations";
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> To "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to use proper conduct before the public and players at all times"; and
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> To "create good athletes" and "good human beings."

Id. at 815–16.

[64] *Id.* at 827 (quoting *Johnson*, 658 F.3d at 967).

[65] *Id.* at 822; *see also* Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996) (holding that religious expression is "obviously of public concern").

as an employee was sufficient to render the resulting expression unprotected, the Ninth Circuit declined to reach *Pickering-Garcetti*'s balancing stage.

Kennedy pressed on, petitioning for certiorari at the Supreme Court on just his free-speech claim. The Court ultimately denied his request, but not without comment from some disgruntled Justices.[66] Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, concurred with the denial in light of "important unresolved factual questions [that] would make it very difficult if not impossible . . . to decide the free speech question."[67] But the concurrence left little doubt that these Justices disapproved of the lower courts' decisions on the merits:

> Under [the Ninth Circuit's] interpretation . . . , if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard. . . . What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty.[68]

Prodding Kennedy to bring his Free Exercise and Title VII claims when he returned to the Court, Alito explained Kennedy's "decision to rely primarily on his free speech claims" as a product of "certain decisions of this Court."[69]

Despite Justice Alito's admonition, the district and appellate courts again ruled in favor of the District, focusing on the communicative nature of Kennedy's ex-

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[66] Kennedy v. Bremerton Sch. Dist., 586 U.S. 1130 (2019).

[67] *Id.* at 1130 (Alito, J., concurring in denial of certiorari).

[68] *Id.* at 1132–33.

[69] *Id.* at 1133. Justice Alito's hope, we can surmise, was that this case would eventually present an opportunity to revisit those precedents. Alito lamented that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause" and that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), limited mandatory religious accommodations under Title VII to those that do not "impose[] more than a *de minimis* burden." *Id.* at 1133–34. The Court loosened *Trans World*'s religious-accommodations rule in *Groff v. DeJoy* in the next Term. 600 U.S. 447 (2023).

pression. The district court held that Kennedy's "prominent, habitual prayer" constituted speech as an employee because it was not "so obviously personal that it [was] delivered as a citizen."[70] Kennedy's insistence that "his prayers were between him and God and not directed at players or audience members" was unavailing because the employee-speech inquiry "is not so subjective."[71] Even if Kennedy did not "intend to direct [his] actions" at others, his expression "at the center of the field, under bright lights, in front of the bleachers, at a time when the general public could not access the field" lacked the "contextual cues" that could "alert [onlookers] that [his] conduct [was] private and not intended to influence them."[72] Similarly, the Ninth Circuit situated Kennedy's post-game expression alongside the "prescribed speaking responsibilities" of an assistant coach at Bremerton High.[73] Far from "personal and private,"[74] Kennedy's "on-field demonstrative activities . . . were designed to attract publicity"—an intention corroborated by his post-suspension prayer in the bleachers "surrounded by news cameras."[75] "[A]t issue in this case," the Ninth Circuit held resolutely, "is *not* . . . a personal and private exercise of faith. At issue [is]—in every sense of the word—a *demonstration*."[76]

The case arrived at the Supreme Court framed by Kennedy as a "triple threat to individual liberty and First Amendment values" that risked pushing the "religious expression of hundreds of thousands of teachers in the Ninth Circuit" to "the verge

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[70] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1235 (W.D. Wash. 2020). By contrast, the court explains that a coach "greet[ing] family in the bleachers" or a teacher "wear[ing] a cross around their neck" *would* be "obviously personal." *Id.*

[71] *Id.* at 1236.

[72] *Id.* at 1235–36.

[73] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1016 (9th Cir. 2021).

[74] *Id.* at 1017.

[75] *Id.* at 1016.

[76] *Id.* at 1018 (second emphasis added). After the panel decision, the Ninth Circuit declined to hear the case en banc, prompting a spate of dissenting opinions. Kennedy v. Bremerton Sch. Dist., 4 F.4th 910 (9th Cir. 2021). Most notably, Judge O'Scannlain lamented that the panel opinion swept in a number of employee actions that should intuitively be protected, including "a coach who kneels during the national anthem in protest or a teacher whose car parked on school property bears a bumper sticker for a presidential campaign." *Id.* at 936 (opinion of O'Scannlain, J.). Under the Ninth Circuit's ruling, O'Scannlain protested, citizens like Kennedy "stand to be censored, disciplined, or even fired by their public employer for any or no reason at all." *Id.*

of extinction."[77] At oral argument, the Justices picked up on threads left unresolved by the courts below. From the jump, Kennedy's lawyer, Paul Clement, sought to persuade the Court that this was not merely a case with two distinct constitutional claims, but something else entirely:

> JUSTICE THOMAS: Mr. Clement, just so I'm clear, . . . below, you had a free exercise claim and you had a free speech claim. Which are you pursuing? Are you pursuing both now, or are you pursuing them separately, or is this sort of a hybrid claim argument you're making?
>
> MR. CLEMENT: So, Justice Thomas, we are pursuing them both. They're both fully preserved in this Court, but I do think you're right in the sense that this is a hybrid-type case in which the Free Speech Clause and the Free Exercise Clause reinforce each other . . . .[78]

Perhaps hesitant to rest the entire case on the religious nature of Kennedy's expression, the Justices circled this theme in several additional exchanges that attempted to flesh out Kennedy's conceptualization of his claims. When asked by Justice Kavanaugh how he would "handle the hypothetical . . . of the coach who . . . wants to unfurl [a] political banner" or "put on a political message at the 50-yard line after the game," Mr. Clement called these "flag" hypotheticals "easy cases."[79] According to Mr. Clement's articulation of established employee-speech doctrine, a school district can regulate such political expression if it does so because the speech is "disruptive or even just because it's political speech."[80] Whereas Mr. Clement deemed there to be "no reason to unfurl a flag other than to communicate with your message," he argued that, with prayer, "[i]t may be very important to somebody to do it in the place where the activities took place," and that may mean

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[77] Petition for Certiorari, *supra* note 13, at 17–18. The petition for certiorari is notable for its vivid and religious rhetoric:

> [P]ugilism in defense of liberty is no vice, and suggesting that efforts to vindicate rights to religious speech and exercise justify greater government suppression creates an unprecedented chilling effect. When a football coach is fired because of his religious activity, which the record now confirms, he is entitled to take to the airwaves. Whatever is true of the kingdom of heaven, the First Amendment is not reserved for the meek.

Id. at 25.

[78] Transcript of Oral Argument at 5, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (No. 21-418).

[79] *Id.* at 50–51.

[80] *Id.* at 51.

"that incidentally there's an audience there."[81] And, attempting to clarify the precise contours of the speech act at issue, Justice Barrett asked "where is . . . the speech?" in Kennedy's silent communication with God.[82] Mr. Clement assured her, on no authority, that silent, private prayer is categorically "expressive conduct . . . or speech."[83]

None of this nuance ultimately appears in Justice Gorsuch's opinion reversing the Ninth Circuit's decision. Writing for an ideologically split 6–3 majority,[84] Justice Gorsuch echoes Kennedy's conception of the case as implicating some sort of synergistic protection for religious expression that is greater than the sum of its free-speech and free-exercise parts.[85] This "hybrid" frame drives the entire opinion—down to its organization. Rather than analyze Kennedy's free-speech and free-exercise "burdens" independently and successively, Gorsuch analyzes them together, followed by the District's countervailing interests.[86]

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[81] *Id.* ("[I]f the reason that the school district is acting is because of disruptive or even just because it's political speech and it wants to take action, that's *Pickering*. They can do that. . . . [T]hose are sort of an easy case.").

[82] *Id.* at 52.

[83] *Id.* at 53. For an excellent discussion on this exact question, see Bhagwat, *supra* note 25, at 852–54, 877.

[84] Justice Gorsuch's opinion was joined by five colleagues, except for Part III.B, which held that Kennedy's expression was private speech. Justice Kavanaugh did not join that portion of the opinion.

[85] *Kennedy*, 597 U.S. at 523–24 ("That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.").

[86] Part III of the *Kennedy* opinion focuses on whether Kennedy "discharged his burdens" under the Free Exercise Clause and under the Free Speech Clause. *Id.* at 525. Part IV analyzes whether the school district carried its "burden," lumping all interests for both claims into one discussion. *Id.* at 531–32; *see also id.* at 532–43. Gorsuch tells us that, for this type of religious-expression claim, "a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." *Id.* at 524 (citing Fulton v. City of Philadelphia, 593 U.S. 532–34, 540–41 (2021); Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015); Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Sherbert v. Verner, 374 U.S. 398, 403 (1963)). For commentary disputing this characterization of the Court's employee-speech framework, see *infra* notes 183–191 and accompanying text.

Gorsuch's analysis of Kennedy's free-speech claim is simple—too simple.[87] He starts by asking whether Kennedy "offer[ed] his prayers in his capacity as a private citizen" or as an employee, in the form of "government speech attributable to the District."[88] Gorsuch concludes that Kennedy's speech was "private speech, not government speech" because "[h]e did not speak pursuant to government policy," "[h]e was not seeking to convey a government-created message," and "[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."[89] The opinion chides the Ninth Circuit for casting Kennedy's job description so broadly that it "treat[ed] everything teachers and coaches say in the workplace as government speech subject to government control."[90] This approach, Gorsuch claims, 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."[91] Having thus concluded that Kennedy was speaking as a citizen, Gorsuch finds the doctrine's other requirement—that the speech be on a matter of public concern—satisfied on stipulation by the parties and declines to conduct any independent analysis of that prong.[92]

Gorsuch then tells us that because Kennedy's prayers constitute speech by a private citizen on a matter of public concern, "the burden shifts to the District."[93] While acknowledging that the standards for free-speech and free-exercise claims

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[87] The Court proceeds to Kennedy's free-speech claim after finding that the District's "challenged policies were neither neutral nor generally applicable" for purposes of the Free Exercise Clause. *Kennedy*, 597 U.S. at 526. Later, however, in a footnote, the Court explains that it is abstaining from "decid[ing] whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework." *Id.* at 531 n.2. In other words, the Court leans on the Free Speech Clause to get Kennedy's claim over the finish line without deciding whether his Free Exercise claim would have been enough on its own.

