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Religion and the First Amendment

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I. The First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ….

II. Regulating in the public square.

A. Restrictions on speech.

"[M]embers of the public retain strong free speech rights when they venture into public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (quotation marks omitted) (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). "In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such 'traditional public fora.'" *Summum*, 555 U.S. at 469 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)). "[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited." *Summum*, 555 U.S. at 469.

A government entity may also create a forum that is limited (i.e., a 'limited public forum' or 'limited forum') for use by certain groups or dedicated solely to the discussion of certain subjects. *Summum*, 555 U.S. at 470. In such limited forums, governmental restrictions on speech must be reasonable and viewpoint neutral. *Id.* (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106–107 (2001)).

Generally, a government regulation of speech in a public forum or limited public forum will be unconstitutional if it is content-based. That is to say, the regulations must be neutral as to the topic discussed or the idea or message expressed. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Id.* at 166. A law is content based on its face if it "draws distinctions based on the message a speaker conveys." *Id.* at 163. In *Reed*, the Town of Gilbert's Sign Code was content based on its face. For example, it defined "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election," and "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that does not fit within the Code's other categories. *Id.* at 164.

B. Restrictions on conduct that includes speech.

While government regulations that directly restrict speech in public fora are typically subject to strict scrutiny, courts impose a type of intermediate scrutiny on regulations of conduct that incidentally restrict speech associated with that conduct.

David Paul O'Brien was convicted of "willfully and knowingly" mutilating, destroying, and changing by

burning his Selective Service registration certificate. *United States v. O'Brien*, 391 U.S. 367, 370 (1968). O'Brien argued that his conviction violated his First Amendment free speech rights because "he had burned his registration certificate because of his beliefs" and that he did so "publicly to influence others to adopt his antiwar beliefs." *Id.* at 369–70. The Court explained, "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court set out a test for evaluating regulations that affect these "speech" and "nonspeech" elements:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Relying on the Supreme Court's decision in *Reed*, Reagan National Advertising of Austin, LLC, challenged the City of Austin's sign ordinance because it distinguished between on-premises and off-premises signs. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, -- U.S. --, 142 S. Ct. 1464 (2022). Reagan contended that the Austin sign ordinance was a prohibited content-based restriction. After the Fifth Circuit struck down the ordinance, the Supreme Court granted review.

The Supreme Court rejected Reagan's challenge to the ordinance, explaining that, under *Reed*, "a regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content"—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 1471 (quoting *Reed*, 576 U.S. at 163). Thus, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* at 1472. A law banning the use of sound trucks, on the other hand, would be a restriction on *conduct*, rather than speech, even though it would have an impact on the promotion of speech, political or otherwise. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455–56 (2002) (Souter, J., dissenting) ("No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning; the sentiment may not provoke, but being blasted out of sleep does.").

While enforcing Austin's ordinance required reading the signs to determine whether they direct readers to the property on which the sign stands, or to some other, offsite location, the ordinance does not "single out any topic or subject matter for differential treatment." *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. at 1472. "The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions," which

are subject to intermediate scrutiny. *Id.* at 1473.

C. Restrictions on religious exercise.

The Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), set off a debate among legal scholars and legislators as to the appropriate method of evaluating the completing claims of religious exercise and government regulation. This debate has yet to be resolved.

The Free Exercise Clause of the First Amendment prohibits the government from "prohibiting the free exercise" of religion. *Fulton v. City of Philadelphia*, -- U.S. --, 141 S. Ct. 1868, 1876 (2021). A law that is neutral and of general applicability is not required to be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice. *Church of the Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law that fails to be either neutral or of general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* at 531–32.

A law is not neutral if it discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Id.* at 532. A law is not of general applicability when the governmental interests that are allegedly the basis for the law are being pursued only against conduct with a religious motivation. *Id.* at 542–43. A law is also not of general applicability if it permits the government to provide individualized exemptions from the restriction at issue. *Smith*, 494 U.S. at 884.

The plaintiffs in *Smith* were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which they were members. *Id.* at 874. When they subsequently applied for unemployment compensation, their requests were denied because they had been discharged for work-related misconduct, i.e., committing the crime of consuming peyote. *Id.* at 874–75. The Supreme Court upheld the denial of unemployment benefits, holding that the Free Exercise Clause permits the state to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the state to deny unemployment benefits to person dismissed from their jobs because of such religiously inspired use. *Id.* at 874, 890.

