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Clear as mud: navigating in-school employee expression in the wake of *Kennedy v. Bremerton School District*

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The Supreme Court ruled in *Kennedy v. Bremerton School District* on June 27, 2022 that a public high school violated the Constitution by restricting a football coach from engaging in "personal" but overt post-game, mid-field prayers while still on duty. What is the practical impact of the *Kennedy* decision on public school districts?

The opinion's 70-plus pages of dense debate over nearly a century of First Amendment jurisprudence is complex and often confusing. But the opinion has potentially sweeping implications not only for religious expression in schools, but also the day-to-day supervision and management of school employees.

The majority discounted evidence that some students felt pressured to attend Kennedy's post-game prayers out of fear of retaliation, writing, "[l]earning how to tolerate" public prayer is "part of learning how to live in a pluralistic society."

To help simplify the issues, we have pulled from the *Kennedy* decision four key questions it should prompt for all school administrators gearing up for another school year.

Fast facts

In 2008, coach Joseph Kennedy established a regular post-game ritual of praying aloud while kneeling at the 50-yard line of the school football field. Students began joining Kennedy while he prayed, and eventually a majority of them regularly participated, prompting Kennedy to incorporate motivational speeches with overtly religious references.

Kennedy and the school district disagree about the evolution of his prayer ritual and the extent to which it involved students. Despite Kennedy's claims that the expression was "private" and "personal," the record indicates that what may have begun as a solo moment of quiet prayer evolved into Kennedy's directing demonstrative center-stage prayers and religion-infused pep talks while surrounded by kneeling students with their helmets raised skyward.

In September 2015, the Bremerton School District instructed Kennedy to discontinue his post-game prayers, asserting they violated the establishment clause of the First Amendment, which prohibits state establishment of religion. Kennedy kept on praying, so the district put him on paid administrative leave and did not rehire him for the next season. Kennedy sued the school district, alleging it violated his First Amendment rights to free speech and free exercise.

In a sweeping decision that sidesteps widely held church-state separation concerns regarding prayer in school, the Supreme Court ruled in Kennedy's favor.

What does all this mean?

What exactly did the Court rule?

(Very) simply put:

- Kennedy's prayers did not violate the establishment clause because they could not reasonably be construed as a religious endorsement and did not coerce student participation in religious activity.
- The school district's instruction that Kennedy discontinue his prayer ritual violated his free exercise and free speech rights because the prayers constituted private — rather than government — speech.

In short, a public school cannot prohibit an employee from engaging in workplace "personal" and "private" religious expression, even when the expression also is overt and public.

How were these prayers 'personal' and 'private'? Didn't this happen at the 50-yard line?

The Court characterized Kennedy's prayer ritual as "private" and "personal" because (1) students were not required to participate; (2) it was not conducted in his capacity as a coach; (3) it was "quiet"; and (4) even though students routinely joined him, Kennedy said he was *willing* to pray in the absence of students.

The Court was not persuaded by the demonstrative nature of Kennedy's prayers or the media attention they attracted — some of

which Kennedy appears to have invited himself. Nor did it matter that Kennedy prayed while on duty and still in his school uniform, and in the middle of school events widely attended by students and the community.

The holding certainly suggests that teachers and other school employees are entitled to broader leeway in expressing their personal views while at work — as long as the expression falls outside their normal job functions.

According to Justice Gorsuch, who wrote the Court's majority opinion, these facts made the prayers "noticeable" but still "personal" and "private" — not unlike "a Muslim teacher [] wearing a headscarf in the classroom" or "a Christian aide []praying quietly over her lunch in the cafeteria."

How do we know what religious activities are allowed in public schools?

Before *Kennedy*, in-school religious activity was not allowed (because it violated the establishment clause) if it could reasonably be interpreted as a school endorsement of religion, or if it tended to "coerce" student participation in religious activity. In *Kennedy*, the Supreme Court rejected the traditional "endorsement" and "coercion" tests in favor of an "analysis focused on original meaning and history" and "reference to historical practices and understandings."

The new history-and-tradition standard offers very little practical guidance to schools, at least until the lower courts more routinely apply the *Kennedy* holding to real-world facts. For now, *Kennedy*'s extension of constitutional protection of school religious activity is limited to "private" religious expression that is non-mandatory for students and conducted outside the scope of the employee's job functions. There is nothing in the decision that suggests mandatory student prayer is newly protected.

While religious activity that obviously pressures or coerces student participation likely will remain off-limits, *Kennedy* suggests that only certain types of coercive conduct rise to the level of triggering an establishment clause violation. After all, in *Kennedy*, Gorsuch discounted evidence that some students felt pressured to attend Kennedy's post-game prayers out of fear of retaliation, writing, "[l]earning how to tolerate" public prayer is "part of learning how to live in a pluralistic society." In other words, suck it up.

In the immediate term, schools would be wise to think twice before restricting employees from engaging in "private" religious expression at school, especially while outside the classroom, during non-working time and/or in non-student-facing settings. Whether in-school religious expression is "private" will depend on the facts at issue, but the *Kennedy* decision suggests a broad definition that does not depend on whether students and/or the public are merely *exposed* to the religious activity.

Does this case change how and when schools can regulate nonreligious employee expression?

Maybe. Under current precedent, a public employee's speech in their official capacity is not entitled to First Amendment protection — and thus is subject to regulation by the employer. In the public school context, this has meant that school districts can put limits on the speech of teachers and coaches when they are speaking in the context of their job duties.

In *Kennedy*, the Court deemed Kennedy's prayers protected from school regulation because they occurred outside the scope of his employee responsibilities as a coach, and thus "personal" speech.

The holding certainly suggests that teachers and other school employees are entitled to broader leeway in expressing their personal views while at work — as long as the expression falls outside their normal job functions.

Presumably this still means that a school can restrict a teacher from incorporating their personal views — religious or otherwise — into formal classroom instruction. But if Kennedy — moments after the end of a game, while still working and in uniform, and in the middle of the football field — was not praying in his capacity as a coach, where exactly are the boundaries of "official capacity"? Is anything outside a formal class period also outside a teacher's official capacity? Must schools now permit employees to express views inconsistent with school positions in all other areas of the school — for example, while eating lunch among students in the cafeteria or when passing in the hallway?

Once again, it's not clear. However, schools should tread more carefully when regulating employee conduct in school areas generally reserved for employees to spend non-class or non-working time. The appropriateness of employee messages and/or displays in hallways and/or other student-traveled school areas likely will be more nuanced and require careful analysis by districts.

For example, in *Weingarten v. Board of Education*, a federal court in New York ruled a district could prohibit teachers from wearing political campaign buttons on school grounds but must allow them to distribute campaign material in teacher mailboxes and on union bulletin boards.

Under *Kennedy*, prohibiting campaign buttons everywhere on school grounds may no longer pass constitutional muster — given the Court deemed Kennedy *outside* his role as a coach even though he was on-duty and physically on the football field where he primarily worked. It remains to be seen where such boundaries lie, but *Kennedy* counsels districts proceed with caution on similar issues until we have more clarity.

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