[88] *Id.* at 528.

[89] *Id.* at 529–30.

[90] *Id.* at 530–31.

[91] *Id.* at 531.

[92] *Id.* at 528. This Court has exhibited a concerning willingness to rely on party stipulations in difficult, consequential cases. *See* Post, *supra* note 5, at 260–63, 292–93 (discussing the central role of stipulated facts in Justice Gorsuch's majority opinion in *303 Creative*).

[93] *Kennedy*, 597 U.S. at 531–32.

differ,[94] he refuses to decide exactly which standard applies in this case. "[I]t does not matter which standard we apply," Gorsuch contends, because "[t]he District cannot sustain its burden under any of them."[95] Gorsuch finds the District's interests insufficient to justify its regulation of Kennedy's expression. First, he overturns a fifty-year-old Establishment Clause precedent to discard the District's interests in avoiding establishment liability.[96] Then, in a footnote, he dismisses the District's crowd-control interest, faulting the District for not raising such concerns with Kennedy contemporaneously.[97] Gorsuch insinuates further that this interest was "hypothesized or invented *post hoc* in response to litigation,"[98] and bristles at the possibility of sacrificing "protected speech or religious exercise" to a "heckler's veto."[99]

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[94] *Id.* at 532 ("Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. The District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 n.1 (1993); and Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015))).

[95] *Id.* at 532; *see also id.* at 544–45 (Thomas, J., concurring) (noting that the Court's opinion "does not resolve" (1) "whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public" and (2) "what burden a government employer must shoulder to justify restricting an employee's religious expression").

[96] In *Kennedy*, the Court overturned *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which looked to a law's purposes, effects, and potential for entanglement with religion to assess Establishment Clause claims. *Id.* at 612–13. The *Lemon* test prohibited government action that involved "coercion"—both direct, literal coercion as well as subtler forms of indirect coercion. *See, e.g.*, *id.* at 622–24. *Lemon*'s progeny had also fleshed out an "endorsement" prong of the Establishment Clause doctrine, which prohibited government action that a "reasonable observer" would consider an "endorsement" of religion. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). *Kennedy* vitiated this endorsement prong entirely and confined the coercion prong to direct coercion alone. For a fuller discussion—and thoughtful critique—of *Kennedy*'s Establishment Clause holding, see Driver, *supra* note 1, at 235–49.

[97] *Kennedy*, 597 U.S. at 543 n.8.

[98] *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[99] *Id.* ("Nor under our Constitution does protected speech or religious exercise readily give way to a 'heckler's veto.'" (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001))). "Roughly put, the heckler's veto doctrine holds that opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence." R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 159 (2017).

Gorsuch ultimately concludes that the District's supposed failure to carry its burden requires the Court to protect Kennedy's post-game prayers.

II. MAKING SENSE OF KENNEDY'S FREE-SPEECH CLAIM

To make sense of Kennedy's free-speech claim, we must analyze it using the Court's well-established employee-speech framework.[100] That means asking, first, whether Kennedy spoke as a citizen and, second, whether his expression bore on a matter of public concern. If Kennedy's post-game ritual indeed constituted citizen speech on a matter of public concern, we then must balance his free-speech interests against the interests of the District. However, if Kennedy falters on either of the threshold inquiries, his free-speech claim necessarily fails.[101]

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[100] Absent explicit guidance otherwise, free-speech questions are governed by free-speech doctrine. While a speech act may implicate other constitutional doctrines—such as the Free Exercise Clause in the case of religious employee speech—to be afforded *free-speech* protection, a speech act must independently satisfy the requirements of free-speech doctrine. Thus, employee speech—religious or not—must be evaluated according to the applicable free-speech doctrine developed by the Supreme Court over the better part of six decades.

[101] Mapping the doctrine, we are left with this 2x2 matrix:

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">Governed by Garcetti's pursuant-to-official-duties test</td></tr>
<tr><td>As Public Employee</td><td>As Private Citizen</td></tr>
<tr><td rowspan="2">Governed by Connick's content-form-context test</td><td>Public Concern</td><td rowspan="2">No protection (Garcetti)</td><td>Pickering-Connick balancing</td></tr>
<tr><td>Private Matter</td><td>No protection "absent the most unusual circumstances" (dicta in Connick*)</td></tr>
</table>

* "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, *absent the most unusual circumstances*, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick v. Myers, 461 U.S. 138, 147 (1983) (emphasis added).

Gorsuch located Kennedy's expression in the upper-right box and found that Kennedy's speech prevailed in the ensuing balancing. *See Kennedy*, 597 U.S. at 527–31. Precisely how the Court balanced and whether its balancing was in accord with that prescribed in *Pickering* and *Connick* is explored in Part III.

A. Did Kennedy Speak as a Citizen?

Kennedy's free-speech holding rests on the conclusion that Coach Kennedy spoke not in his capacity as a public-school football coach but as a private citizen. Before weighing the parties' respective interests, including the District's establishment concerns, Justice Gorsuch asks whether Kennedy "offer[ed] his prayers in his capacity as a private citizen" or if "they amount[ed] to government speech attributable to the District."[102] The answer, Gorsuch identifies correctly, lies in whether the expression at issue was made "pursuant to [the employee's] official duties."[103] Only speech made outside the scope of these duties is made as a citizen.[104]

Gorsuch begins his analysis with a series of conclusory statements about the "substance" of Kennedy's expression.[105] When Kennedy "uttered the three prayers that resulted in his suspension," Gorsuch confidently announces:

- "[H]e 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"; and
- "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."[106]

Gorsuch sums all this up to find that, "simply put," Kennedy's prayers "did not 'ow[e their] existence' to [his] responsibilities as a public employee."[107]

Only after making these pronouncements does Gorsuch turn to the "timing and circumstances of Mr. Kennedy's prayers," which apparently "confirm" his

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[102] *Kennedy*, 597 U.S. at 528.

[103] *Id.* at 527 (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

[104] If an employee's speech is made pursuant to official duties, it is government, not citizen, speech because it is speech the government "itself . . . commissioned or created." *Garcetti*, 547 U.S. at 422.

[105] *Kennedy*, 597 U.S. at 529–30.

[106] *Id.* (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

[107] *Id.* at 530 (quoting *Garcetti*, 547 U.S. at 421).

substantive findings.[108] Two principal facts ground Gorsuch's conclusion that Kennedy spoke as a citizen. First, Kennedy's expression occurred in the "postgame period," when "coaches were free to attend briefly to personal matters," such as checking their phones or greeting people in the stands.[109] Given that the coaching staff was "free to engage in all manner of private speech" during this time, it is unlikely that Kennedy's expression was "fulfilling a responsibility imposed by his employment."[110] Second, the fact that Kennedy engaged in these prayers while players were engaged in other activities, such as singing the school fight song, establishes that his speech was not directed at players and therefore was not within the scope of his employment duties.

On Gorsuch's cursory and thin characterization of these facts, there is much to take issue with.[111] But even setting those factual disputes aside, Gorsuch's reasoning is structurally flawed.

Determining whether an employee's expression is within the scope of their duties is effectively a two-step process. We first determine (a) the nature of the expression at issue and (b) the scope of the job. Only then can we ask whether the former falls within the latter. By failing to keep these determinations separate, Gorsuch writes a muddy opinion that leaves us with no clear answers on the nature of Kennedy's expression nor on the scope of his job. Carefully parsing these components helps to both distill the factual points in contention and refine our understanding of *Kennedy*'s holding.

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[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] For example, while Kennedy did on some occasions begin praying while his team was singing the school fight song, he was also on multiple occasions joined by some of his players. The logic of Gorsuch's first rationale—that this was a period during which coaches could temporarily do things outside the scope of their employment—is flawed. Just because some of the coaches could engage in private speech during this time does not mean that *every* coach could do so simultaneously or that every coach's actions during this period constitute private speech. Given that the coaching staff is still partially responsible for the players during this period, at least *some* coaches have to be attending to their official duties. *See* Joint Appendix, *supra* note 36, at JA 276–77 (Transcript Excerpts from Deposition of J. Kennedy) (discussing how coaches "cover each other all the time").

As should be asked at the outset of every free-speech case, what exactly is the expression at issue here?[112] Or, to borrow Justice Barrett's line from oral argument, where is the speech?[113] Justice Gorsuch refers to Kennedy's expression only as "Mr. Kennedy's prayers"[114] or "demonstrative religious activity";[115] Justice Sotomayor's dissent refers to it as "demonstrative prayer."[116] But what, precisely, *is* demonstrative prayer? None of these formulations[117] adequately captures the speech acts at issue in *Kennedy*.[118]

Kennedy's expression, and demonstrative prayer generally, can be understood in at least two distinct ways.[119] Conceived narrowly, Kennedy's expression is limited to the content—what Gorsuch calls the "substance"—of Kennedy's expressive

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[112] In every free-speech inquiry, the speech act must be considered within its sociological context. Despite the Court's recent protestations, there is no homogenous category of "speech." Robert C. Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, 153 DAEDALUS 135, 137, 140 (2024). For the purposes of free speech, there is no such thing as "speech *as such*." *Id.* at 137. Even terminological subcategories of speech—such as "religious speech" as in *Kennedy* or so-called "pure speech" as in the case of *303 Creative*—fail to provide a theoretically coherent account of their inhabitants.