In contrast, the Supreme Court struck down the City of Hialeah's ordinances prohibiting the "sacrifice" of animals within city limits, but excepting from the prohibition the slaughtering of animals for consumption and the slaughtering of animals in accordance with kosher law. *Church of the Lukumi Babalu Aye*, 508 U.S. at 527–28, 539. The Court held that the municipal ordinances were not neutral because they were motivated by a desire to suppress the animal sacrifices of the Santerian religious community,[1] and that they were also

[1] More recently, the Supreme Court ruled against the Colorado Civil Rights Commission based, holding that it had failed to act neutrally because it appeared to have proceeded in a manner intolerant of religious beliefs and/or restricting practices because of their religious

not of general applicability because the ordinances were substantially underinclusive in light of the purported governmental interests. *Id.* at 533–46.

Most recently, the Supreme Court ruled unconstitutional the City of Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services because CSS would not certify same-sex couples as foster parents. *Fulton*, 141 S. Ct. at 1882. The Court concluded that the contract provision at issue was not of general applicability because it permitted individual exemptions, and thus was subject to strict scrutiny. *Id.* at 1878.

The judgment of the Supreme Court in *Fulton* was unanimous, but the justices lacked unanimity as regards the continuing vitality of the central ruling in *Smith*, i.e., that neutral laws of general applicability are subject to a lesser (rational basis) review. Justices Alito, Thomas, and Gorsuch would do away with *Smith*, and apply strict scrutiny more generally to laws that substantially burden the free exercise of religion. *Id.* at 1883. Justices Barrett and Kavanaugh expressed a willingness to reconsider *Smith*, but also expressed reservations about imposing strict scrutiny more broadly. *Id.* at 1882.[2]

III. The government speaking for itself.

A. When does the government speak?

As explained in greater detail above, in traditional public fora and when the government creates a forum for debate, the First Amendment generally prohibits discriminating against speakers based on their viewpoint. "But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to promote a program or espouse a policy in order to function." *Shurtleff v. City of Boston, Mass.*, -- U.S. --, 142 S. Ct. 1583, 1587 (2022) (quotation marks removed).

For example, Congress enacted a law designed to facilitate the promotion of beef and beef products. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005). Part of the "Beef Act" was the creation of a "Promotion and Research Board" that uses a tax assessment on beef producers to prepare advertising. *Id.* at 553–54. Certain beef producers brought suit, alleging that they were being compelled to subsidize the speech of a private entity, the Promotion and Research Board. The Court rejected their challenge, holding that the Beef Act was not subject to challenge under the

nature. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, -- U.S. --, 138 S. Ct. 1719, 1730–32 (2018).

[2] Several recent articles provide scholarly considerations of the potential options in the event the Court overturns *Smith*. Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 Cato Sup. Ct. Rev. 33 (2021) (advocating strict scrutiny); Andrew Lavender, *Constitutional Law—Answering Justice Barrett's* Fulton *Prompt: The Case for a Narrow Reconsideration of Free Exercise*, 44 W. New Eng. L. Rev. 429 (2022) (advocating for a slow adoption of, perhaps varying forms of, intermediate scrutiny); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 Harv. L. Rev. 267 (Nov. 2021) (advocating for an intermediate scrutiny that, for example, permits the application of antidiscrimination laws to religious believers and does not require religious exemption when doing so would harm others).

First Amendment free speech clause because the resulting advertising was "government speech."

> When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.

*Id.*at 562.

The Supreme Court likewise held that monuments displayed in a public park were government speech, and thus not subject to the First Amendment. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009). Public parks are a traditional public forum. *Id.* Pioneer Park is a public park in Pleasant Grove City that contains fifteen permanent displays, at least eleven of which were donated by private groups or individuals (e.g., a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971). *Id.* at 464–65. Summum, a religious organization, requested permission to erect a monument containing "the Seven Aphorisms of SUMMUM." *Id.* at 465. The City denied the request, so Summum brought suit alleging that the denial was viewpoint discrimination in violation of the First Amendment. *Id.* at 465–66. The Court rejected Summum's suit, explaining that, "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." *Id.* at 470–71.

The Court again upheld government action under the government speech doctrine in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). The State of Texas permits automobile owners a choice between ordinary and specialty license plates. A person who wants the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or both. *Id.* at 203. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available. The Board, however, rejected a design proposed by the Texas Division of the Sons of Confederate Veterans that would feature a Confederate battle flag. *Id.* The Court rejected the First Amendment challenge, concluding that the license plates were government speech. The Court pointed out that the history of license plates is as a means of communicating a message from the government, they are generally understood to be communicating a government message by members of the public, and the government maintains direct control over the messages conveyed on its specialty plates. *Id.* at 211–13.