[113] *See supra* notes 82–83 and accompanying text.

[114] *Kennedy*, 597 U.S. at 530.

[115] *Id.* at 540.

[116] *See, e.g.*, *id.* at 554 (Sotomayor, J., dissenting).

[117] These labels were introduced into the litigation in one of the District's letters to Coach Kennedy requesting that he suspend his post-game religious ritual. The letter instructed Kennedy that "[w]hile on duty for the District as an assistant coach, [he] may not engage in *demonstrative religious activity*," which the District defined as activity "readily observable to (if not intended to be observed by) students and the attending public." Joint Appendix, *supra* note 36, at JA 144 (emphasis added). The District shortened the label to "demonstrative prayer" in its response to Kennedy's motion for preliminary injunction, *see* Response to PI Motion, *supra* note 7, at 13, and this formulation made its way into every major opinion thereafter, including the Supreme Court's. *See Kennedy*, 597 U.S. at 540 (majority opinion using "demonstrative religious activity"); *id.* at 554 (Sotomayor, J., dissenting) (dissent using "demonstrative prayer").

[118] Insofar as "demonstrative prayer" or "demonstrative religious activity" is what the Court protected in *Kennedy*, the implications of the Court's holding for the scope of protected behavior vary dramatically under the term's various interpretations.

[119] Kennedy's own position is of little help in determining which of these interpretations the case implicates. Arguing for a preliminary injunction before the district court, Kennedy's lawyers characterized the District's no-demonstrative-prayer rule as prohibiting "all *visible* religious expressions"—covering everything "from wearing a head scarf" to "wearing a cross" to "making the sign

actions. Given Gorsuch's repeated invocation of "Mr. Kennedy's prayers," for him, Kennedy's expressive conduct must reduce to its private, religious elements. However, while Kennedy silently dedicated some words to God, these mental prayers are not "speech" and thus are not owed free-speech protection.[120] So we are left, then, with the nub of Kennedy's expression: kneeling and bowing his head in a manner intended by Kennedy and understood by others to constitute a personal act of religious exercise.[121] On this read, Kennedy's physical actions were expressive insofar as they were simply visible, and therefore recognizable, to onlookers.

Alternatively, one can conceive of Kennedy's expression more broadly—as an *outward-facing* communicative act intended to send a message to onlookers.[122] His

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of the cross." PI Hearing, *supra* note 58, at App-289. But when appealing the district court's denial to the Ninth Circuit, Kennedy analogized his ritual to "high school football coaches who recently knelt on the field during the playing of the national anthem prior to the start of their games." Brief of Appellant at 24 n.8, Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017) (No. 16-35801). Those coaches, too, were visible to the people around them, but the overwhelming significance of their expression came from the *message* they conveyed to all who witnessed their actions.

[120] *See* Bhagwat, *supra* note 25, at 854 ("[B]oth prayer and worship can . . . be solitary activities, in which circumstances there is no intended human audience—the intended 'audience' presumably is a deity, but a court applying the Constitution surely cannot treat this as an act of communication without adopting highly problematic theological assumptions."). These mental recitations are surely covered—if not protected—by the Free Exercise Clause though.

[121] Concurring with the Court's initial denial of certiorari, Justice Alito seemed to adopt some version of this interpretation. He characterized "'demonstrative' conduct of a religious nature" as *visible* or outwardly discernible prayer, invoking the image of a teacher "folding their hands or bowing their heads" in the cafeteria. Kennedy v. Bremerton Sch. Dist., 586 U.S. 1130, 1132–33 (2019) (Alito, J., concurring in the denial of certiorari). The defining feature of demonstrative prayer under this reading is simply that a third party can tell the individual is praying.

[122] Strictly in the abstract, both interpretations are reasonable. Merriam-Webster defines "demonstrative" as "marked by display of feeling," "inclined to display feelings openly," or "characterized or established by demonstration." *Demonstrative*, MERRIAM-WEBSTER, https://perma.cc/SA5P-5X26.

Every other judicial case that has characterized the expression at issue as "demonstrative prayer" thus far has been a prison case. *See, e.g.*, Smith v. Artus, No. 9:07-CV-01150, 2015 WL 9413128 (N.D.N.Y. Dec. 22, 2015); Roberts v. Coughlin, 165 A.D.2d 964, 964–65 (N.Y. App. Div. 1990). While the merits of these cases are not relevant to *Kennedy*, it is notable that some distinguish between *types* of demonstrative prayer, with some types approximating merely visible prayer and some involving interaction with others. *See* Withrow v. Bartlett, 15 F. Supp. 2d 292, 294 (W.D.N.Y. 1998) (using the New York State Department of Correctional Services definition of "demonstrative prayer" as "individual prayer that involves movement, position changes, calls, or audible chants,"

kneeling was animated by his faith, no doubt, but—in full view of its context and circumstances—took on expressive significance beyond that of a private, personal act of conscience. Regardless of his intentions, Kennedy prayed alongside players, elected officials, and members of the media. He prayed conspicuously at midfield while players and staff were still on the field and fans still in the stands. He posted on social media about his post-game ritual and the District's disapproval thereof, and embarked on a local and national media campaign ginning up public attention for his cause. If Gorsuch's "substance"-focused conception sees Kennedy's post-game ritual as personal and minimally invasive, this *context*-focused conception regards his expression as maximally and intentionally disruptive. Procuring attention was not an accidental byproduct of Kennedy's expression, but part of the expression itself.[123]

The doctrinal implications that flow from these distinct conceptions of Kennedy's speech are profound. What matters in the "citizen vs. employee" prong of the employee-speech doctrine is whether the expression at issue is *itself* within the

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and distinguishing between "solitary demonstrative prayer" and "group demonstrative prayer"); Chatin v. Coombe, 186 F.3d 82, 84 (2d Cir. 1999) (referring to "silent, individual, demonstrative prayer").

Regardless, we do not adjudicate First Amendment cases in the abstract, solely on the basis of tidy, judicially constructed categories of speech. In free-speech cases, "the court is obligated 'to make an independent examination of the *whole record* in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Snyder v. Phelps, 562 U.S. 443, 453 (2011) (emphasis added) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)). *Kennedy* cannot rest on a definition of "demonstrative prayer" divorced from the content, form, and context of Kennedy's expression.

[123] This conception of Kennedy's speech act largely accords with the Ninth Circuit's. *See supra* notes 60–65 and accompanying text. In that court's view, "Kennedy was *sending a message* about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave." Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 827 (9th Cir. 2017) (emphasis added). The conspicuousness of his activity—the fact that it was on-field, after the game, in full view of students and fans—was relevant insofar as it was "central to the *message he convey[ed]*." *Id.* at 827 n.8 (emphasis added). The centrality of his message was confirmed by his post-suspension "prayer in the bleachers, surrounded by news cameras," expression for which the distinctly religious purpose of "thanksgiving for player safety, sportsmanship, and spirited competition was notably absent, or at least seriously diminished." Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1016 (9th Cir. 2021).

scope of the employee's duties.[124] That a speech act simply touches on matters related to an employee's duties is not enough to render it employee speech.[125] For example, the Court has held that an employee's sworn testimony in a public-corruption trial constituted citizen speech even though the content of the testimony related to the employee's official duties.[126] Because the act of testifying was not part of the employee's employment responsibilities, the testimony was not employee speech.[127]

Applying this rule to *Kennedy*, distinct questions arise for each rendition of the expression at issue. Under the narrow conception of Kennedy's expression, the relevant question concerns whether praying—in the physically expressive manner Kennedy chose—is within the scope of his employment. While we have not yet determined the scope of Coach Kennedy's official duties, framing his expression this way almost obviates the need. Surely, praying, in any form, is not within the scope of a public employee's official duties; Gorsuch did not need a formal job description, an employment contract, or third-party declarations to safely conclude as much. Indeed, Gorsuch likely ran with this narrower construction precisely because it allowed him to cast the case as a no-brainer while sidestepping highly contestable questions with no clear answers. By construing Kennedy's expression so narrowly, Gorsuch avoided difficult and deep questions about how free-speech doctrine should handle the speech of public-school employees—teachers, coaches, administrators—whose jobs *require* that they use their speech and expression to model good behavior for students.[128]

Under the more capacious conception of Kennedy's expression, however, we are forced to grapple with those thorny questions. In *Kennedy*, the relevant question becomes: Is communicating demonstratively with onlookers—Bremerton players,

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[124] Lane v. Franks, 573 U.S. 228, 240 (2014) ("The critical question under *Garcetti* is whether the speech at issue is *itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." (emphasis added)).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *See* Waldman, *supra* note 33, at 250 (contending similarly that, by "suggesting that the choice was between 'private citizen' and 'government speech,'" Gorsuch "essentially set up the latter as a straw man argument to be rejected," and arguing that the Court "presented the facts and the issues in an oversimplified way that favored Kennedy").

opposing players and staff, fans in the stands—part of an assistant coach's official responsibilities during this post-game period? While not entirely clear, the answer could at least plausibly be yes. Kennedy's formal employment responsibilities included "[o]bey[ing] all . . . Rules of Conduct before players and the public," "maintaining positive media relations,"[129] and generally serving as a "mentor and role model for the student athletes" in the District.[130] Even heeding the Court's warnings about "excessively broad job descriptions,"[131] it seems common sense that a high-school football coach has the duty of communicating demonstratively to onlookers after games while still on school property—let alone on the field—and while still custodially responsible for his players.[132] At the least, a coach has the responsibility of conducting himself in accord with the District's policies if affirmatively engaging in demonstrative speech under these circumstances, when players remain on the field and audience members in the stands.

With these two possible conceptions of Kennedy's expression on the table, the cracks in Gorsuch's reasoning become apparent. If Kennedy's expression is private prayer, as Gorsuch imagines it, then perhaps Kennedy and the coach "checking sports scores" on his phone after the game are not all that different. Whereas Kennedy chose to pray, Kennedy's co-coach chose—and was permitted—to use this

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[129] Joint Appendix, *supra* note 36, at JA 30, JA 56.

[130] *Id.* at JA 56.

[131] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006). The Court recently considered this scope-of-duties inquiry in a different free-speech context. *See* Lindke v. Freed, 601 U.S. 187 (2024). In *Lindke*, the Court struck a different tone when discussing how to determine the scope of a public official's power. There, the Court explained that one must look at the "relevant statute, ordinance, regulation, custom, or usage" to determine an "official's power." *Id.* at 200. What matters, the Court said, is not whether a given activity "*could* fit within the job description" but whether it is "*actually* part of the job that the State entrusted the official to do." *Id.* at 201. Granted, *Lindke* arises in a different doctrinal context—determining whether an official violated a constituent's free-speech rights by deleting the constituent's comments on social media and blocking him—and involves a distinct inquiry from the employee-speech context: determining an official's powers (for state-action purposes) versus an official's duties. There is, however, enough overlap between the cases to demonstrate the malleability of the Court's scope-of-duties analysis.

[132] Joint Appendix, *supra* note 36, at JA 108 (explaining that after games, student players "remain in the care of the District, and the District's employees have a legal obligation to maintain supervision of the players until they have left the event").

time to check whether the Seattle Kraken won or lost.[133] Neither activity is within the scope of a coach's official duties. But if Kennedy's expression is some sort of outward-facing demonstration, the two coaches do not seem so alike. Kennedy speaks as an employee while his coaching colleague speaks as a citizen (to the extent that checking your phone is expressive at all). That "Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities" is immaterial if those *non-demonstrative* activities are categorically distinct from Kennedy's *demonstrative* expression.[134]

It is noteworthy that Gorsuch distinguishes Kennedy's expression from that of his coaching colleagues not on the basis of demonstrativeness but on the basis of secularity. Much of Gorsuch's opinion rides specifically on the religious nature of Kennedy's expression. At base, Gorsuch is interested in vindicating Kennedy's claim of conscience: The District disciplined Kennedy for praying and—doctrine notwithstanding—that deed could not go unpunished.[135]

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[133] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 531 (2022) ("That he chose to pray doesn't transform his speech into government speech.").

[134] Justice Sotomayor makes a similar point in her dissent:

> The Court's primary argument that Kennedy's speech is not in his official capacity is that he was permitted "to call home, check a text, [or] socialize" during the time period in question. These truly private, informal communications bear little resemblance, however, to what Kennedy did. Kennedy explicitly sought to make his demonstrative prayer a permanent ritual of the postgame events, at the physical center of those events, where he was present by virtue of his job responsibilities, and after years of giving prayer-filled motivational speeches to students at the same relative time and location. In addition, Kennedy gathered public officials and other members of the public onto the field to join him in the prayer, contrary to school policies controlling access to the field. Such behavior raises an entirely different risk of depriving the employer of "control over what the employer itself has commissioned or created" than an employee making a call home on the sidelines, fleetingly checking email, or pausing to hug a friend in the crowd.

Kennedy, 597 U.S. at 565 n.3 (Sotomayor, J., dissenting) (citations omitted).

[135] *See id.* at 531 (majority opinion) (arguing that to hold that Kennedy praying during a time when other coaches "were free to engage briefly in personal speech" constituted government speech "would be to treat religious expression as second-class speech").

But Gorsuch's focus on Kennedy's expression as private prayer may run deeper than mere rhetoric. For one, private prayer is definitionally outside of public employees' scope of work and thus constitutes citizen speech. Because only citizen speech is protected by the employee-speech doctrine, framing Kennedy's expression as private prayer pushes the expression toward protection. Moreover, Gorsuch's framing of the expression as personal, private prayer sets up his subsequent Establishment Clause inquiry. Downplaying the demonstrativeness of Kennedy's religious expression (and emphasizing its privateness) is crucial to Gorsuch's redefinition of "impermissible government coercion" to consist only of that which is "*directly* coerc[ive]."[136] Here, we begin to sense clear tension between the values undergirding free-speech and anti-establishment protections—the former protecting demonstrations more forcefully, the latter regulating demonstrations more stringently.

Defenders of Gorsuch's opinion may protest that, regardless of how we construe Kennedy's expression, defining coaches' and teachers' roles broadly—as all-purpose role models—does unacceptable violence to their free-speech rights. The broader an employee's official duties, the argument goes, the greater proportion of her speech is made as an employee and thus is unprotected. Justice Gorsuch makes this argument himself when he asserts that "[o]n this understanding," a public school "could 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."[137] But Gorsuch's conclusion does not follow from his premise. Even if we construe the employee's relevant duty as broadly as, say, modeling good behavior through positive demonstrative communication, it is not clear why the activities Gorsuch invokes would fall within that duty. Is wearing a headscarf or praying over food always demonstrative? Are these activities expressive at all?[138] In any event, free-

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[136] *Id.* at 537–40 (emphasis added); *see also* Driver, *supra* note 1, at 235–49; *supra* note 96 and accompanying text.

[137] *Id.* These analogies resemble the analogies Gorsuch used in *303 Creative v. Elenis*, 600 U.S. 570 (2023), where he argued that, if an approach contrary to the majority's in that case was taken, the "government could require an unwilling Muslim movie director to make a film with a Zionist message, or an atheist muralist to accept a commission celebrating Evangelical zeal." *Id.* at 589. The problem is that in both cases, the analogies are not on all fours with the expression at issue and thus distort and confuse the cases' respective holdings. *See* Post, *supra* note 5, at 290.

[138] Some commentators claim that wearing religious clothing, such as the Muslim hijab or Jewish yarmulke, is categorically expressive, but the issue is not definitively settled—at least not in the

speech coverage of these activities does not depend only on whether they constitute citizen speech. As with the expression in *Kennedy* itself, to warrant coverage, Gorsuch's slippery-slope vignettes must independently constitute speech on a matter of public concern.

B. Did Kennedy Speak on a Matter of Public Concern?

If Kennedy spoke as a private citizen, the question becomes whether his expression constituted a matter of public concern. Over the six years of this litigation, no court ever seriously asked that question. From the very beginning, the District conceded that Coach Kennedy's expression was a matter of public concern[139] because the Ninth Circuit considers any "religious expression" to be of public concern per se.[140] Gorsuch accepted the parties' stipulations on the public-concern prong and assumed the requirement met.[141] This Section demonstrates how Gorsuch's failure

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context of employee-speech doctrine. *See, e.g.*, Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 979 (1999) ("[T]he wearing of religious clothing, jewelry, or hairstyles is often a form of expression . . . ."); John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 90 (2020) (listing "wearing . . . religious clothing" as "among the most accessible and useful ways to participate in public discussions of the day").

[139] *See supra* note 59 and accompanying text.

[140] Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996); *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011) ("[S]peech concerning religion is unquestionably of inherent public concern." (citing *Tucker*, 97 F.3d at 1212–13)).

[141] *Kennedy*, 597 U.S. at 528 ("[Both sides] agree that Mr. Kennedy's speech implicates a matter of public concern."). Interestingly, in a case factually similar to *Kennedy*, the Third Circuit conducted a public-concern inquiry despite the defendant's failure to raise the issue before the district court. *See* Borden v. Sch. Dist. of Twp. of East Brunswick, 523 F.3d 153 (3d Cir. 2008). That court explained its choice to do so like this:

> Borden argues that we may not address this issue because the defendants did not argue that the speech was not on a matter of public concern in their initial brief or their reply brief before the District Court. However, "'[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" Thus, we must engage in a proper constitutional analysis of whether Borden has a free speech right to engage in his proposed silent acts regardless of what legal theory he or the defendants argued at any point in this litigation. Here, a proper constitutional analysis requires us to consider whether Borden's speech was on a matter of public concern before we make any other determinations. Therefore, not only are we not prohibited from engaging in step one of the *Connick* test, we must do so.

to independently examine Coach Kennedy's expression on the dimension of public concern came at the hefty cost of an unrefined and undertheorized conceptualization of the speech acts at issue.[142]

Whether an employee's expression constitutes a matter of public concern is determined by the expression's "content, form, and context . . . , as revealed by the whole record."[143] Because this standard provides little guidance on the definition of "public concern" itself, the contours of the public-concern test remain hazy.[144] The

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Id. at 169 n.9 (citations omitted). Again, Gorsuch's opinion seems to run up against the Court's direction that free-speech cases demand "an independent examination of the whole record." Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).

[142] Whether the public-concern inquiry should have a rightful home in employee-speech doctrine is beyond the scope of this Article. The public-concern prong is certainly not without its critics, some of whom claim that the Court's inconsistent decisions in the decades since *Connick* have made the public-concern inquiry "slippery and amorphous." R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 27 (1987). More abstractly, the public-concern prong has been criticized on the ground that it taints free-speech jurisprudence with the "vagaries of judicial line-drawing" by permitting judges—rather than "the people"—to "defin[e] the appropriate topics of public debate." Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990). These critiques, however persuasive, are distinct from my point here. Regardless of whether the Court *should* ask, as a threshold inquiry, if Coach Kennedy's speech constituted a matter of public concern, asking that question would have forced the Court to make more precise descriptive and normative judgments—and that precision was necessary in a case of this constitutional gravity.

[143] Connick v. Myers, 461 U.S. 138, 147–48 (1983).