Most recently, the Court rejected reliance on the government speech doctrine in *Shurtleff v. City of Boston, Massachusetts*, -- U.S. --, 142 S. Ct. 1583 (2022), and *Kennedy v. Bremerton School District*, -- U.S. --, 142 S. Ct. 2407 (2022).[3] The City of

[3] Since *Kennedy* involves government regulation of the speech of a government employee, it is discussed below.

Boston has a flagpole in the plaza outside Boston City Hall. Generally, the flagpole in question displays the flag of the City. *Shurtleff*, 142 S. Ct. at 1588. Since at least 2005, the City had permitted groups to hold public events in the plaza, and to fly some other flag on the flagpole. The other flags flown have varied from the flags of other nations, "marking the national holidays of Bostonians' many countries of origin," to the flags of specific groups or causes, such as Pride Week and a community bank. *Id.* "All told, between 2005 and 2017, Boston approved about 50 unique flags, raised at 284 ceremonies. Boston has no record of refusing a request before the events that gave rise to this case." *Id.* Shurtleff, director of an organization called Camp Constitution, planned to hold a public event in the plaza and requested to fly "the Christian flag." *Id.* The City refused, and Shurtleff brought suit.

While the Court recognized that flags are frequently used as a type of government speech, "the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raising as private, not government, speech." *Id.* at 1593.[4]

B. What about when the government endorses religion or religious practices?

Since its adoption more than fifty years ago, the so-called *Lemon* test, from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has been the only "grand unified theory" available for assessing Establishment Clause claims. *See American Legion v. American Humanist Ass'n*, -- U.S. --, 129 S. Ct. 2067, 2080 and 2087 (2019) (plurality).

> That test … called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion.

Id. at 2080 (citations omitted).

The plurality in *American Legion* noted that, in light of the shortcomings of the *Lemon* test, the Court had, in many cases, "either expressly declined to apply the test or … simply ignored it." *Id.* The Court again declined to apply the *Lemon* test, but failed, as Justice Thomas pointed out, to "take the logical next step and overrule the *Lemon* test in all contexts." *Id.* at 2097 (Thomas, J., concurring in the judgment).

Last year, however, the Supreme Court overruled a Ninth Circuit decision applying the *Lemon* test, explaining that the Supreme Court "long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy v. Bremerton Sch. Dist.*, -- U.S. --, 142 S. Ct. 2407, 2427 (2022) (citing *American Legion*). In the place of *Lemon* and the endorsement test, the Supreme Court held that the Establishment Clause must be interpreted by reference to historical practices and understandings. *Id.* at 2428. For example, the government

[4] The Court went on to note, however, that "nothing prevents Boston from changing its policies going forward." *Id.*

may not, "consistent with a historically sensitive understanding of the Establishment Clause," make a religious observance compulsory. *Id.* at 2429. Nor may the government "coerce anyone to attend church, [or] force citizens to engage in a formal religious exercise." *Id.*

Considering the Establishment Clause in light of its history, the Court held that no Establishment Clause concerns justified the termination of Coach Kennedy's employment. The Court explained that, when Coach Kennedy went onto the football field after the end of a game and knelt down to silently pray, he did not seek to direct any prayers to students nor require anyone else to participate. *Id.* The Court further noted that the school district had not argued or presented evidence indicating that Coach Kennedy's conduct raised coercion concerns. *Id.*

IV. Regulating employees.

"[F]or many years, 'the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.'" *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983). "The classic formulation of this position was…: 'A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Connick v. Myers*, 461 U.S. 138, 143 (1983) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892)). Over the course of the 1950s and 1960s, however, the Supreme Court began to "invalidate[] statutes and actions [that] sought to suppress the rights of public employees to participate in public affairs." *Connick*, 461 U.S. at 144. Even still, the Court recognized that the government "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Ed. Of Tp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

Consequently, in *Pickering*, the Court held that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, 461 U.S. at 140. But in order to balance the competing interests of the government and public employee, the Court identified "two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti*, 547 U.S. at 418.

> The first [inquiry] 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. The question becomes [second inquiry] whether the relevant government entity has 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 expression 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.

Id. (citations omitted; emphasis added).

Marvin Pickering, a teacher in Township High School District 205, was fired from his position for sending a letter to a local newspaper alleging mishandling and misallocation of funds by the school board and superintendent. *Pickering*, 391 U.S. at 564, 566. Pickering challenged his termination, alleging that it violated his First Amendment rights. While Pickering's claim was dismissed at the trial court and dismissal affirmed in the state appellate courts, the United States Supreme Court reinstated his claim. The Court explained,

> What we have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.