[144] *See Snyder*, 562 U.S. at 452 ("We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that 'the boundaries of the public concern test are not well defined.'" (quoting City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam))). Precisely what expression falls within the bucket of public concern, of course, depends on what we mean by public concern. Do we mean expression whose *content* contains matters of inherently public concern—for example, overtly political speech or speech on (already) popular issues? Or do we mean speech of a public *purpose* relative to others—speech aimed at persuading the public and shaping public discourse? *See* Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083, 1104–17 (2012) (demonstrating that the Court has "sent very mixed signals" on the definition of public concern, sometimes implying that public-concern speech is defined only by its content and at other times implying that a speaker's public motivation may be determinative); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 1008 (1997) (explaining that, in conducting the public-concern inquiry, the Court has vacillated between a "content-based

closest the Court has come to articulating a cohesive framework is when it explained that "[s]peech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[145] In this articulation, the expression's *content* takes center stage; there is no consideration of the expression's form and context.

At other points, however, the Court has insisted that "[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[146] In this spirit, the Court deemed of public concern an employee's statement, in the wake of an attempt on President Reagan's life, that she hoped for a future successful assassination of the president.[147] While an explicit "threat to kill the president would not be protected by the First Amendment," this employee's statement "plainly dealt with a matter of public concern" because it "was made in the course of a conversation addressing the policies of the President's administration" and "on the heels of a news bulletin regarding . . . a matter of heightened public attention: an attempt on the life of the President."[148] Precedent "require[d]" that the Court "[c]onsider[] the statement in *context*," and that context transformed this otherwise doubtfully covered statement into one on a matter of public concern.[149]

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analysis" and a "context-based analysis" that considers "*where*, *when*, and *to whom* the speech was uttered"); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667–74 (1990) (distinguishing between the normative and descriptive conceptions of public concern). This Article does not seek to definitively resolve these questions—only to illustrate their stakes.

[145] Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting *Snyder*, 562 U.S. at 453); *see also Connick*, 461 U.S. at 146 (describing matters of public concern as those "relating to any matter of political, social, or other concern to the community").

[146] *Snyder*, 562 U.S. at 454.

[147] Rankin v. McPherson, 483 U.S. 378, 381, 384–87 (1987) ("[I]f they go for him again, I hope they get him.").

[148] *Id.* at 386–87.

[149] *Id.* at 386 (emphasis added).

In *Kennedy*, by leaving the parties' positions unchallenged, Gorsuch implicitly adopts the Ninth Circuit's categorical approach to "religious expression" as public concern. In the context of public-employee speech, the Ninth Circuit has "defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace."[150] On this logic, public concern is not so much about distinguishing public from private speech, but rather public speech from speech internal to the government workplace, such as "individual personnel disputes and grievances."[151] And because "religious expression" does not fall within this category of workplace speech, it is "obviously of public concern."[152] As with much of the reasoning in *Kennedy*, Gorsuch's reasoning here is streamlined but reductive: Kennedy's speech at midfield involved prayer, so it was religious expression and therefore of public concern.

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[150] Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996); *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011).

[151] *Tucker*, 97 F.3d at 1210 (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)); *see also* Nat'l Treasury Emps. Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993) (describing public-concern speech as "expression [that] relates to some issue of interest beyond the employee's bureaucratic niche"), *aff'd in relevant part, rev'd in part on other grounds*, 513 U.S. 454 (1995). That this is the correct distinction for the public-concern test to draw is far from clear. First, public speech and speech internal to the government workplace do not comprise the full universe of speech. Much of public employees' private speech, such as conversations with friends and family or conversations about their personal finances, is neither public speech nor workplace speech. As *Kennedy* illustrates, a robust theory of public concern must address more than just public speech and workplace speech. Further, this framing of public concern—public vs. workplace speech—risks collapsing the public-concern test into the citizen-speech test. Under this logic, definitions of "speech internal to the workplace" begin to sound like not-so-distant cousins of *Garcetti*'s pursuant-to-official-duties test.

[152] *Tucker*, 97 F.3d at 1210. The Ninth Circuit seems to believe that "religious expression" is "obviously of public concern" because it so clearly does not implicate internal workplace speech (*i.e.*, issues of internal office management). Gorsuch implicitly adopts the Ninth Circuit's rule for religious expression but does so on seemingly different grounds. For Gorsuch, religious speech is obviously of public concern because it is speech that the public—or, perhaps more transparently, the Court—deems important to protect. *See infra* note 165 and accompanying text. Justice Gorsuch in *Kennedy* leaves no doubt that he holds "religious speech" on such a pedestal because religious speech is "doubly protect[ed]" by the Free Speech and Free Exercise Clauses. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543 (2022).

Gorsuch should not have been so quick to piggyback on the Ninth Circuit's categorical framework.[153] The Ninth Circuit's approach errs on at least two counts. First, it flouts precedent requiring that the public-concern inquiry consider the speech's content, form, and context.[154] The Ninth Circuit instead has developed a content-exclusive understanding of public concern that ignores the nuances in form and context that materially distinguish different instances of religious expression.[155]

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[153] If for no other reason, the Court should not have been so quick because this was not a settled issue in the Circuits. In *Borden v. School District of Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), the Third Circuit confronted a case strikingly similar to *Kennedy*. *Borden* involved a high-school football coach who joined his players in prayer by silently bowing his head during a prayer preceding team dinner and by kneeling during a pre-game prayer. *Id.* at 162. The Third Circuit found that the coach's "silent acts of expression" were not matters of public concern because his interests—"providing the team with feelings of unity and increasing team moral" and "respecting the players' prayers"—were "personal to [him] and his team." *Id.* at 169. Coach Borden, unlike Kennedy, alleged that his gestures did not constitute personal religious exercise and their contents were secular, "intended to promote solidarity, help form the team into a cohesive family unit, and show respect for the players' prayers." *Id.* at 170. Looking also to form and context, the court emphasized that Borden's expression occurred only in "private settings" and did "not extend into any type of public forum." *Id.* at 171. Most relevant for our purposes, the Third Circuit explained that Borden did "not perform [his] silent acts as part of a broad social or policy statement of being able to take a knee or bow his head in public," *id.* at 170, and explicitly declined to reach the question of whether his "silent acts" would be of public concern if he characterized them as "religious speech." *Id.* at 170 n.12. This lingering question is what the Supreme Court confronted in *Kennedy*.

[154] *See supra* note 143 and accompanying text.

[155] Reasonable minds can debate which definition of public concern is democratically and doctrinally preferable. While it provides relatively clear and operationalizable boundaries, a purely content-based conception of public concern falters in that it is severely underinclusive. Limiting public concern to speech directly related to governmental action or even to social issues already popularized and discussed by the public leaves unprotected speech that is crucial to the *formation* of public opinion. Maintaining a vibrant, self-governed democracy requires protecting expression about issues that lie far upstream of government decision-making (on popular culture, arts, sports, etc.) and expression that wades into topics not yet on the public's radar. On the other hand, a purpose-based conception—one that incorporates more fulsomely form and context—aligns with the principal value underlying free speech doctrine generally: to protect the formation of public opinion from government intrusion. When a speaker aims their expression externally at other individuals with an intention to engage in public discourse, they advance the project of democratic self-governance, and the First Amendment should protect that expression accordingly. That said, this purpose-based approach is vulnerable in different ways. Pegging public concern to public discourse requires a construction of public discourse itself: Does public discourse include commercial speech? What about

Second, and more importantly, the coarse category driving the Ninth Circuit's approach—religious expression—is overbroad, containing both expression that falls within the ambit of public concern and expression that almost certainly does not. Religious expression encompasses both private religious obligations (like personal prayer) as well as speech *about* religion. The latter, illustrated in canonical cases like *Cantwell v. Connecticut*,[156] constitutes protected speech under any theory of free speech and, indeed, is often referenced as a paradigmatic example of constitutionally protected speech. Newton Cantwell's proselytization on the streets of New Haven may have satisfied a personal religious obligation, but it was also something more. Proselytization is unavoidably dialogic. Cantwell satisfied his personal religious obligation by engaging with his fellow citizens on matters of theology and attempting to persuade them of the righteousness of his religious tradition and the misguidedness of others'. Cantwell was, in short, contributing to the formation of public discourse, a core value—if not *the* core value—undergirding free-speech doctrine.[157] Speech *about* religion thus seems categorically to be of public concern.

But it is not at all clear that personal religious exercise, such as private prayer, constitutes speech on a matter of public concern.[158] We know that (1) private prayer is inherently nondialogic (unlike speech about religion), and (2) that it is not related to internal workplace relations.[159] It is, in other words, neither public speech nor workplace speech. Intuitively, private prayer is a third type of speech: private

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speech by doctors treating patients or lawyers advising clients? These are tough normative questions with no easy answers.

[156] 310 U.S. 296 (1940). Cases like *Cantwell* and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), are often invoked to support the notion that religious speech is not only core to the body of speech covered by the First Amendment but also that it indeed *shaped* modern Free Speech jurisprudence. *See, e.g.*, ZICK, *supra* note 4, at 108–09. But these cases deal only with speech *about* religion, not personal prayer.

[157] *See* Post, *supra* note 144, at 630–31; ZICK, *supra* note 4, at 108–09. Speech about religion is, of course, also justified by other theories of free speech, such as autonomy.

[158] I am speaking here only about private prayer that is sufficiently expressive to constitute speech for purposes of free-speech doctrine. For the purposes of this illustration, I assume the Ninth Circuit's content-only approach and set aside any form or context that would contribute additional expressive content to the speech act. That form or context might transform expression that otherwise codes as private prayer into something with greater free-speech implications. *See infra* notes 168–172 and accompanying text.

[159] *See supra* notes 150–152 and accompanying text.

speech. In fact, the Supreme Court has previously held "private religious speech" to be "protected under the Free Speech Clause as *secular private expression*."[160] And the Justices in the *Kennedy* majority admit as much. While reasoning through the "citizen vs. employee" prong, Gorsuch analogizes Kennedy's post-game prayers to the speech of Kennedy's colleagues who check their phones or speak with friends and family after the games—speech he calls "private speech."[161] In his concurrence, Justice Alito asserts that Kennedy "acted in a purely private capacity."[162] But the Court has held emphatically that "where a government employee speaks 'as an employee upon matters only of personal interest,' the First Amendment does not offer protection."[163] If Kennedy's prayer is as strictly a private affair as the majority and Kennedy himself[164] assert, its status as public-concern speech is dubious at best.

Some will surely bristle at the suggestion that an employee's personal religious exercise does not inherently constitute a matter of public concern and the attendant conclusion that it is not necessarily protected speech. Such critics may perceive private prayer's exclusion from the realm of public concern as a thinly veiled attack on the constitutional protections for religious exercise. Not so. At least under Gorsuch's content-focused approach, when we ask whether private prayer is of public

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[160] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (emphasis added).

[161] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 530 (2022); *see also supra* notes 130–131 and accompanying text. Gorsuch later describes Kennedy's expression as "brief, quiet, personal religious observance." *Kennedy*, 597 U.S. at 543.

[162] *Id.* at 545 (Alito, J., concurring). Of course, Alito may very well be using "private" here in the context of a "citizen vs. employee" inquiry; that is, he might be tacitly contending that Kennedy was a public employee speaking in a "private capacity" as opposed to "pursuant to official duties." Even so, Alito's comment reveals a tension between the employee-speech doctrine's two threshold inquiries and the consequences of using the same terms—like "private"—on multiple dimensions to characterize a given speech act.

[163] Garcetti v. Ceballos, 547 U.S. 410, 445 (2006) (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

[164] The district court found that Kennedy's prayers were "private communications with God." Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020); *see also supra* note 42 and accompanying text. Kennedy's complaint describes his post-game speech as "brief, private religious expression," Joint Appendix, *supra* note 36, at JA 148, and as part of a "covenant he made with God," *id.* at JA 149. Illustrating the intensely personal nature of his post-game prayers, Kennedy alleged that on one occasion (during the period he was attempting to comply with the District's directives), he left a game without praying but drove back to the field to pray alone. *Id.* at JA 154. He "felt 'dirty' because he had broken his covenant with God." *Id.*

concern, we do not ask whether religion generally or the scope of individual free-exercise rights are of public concern. We ask, instead, the much narrower question of whether an individual's self-avowedly private spiritual communications are themselves of public concern—of concern to the general public. When posed like this, it again becomes evident that the respective values undergirding the First Amendment's various protections—here, free speech and free exercise—are in tension, at least in the context of the public workplace.[165] Free exercise seeks to shield individuals' religious exercise from government intrusion on the premise that religious exercise is a fiercely *personal* concern, a domain not to be intruded upon by even a democratic government. Insofar as free-exercise logic should inform our free-speech inquiry at all, it suggests that Kennedy's "private communications with God" are *not* a matter of public concern, but rather are a matter of concern to Kennedy alone.[166]

So if private prayer is not of public concern, does it follow that Kennedy's expression wasn't either? Not necessarily. Just as with the "citizen vs. employee" prong explored in Section II.A, the answer hinges on how we conceive of Kennedy's so-called "demonstrative prayer." Viewed through a free-exercise lens, Kennedy's expression was, of course, prayer. But for the purposes of free speech, was Kennedy's expression prayer or demonstration?[167] Gorsuch's content-only approach to public concern ties us to the former; the Court's longstanding insistence on judging public concern according to an expression's "content, form, and context" points toward the latter.[168]

In the realm of free speech, context is everything. Judicial evaluation of free-speech cases ought to be as nuanced as the speech acts that surround us every day.

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[165] This observation casts serious doubt on Gorsuch's blanket assertion "[t]hat the First Amendment doubly protects religious speech." *Kennedy*, 597 U.S. at 523.

[166] *Kennedy*, 443 F. Supp. 3d at 1228.

[167] One commentator has pinpointed this tension, arguing that "Coach Kennedy apparently wanted to have it both ways; his religious expression was 'private'—as he asserted in several places, all he wanted was the opportunity for a brief, *private* prayer—but then that private prayer opportunity was also a matter of public concern." Steven K. Green, *First Amendment Imbalance:* Kennedy v. Bremerton School District, 99 NOTRE DAME L. REV. REFLECTION 269, 274 (2024). While Kennedy, as a litigant, may have wanted it "both ways," it is the Court's duty to acknowledge—if not justly and compellingly resolve—such tensions. Instead, Justice Gorsuch swept it under the rug.

[168] *See supra* note 143 and accompanying text.

Because speech is so contextually contingent, the Court has acknowledged that even "certain private remarks" can "touch on matters of public concern."[169] Consider again the employee who shares with her colleagues her hope that someone successfully assassinates the president.[170] Alone, her statement may not constitute public concern. However, when viewed in its full context—that the conversation occurred in the aftermath of a seminal national event and that the statement was uttered immediately after discussion of the employee's substantive policy disagreements with the then-current presidential administration—the statement becomes a matter of public concern. Likewise, in *Kennedy*, the question is whether the form and context surrounding Kennedy's post-game expression transformed his private prayers into public-concern speech.

Again, we can recount Kennedy's expression in two ways. The flattened story—the story Justice Gorsuch prefers—is that Coach Kennedy knelt in private prayer after his team's games. Additional information about the expression's form and context paints a more complicated picture. Coach Kennedy certainly prayed, but he prayed immediately after the game; in the center of the field; before a crowded stadium of fans; alongside players, media, and elected representatives; after years of leading students in prayer in the school locker room; after engaging in media interviews where he sought to discuss the controversy over his religious expression and the District's censorship; and after repeated instructions by the District to stop this post-game ritual. And Coach Kennedy continued praying after the District suspended him—praying in the bleachers in front of students, parents, and, perhaps most importantly, local news cameras.

If Kennedy's expression is fairly characterized as "demonstrative prayer," it is the adjective "demonstrative" and not the noun "prayer" that makes his expression a matter of public concern. No one can reasonably dispute that Coach Kennedy's post-game ritual was, on some level, religious speech. But that label lacks the descriptive granularity needed to unpack the free-speech implications of a specific speech act. When Kennedy's expression is considered within its proper context, it seems quite probable that, in addition to being prayer, the expression was intended

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[169] City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam).

[170] *See supra* notes 146–149 and accompanying text; Rankin v. McPherson, 483 U.S. 378, 381, 384–87 (1987).

to communicate a message to the onlooking public. The act of conspicuously kneeling on the field before a packed stadium for the particular purpose of being maximally disruptive made his expression not only visible but *communicative*—and that squarely situates it within the realm of public concern. In using personal religious practice to communicate to his fellow citizens about religion, Kennedy's post-game ritual was not that different from Newton Cantwell's proselytization.

Kennedy was praying, but for the purposes of free-speech (not free-exercise) doctrine, his demonstration is more fruitfully conceptualized as political expression *about* religion. The outward-facing message attached to Coach Kennedy's demonstration had little to do with his personal spiritual communication with God. Instead, it expressed a stance on the role of religion in public life. It is not difficult to imagine the universe of messages Coach Kennedy may have intended to send: "Religious expression should be more widely accepted, or celebrated, in society," "religious expression should be more widely permitted within government institutions or as part of government employment," and so on. Such messages are central to the formation of public opinion,[171] and take on unique significance given Kennedy's identity as a public employee.[172]

The free-speech issue at *Kennedy*'s core, then, is distinct from the speech act's personal religious value to Kennedy himself. With the religious dimension of Kennedy's expression parsed from the political, Kennedy's post-game ritual becomes indistinguishable from a coach kneeling at the center of a public-school football

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[171] Although much of this Article is devoted to the construction of a doctrinal firewall between free speech and free exercise, it is important to observe that, if properly conceived, *Kennedy*'s free-speech holding could be used to advance the substantive aims that Coach Kennedy, Justice Gorsuch, and the rest of the Court's conservative majority seemingly wish to champion. The speech required to advocate for a more muscular free-exercise doctrine should be protected, but there is a difference between ensuring those protections and deciding that private prayer itself should receive free-speech protections. For a wonderful discussion of the dialectic relationship between popular engagement and constitutional interpretation, see generally Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

[172] The Court appreciates public employees' unique contributions to public discourse. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 419–20 (2006) (acknowledging "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion"); *San Diego*, 543 U.S. at 82 ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." (citation omitted)).

field to bring attention to racial injustice, police brutality, or any other political matter.[173] Although the religious nature of Kennedy's expression is significant for other reasons—chiefly, because it implicates the Establishment Clause—it is not central to the expression's free-speech analysis.[174] Shifting the frame from religious to political expression situates the case comfortably within the existing employee-speech framework and avoids the pitfalls of tethering free speech to the practically limitless scope of religious exercise.[175]

On that score, it is worth briefly revisiting Gorsuch's references to a Muslim teacher wearing a headscarf and a Christian aide praying over her food in the cafeteria.[176] Even assuming the analogies were apt because those employees' speech falls outside the scope of their official duties, the analogies remain suspect from the perspective of public concern. Gorsuch used the Muslim teacher and Christian aide to rhetorically establish *Kennedy*'s stakes because they are so obviously private and personal. He played on the public's unease with the prospect that employees could be subject to discipline for nondisruptive private, personal prayer. But when we probe *why* that prospect feels wrong, we are tempted to respond with reasoning that sounds in the register of free exercise, not free speech. If threatened with or subject to a prohibition on practicing their religion, these employees would have a cognizable free-exercise claim, no doubt.[177] However, Gorsuch confuses free exercise with

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[173] *See supra* note 79 and accompanying text. We might imagine Kennedy's expression as adjacent to Colin Kaepernick's. *See* Kurt Streeter, *Kneeling, Fiercely Debated in the N.F.L., Resonates in Protests*, N.Y. TIMES (June 5, 2020).

[174] It is possible that the religious elements of Kennedy's speech act could be explicitly considered at the balancing stage, but the point here is that they play a limited role in the doctrine's two threshold inquiries.

[175] *See supra* note 34.

[176] *See supra* notes 91, 137 and accompanying text.

[177] *See supra* notes 26–29 and accompanying text. These employees may claim that the government's regulation is not neutral because it is "'specifically directed at . . . religious practice,'" or is "'discriminat[ory] on its face.'" *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022) (quoting Emp. Div. v. Smith, 494 U.S. 872, 878 (1990); and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)). Or they may claim that the regulation is not generally applicable if their employer allows for individualized exemptions or permits secular conduct with a similar impact as the prohibited religious practice. *Id.* (citing Fulton v. City of Philadelphia, 593 U.S. 522, 533–34 (2021)). Either way, the regulation would trigger strict scrutiny and thus likely fail. Of course, as public employees, their free-exercise rights would still be limited by the Establishment

free speech when he ignores the deliberately heightened requirements of the employee-speech doctrine. This does not mean that free speech never has anything to say about employees' private religious speech. Insofar as it is sufficiently expressive, such speech may be covered or even protected by the Free Speech Clause in the public square—outside the realm of public employment—where there is no explicit requirement that speech be on a matter of public concern.

Gorsuch's analogy to instances of private religious exercise is most concerning, though, because it leaves *Kennedy*'s holding open to dramatic expansion. At its narrowest, *Kennedy*'s free-speech holding can be understood to protect public employees' deliberately and publicly communicative expression. But Gorsuch's opinion leaves the door open to a more capacious holding that would shield public employees' expressive religious exercise regardless of its communicative intent or effect.

In fact, since the Court decided *Kennedy* in 2022, lower courts have accepted Gorsuch's tacit invitation and stretched the case's holding even further. The Ninth Circuit used *Kennedy* to justify referencing free-exercise case law in a major free-speech case, resting its trans-doctrinal analysis on the fact that the *Kennedy* Court "applied the same analysis under both Clauses" to protect Coach Kennedy's speech.[178] And a district court in Indiana characterized *Kennedy* as indicating that "silent prayer" is categorically protected speech, with no reference to *Kennedy*'s public-employment roots nor to the context of Coach Kennedy's expression.[179]

Clause, but the balance between those rights would be struck by negotiating the values underlying the Religion Clauses—values orthogonal to those supporting free speech.

[178] Green v. Miss U.S. of Am., LLC, 52 F.4th 773, 786–87, 787 n.14 (9th Cir. 2022). This gambit did not go without rebuke from the panel's dissenting judge. *Id.* at 818 n.9 (Graber, J., dissenting) ("References to cases dealing with the Free Exercise Clause . . . have no bearing on the appropriate analysis. . . . [T]he fact that the result in *Kennedy* happened to be the same under either clause does not support the majority opinion's contention that 'the reasoning of Free Exercise caselaw is directly applicable to the concern raised in this case.'" (citation omitted)). For decisions refusing to blindly merge plaintiffs' free-exercise claims with their free-speech claims even after *Kennedy*, see *Jarrard v. Moats*, No. 4:20-CV-2-MLB, 2022 WL 18586257, at *11 n.15 (N.D. Ga. Sep. 27, 2022); and *Blankenship v. Louisville-Jefferson County Metro Government*, No. 3:23-CV-235-RGJ-CHL, 2024 WL 5012059, at *9 (W.D. Ky. Dec. 6, 2024).

[179] Doe No. 1 v. Att'y Gen. of Ind., 630 F. Supp. 3d 1033, 1053 (S.D. Ind. 2022) ("As the Supreme Court explained, free exercise and free speech claims often go hand in hand as the 'Clauses work in tandem.' For example, there was no question that a silent prayer triggered scrutiny under both the

These sorts of extensions demonstrate the real danger in Gorsuch's sweeping decision: If divorced from employee-speech doctrine and the particulars of Kennedy's speech act, *Kennedy*'s free-speech holding may set us down a road that leads to permanent fusion of free-speech and free-exercise rights across all contexts—both within and outside public employment.

III. Weighing Kennedy's Free-Speech Claim

Even if we accept the Court's assessment that Coach Kennedy acted as a private citizen and decide that his expression constituted a matter of public concern, we still must confront the subsequent issue of balancing the parties' interests.

The Court has long held that the core objective of the employee-speech doctrine is to negotiate between the free-speech value of employees' speech and the state's prerogative to impose "managerial discipline"[180] as an employer. *Pickering v. Board of Education*, the Court's first modern employee-speech case, described the "problem in any [employee-speech] case" as striking "a balance between the interests of the [public 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."[181]

Connick v. Myers refined the "*Pickering* balance" by emphasizing that it "requires *full consideration* of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[182] The *Connick* Court admonished the lower court for "imposing an unduly onerous burden on the state" to justify an

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Free Exercise and Free Speech Clauses." (citing *Kennedy*, 597 U.S. at 523)), *rev'd and remanded sub nom.* Doe v. Rokita, 54 F.4th 518 (7th Cir. 2022).

[180] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

[181] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* Connick v. Myers, 461 U.S. 138, 154 (1983) ("Our holding today is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office.").

[182] 461 U.S. at 150 (emphasis added). To substantiate this claim, the Court cited precedent that took quite an aggressive stance on the state's managerial authority. *Id.* at 150–51 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882); and Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

employee's discharge.[183] It is not the "government's burden to 'clearly demonstrate'" that the employee's speech impairs the state's institutional mission.[184] Rather, courts "must reach the most appropriate possible balance of the competing interests," which "varies depending upon the nature of the employee's expression."[185] As recently as 2006, cases have cited *Connick* for the proposition that "[g]overnment employers . . . need a significant degree of control over their employees' words and actions."[186] The *Pickering-Connick* balance can thus be understood as a balance with a thumb on the scale *for*, not against, the government.

Despite professing to engage in a "delicate balancing,"[187] the *Kennedy* majority's articulation and application of the *Pickering-Connick* balance hardly resemble these careful precedents. According to Justice Gorsuch, "[i]f the plaintiff carries [his] burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law."[188]

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[183] *Id.* at 149–50.

[184] *Id.* at 150.

[185] *Id.*

[186] Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006) (citing *Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.")); *see also id.* at 422–23 ("Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.").

[187] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 528 (2022) (quoting *Garcetti*, 547 U.S. at 423).

[188] *Id.* at 524. Gorsuch draws this rule from a relatively recent employee-speech case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and a non-employee-speech case, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). He seems to be channeling the following language in *Garcetti*:

> The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Once he finds that Coach Kennedy satisfied his burden, Gorsuch claims that "at this point the burden shifts to the District," and that it does not matter whether the Court applies strict scrutiny or "the more lenient second-step *Pickering-Garcetti* test, or alternatively intermediate scrutiny" because the District "cannot sustain its burden under any of them."[189]

Before even reaching the merits, the Court's approach to balancing contravenes decades of employee-speech precedents.[190] Never has the Court shifted the burden to the government in an employee-speech case as Justice Gorsuch does in *Kennedy*—and why is no mystery. Gorsuch's simplistic burden-shifting runs counter to the particularized balancing the Court established in *Connick*, which explicitly rejected imposing on a government employer the burden of unilaterally justifying its actions.[191] The very point of distinguishing the employee-speech doctrine from normal free-speech doctrine is to provide government institutions greater discre-

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547 U.S. at 418 (citation omitted). In addition to ignoring *Connick* entirely, Gorsuch sidesteps language in *Garcetti* that emphasizes the "limitations on [a public employee's] freedom" that the citizen must "by necessity" accept when he or she "enters government service," and that "the government as employer . . . has far broader powers than does the government as sovereign." *Id.* (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994)). Separately, Gorsuch's reference to *Reed*, which is not an employee-speech case at all, tells us nothing about the operation of employee-speech doctrine and instead further illustrates the Court's insistence on sweeping trans-substantive, and ultimately incoherent, doctrinal tests for free speech. *See* Post, *supra* note 5, at 251–52.

[189] *Kennedy*, 597 U.S. at 531–32.

[190] The Justices in the majority would likely retort that they never professed *Kennedy* to be a traditional employee-speech case. Gorsuch himself does not make clear whether he views this case as an application of free-speech doctrine or as a novel refashioning of a free-exercise claim, and he refuses to choose a governing standard. *See supra* note 189 and accompanying text. Justice Alito concurred to add that "[t]he expression at issue in [*Kennedy*] is unlike in any of our prior cases involving the free-speech rights of public employees." *Kennedy*, 597 U.S. at 545 (Alito, J., concurring). And Justice Thomas, in his own concurrence, emphasized that the "Court . . . does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression. . . . A government employer's burden . . . might differ depending on which First Amendment guarantee a public employee invokes." *Id.* at 545 (Thomas, J., concurring). But these Justices' disclaimers do little to mitigate the harm this opinion inflicts on the employee-speech doctrine. *See supra* notes 178–179 and accompanying text. Instead of announcing actionable guidance on the very issues the Justices identify, the Court pretends it is merely applying preexisting law—of some kind.

[191] *See supra* notes 182–185 and accompanying text.

tion to effectively manage their workplaces. By shifting the burden to the government, *Kennedy* sidelines the employee-speech doctrine's core animating value and risks disrupting the entire doctrine.

On the merits, the Court ultimately does not do much balancing at all. Justice Gorsuch substantively addresses only the District's interest in avoiding a violation of the Establishment Clause. After finding that Kennedy's post-game ritual did not offend the Establishment Clause—in so doing, overturning a canonical Establishment Clause precedent[192]—Gorsuch declares that there is "only the 'mere shadow' of a conflict" between Kennedy's free-speech and free-exercise rights and the District's anti-establishment obligations.[193] Under this new interpretation of the Establishment Clause, permitting Kennedy's expression would not have created establishment liability for the District, and thus the District's discipline of Coach Kennedy fails.[194] Or so Gorsuch's story goes.

The record in *Kennedy* makes clear that the District's anti-establishment interest was not actually its sole interest. In its merits brief before the Supreme Court, the District had also asserted interests in "maintain[ing] control over school events,"[195] "manag[ing] the working relationships of its staff,"[196] and avoiding the creation of a public forum.[197] To substantiate its interest in maintaining order and "ensuring student safety,"[198] the District pointed to considerable crowd-control issues caused by the public fervor about Kennedy's demonstrations.[199] Cheerleaders and band members had been knocked down by onrushing crowds, which included media and other individuals from outside the local community, and the head coach was "cursed . . . in a vile manner," leading him to worry that he might "be shot from

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[192] The Court overturned *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[193] *Kennedy*, 597 U.S. at 543 (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

[194] *Id.* ("[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.").

[195] Brief for Respondent at 29, *Kennedy*, 597 U.S. 507 (No. 21-418).

[196] *Id.* at 30.

[197] *Id.* at 32.

[198] *Id.* at 30.

[199] *Id.* at 31.

the crowd."[200] To justify its staffing-management interest, the District explained that Kennedy's actions—including their knock-on effects like the disruptive public response—"were dividing the coaching staff and creating discord that . . . led to the departure of several coaches," including the head coach.[201] And, lastly, the District sought to avoid opening the field up to public use in the face of active "demand[s]" from outside groups, including a group of "Satanists," for "the same access to the field to pray" as Kennedy.[202]

Gorsuch considers none of these interests in his rendition of the *Pickering-Connick* balance. He dismisses the District's interest in maintaining order and safety as spurious because the District did not raise these concerns with Coach Kennedy prior to the start of this litigation—and ignores the rest.[203] Here, Gorsuch evades his judicial responsibilities. The Court's precedents did not mince words when they explained that the *Pickering-Connick* balance requires the Court to "examine for [itself] the statements in issue and the circumstances under which they are made," and, if necessary, "mak[e] an independent constitutional judgment on the facts of the case."[204] Instead of addressing the District's interests head-on, Gorsuch shirks

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[200] *Id.*

[201] *Id.* at 32.

[202] *Id.*

[203] *Kennedy*, 597 U.S. at 543 n.8 ("Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))). The Court also dismisses the District's justification as advocating for a "heckler's veto." *Id.* (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001)). This heckler's-veto point totally misses the mark because it betrays either a fundamental misunderstanding or purposeful evasion of the employee-speech doctrine's guiding purpose: to ensure that the state can function as an employer as well as a sovereign. If speech is sufficiently disruptive to the institution's mission, then the state may regulate it. Thus, the general rule against heckler's vetoes operates uniquely in the context of employee speech.

[204] Connick v. Myers, 461 U.S. 138, 150 n.10 (1983) (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946); and Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)). It is helpful context that the Court has previously shown a capacity and willingness to wade into governmental interests far more in the weeds than the District's. In *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, the Court credited the government's asserted interest in avoiding "distort[ed] competition between high school [athletic] teams" and "an environment in which athletics are prized more highly than academics." 551 U.S. 291, 300 (2007). The Court did not need "empirical data" to get on board with this "commonsense conclusion." *Id.* What mattered was not

the questions altogether by framing his refusal as a mandatory principle of constitutional law, rather than mere discretion. That refusal to consider the District's very real interests opacifies *Kennedy*'s holding and leaves unsettled whether a government employer can restrict employees' speech on the grounds asserted by the District.[205]

Gorsuch's out-of-hand dismissal of the District's asserted interests also violates the guiding principle of *Connick*'s "particularized balancing." In a *Pickering-Connick* balance, parties' interests must be considered in the context of the speech act at issue. As the District argued to the Court, divorcing parties' interests from the speech act and its consequences leads to the untenable situation in which an employee's "op-ed on the District's allocation of resources"—the expression at issue in *Pickering*—"must be treated the same way as . . . [an employee] leading a rally [during a school activity] to demand better funding."[206]

Just as in the "citizen vs. employee" and "public vs. private concern" prongs explored in Part II, we observe in the balancing stage the enormous consequences of the Court's reductive and misleading construction of Kennedy's expression. The District asserted an interest in maintaining order and public safety not in response to Kennedy's private prayer—à la Gorsuch's Christian aide praying silently over

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the details but the fact that the asserted harms would detract from the public entity's "ability to operate 'efficiently and effectively.'" *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 419 (2006)).

[205] *Kennedy* is illegible on this point. Post-*Kennedy* guidance from the U.S. Department of Education confidently asserts that *Kennedy* does not prohibit such speech restrictions: "To be sure, a public school, like any other governmental employer, may reasonably restrict its employees' private speech in the workplace where that speech may have a detrimental effect on close working relationships, impede the performance of the speaker's duties, or otherwise interfere with the regular operation of the enterprise." Off. of Commc'ns & Outreach, *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. DEP'T OF EDUC. (Jan. 14, 2025), https://perma.cc/G6EQ-G985. Query whether this is the clearest or fairest reading of *Kennedy*. We cannot be sure because Gorsuch does not affirmatively accept or reject the District's interests but simply refuses to consider them at all.

[206] Brief for Respondent, *supra* note 195, at 33–34.

her food in the cafeteria—but in response to a public demonstration involving hundreds of people and seriously threatening the District's ability to function.[207] Gorsuch's perfunctory dismissal of the District's disruption interest may provide a hint as to why he insisted on conceptualizing Kennedy's expression as private prayer rather than as a demonstration. Had the Court approached Kennedy's expression from the latter perspective, it would have run headfirst into a balancing test already weighted against the employee-plaintiff. Even without the District's anti-establishment interest, the District's desires to protect its students and maintain the integrity of its workforce are likely winners under a faithful application of the *Pickering-Connick* balance.

By shifting the burden to the government and artificially constraining the District's interests, Justice Gorsuch transformed the *Pickering-Connick* balance from a test modestly deferential to the government to one firmly deferential to the speaker.[208] This shift has monumental implications for the employee-speech doctrine and public institutions' managerial authority. *Kennedy*'s burden-shifting to the government threatens the state's ability to perform its crucial public functions. Read in this light, *Kennedy* is quite the myopic opinion.

Conclusion

For Gorsuch, *Kennedy* was an open-and-shut case about religion and religious expression.[209] But for the future litigants citing it, the case will almost certainly be about something bigger—about employee speech, about free speech generally.[210]

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[207] The District made this point clearly in its merits brief. *Id.* at 33 ("[D]espite the District's attempts to keep the field from becoming a venue for public debate over prayer with students, Kennedy allowed Representative Young onto the field, prayed with him and others, and then had Young address the team. *That*, not isolated 'private' prayers, is what the District was responding to." (internal citations omitted)).

[208] One commentator has posited that *Kennedy* "tells us"—categorically—that "a school employee's 'right' to engage in 'private' religious expression while engaged in their duties will likely prevail over [a] school district's interests." Green, *supra* note 167, at 288.

[209] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543 (2022) ("Respect for religious expressions is indispensable to life in a free and diverse Republic.").

[210] This abstraction has already begun. *See supra* notes 178–179 and accompanying text.

While *Kennedy* has received plenty of attention—from liberals and conservatives alike—for its Establishment Clause holding,[211] its free-speech holding deserves equally serious attention. This Article insists that a more faithful application of the Court's employee-speech doctrine would have dramatically changed the Court's reasoning. Even if the Court's ultimate decision remained the same, a more nuanced conception of Kennedy's expression would have yielded a more legible and robust free-speech holding. At the least, this would have improved our ability to doctrinally distinguish between expression like Kennedy's and that of the oft-referenced employee privately praying over her food in a crowded lunchroom. A more careful parsing of Kennedy's free-speech and free-exercise claims would have honored the doctrines underlying each of those First Amendment protections while beginning to refine the constitutional norms surrounding religious expression. We got none of this. Instead, as written, *Kennedy* stands as a grave warning of the havoc courts can wreak on the doctrine of free speech should they fail to situate free-speech claims within their proper free-speech frameworks.

The clearest implication in Justice Gorsuch's opinion is that *Kennedy* is about more than black-letter doctrine. For all its doctrinal opacity, the opinion offers a transparent account of the current Court's totalizing vision of the First Amendment. At one point, Gorsuch expresses bewilderment at the Ninth Circuit's conclusion that the District's interest in avoiding an Establishment Clause violation "trump[ed]" Coach Kennedy's free-speech rights.[212] "How could that be?" he asks—and then answers.[213] Gorsuch insists that the answer lies in the text of the First Amendment itself: A "natural reading" of the Amendment "would seem to suggest," he says, that the Free Speech, Free Exercise, and Establishment "Clauses have 'complementary' purposes, not warring ones."[214] Said differently, Kennedy's

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[211] *See* Waldman, *supra* note 33, at 240 (noting that "much of the discussion after the decision was released . . . focused on the religious aspects of his case").

[212] *Kennedy*, 597 U.S. at 532.

[213] *Id.*

[214] *Id.* at 533 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 13, 15 (1947)). But despite Gorsuch's insistence, the mere fact that the protections enshrined in the Free Speech and Free Exercise Clauses "overlap[]" in the context of "expressive religious activities" does not demand a combined doctrinal analysis. *Id.* at 523. Constitutional rights serve constitutional values, which are instantiated in constitutional doctrine. Merging distinct bodies of doctrine simply because they are both applicable in a given case does violence to the values antecedent to either.

religious expression must be protected, so our constitutional doctrine must protect it. This Article insists there is a better approach—one that would have avoided such blatant circularity by situating Kennedy's expression within its proper doctrinal context: the Court's longstanding employee-speech doctrine.