Id. at 572–73. Since the teacher's employment is "only tangentially and insubstantially" related to the public communication, the teacher should be regarded "as the member of the general public he seeks to be." *Id.* at 574. Absent proof of false statements knowingly or recklessly made by him, *i.e.*, the standard applicable under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),[5] "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering*, 391 U.S. at 574.

While *Pickering* involved a First Amendment claim that was reinstated by the Supreme Court, *Connick* and *Garcetti* involved claims that were initially sustained by lower courts, but were dismissed by the Supreme Court. In *Connick* and *Garcetti*, the Court further elaborated certain limits on the free speech rights of government employees.

Sheila Myers was an assistant district attorney in New Orleans who was informed that she would be transferred to prosecute cases in a different section of the criminal court. *Connick*, 461 U.S. at 140. Myers objected to the transfer and, in an attempt to gather support, distributed a

[5] Justices Thomas and Gorsuch have, within the past couple of years, urged the Court to grant review so as to overturn *Sullivan*. *See Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, -- U.S. --, 142 S. Ct. 2453, 2454 (2022) (Thomas, J., dissenting from denial of certiorari); *Berisha v. Lawson*, -- U.S. --, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2425 (Gorsuch, J., dissenting from denial of certiorari). Justices Thomas and Gorsuch contend that *Sullivan* and its progeny unconstitutionally usurped state libel law by imposing a higher threshold for libel cases against public figures.

questionnaire to other staff members concerning the office transfer policy, office morale, the alleged need for a grievance committee, the level of confidence the staff had in their supervisors, and whether employees felt pressured to work in political campaigns. *Id.* at 141. The Court rejected Myers' First Amendment claim, explaining that the questionnaire "touched upon matters of public concern in only a most limited sense; her survey … is most accurately characterized as an employee grievance concerning internal office policy." *Id.* 154. Consequently, the First Amendment did not protect her speech where her supervisor, Connick, reasonably believed that the speech "would disrupt the office, undermine his authority, and destroy close working relationships." *Id.*

> We hold only that when 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. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

Id. at 147 (citations omitted).

Richard Ceballos, in turn, was a deputy district attorney with the Los Angeles County District Attorney's Office. Pursuant to his duties as a calendar deputy, he prepared a memorandum advising his supervisor that he believed there were serious inaccuracies in an affidavit used to obtain a critical search warrant in a pending criminal case. *Garcetti*, 547 U.S. at 413–15, 421. Ceballos alleged that, in retaliation for his memorandum, he was reassigned, transferred to another courthouse, and denied a promotion. *Id.* at 415.

The Supreme Court rejected Ceballos' First Amendment claim because the speech (i.e., the memorandum) was made pursuant to his duties as a calendar deputy. *Id.* at 121. The Court was careful to note two factors that were *not* dispositive: (1) the fact that Ceballos expressed his views inside his office, rather than publicly;[6] and (2) the fact that the memorandum concerned the subject matter of Ceballos' employment.[7] *Id.* at 420–21.

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate

[6] "Employees in some cases may receive First Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any member of the general public,' to hold that all speech within the office is automatically exposed to restriction." *Id.* at 420–21 (citations omitted).

[7] "The First Amendment protects some expressions related to the speaker's job." *Id.* at 421.

> their communication from employer discipline.

Id. at 421.

Pickering, *Connick*, and *Garcetti* generally distinguish between speech by a public employee, but engaged in "as a citizen on a matter of public concern,"[8] which is subject to First Amendment protection, and speech by an employee as an employee. Speech by an employee as an employee may be, as in *Connick*, speech "as an employee upon matters only of personal interest," 461 U.S. at 147, or, as in *Garcetti*, speech that is made pursuant to official duties. 547 U.S. at 421.

The Supreme Court's recent decision in *Kennedy v. Bremerton School District*, however, appears to alter the method of determining whether public employee speech is protected. Whereas prior case law distinguished between speech by a public employee as a private citizen from speech by a public employee as an employee, *Kennedy* distinguishes between private and government speech. 142 S. Ct. at 2424. Since Coach Kennedy's prayers on the football field were not "ordinarily within the scope of" his duties as coach, as they undoubtedly were not, they were entitled to protection under the First Amendment free speech clause. *Id.*

Connick, which dealt with an internal personnel complaint, also did not involve "government speech," as it was not speech that was endorsed, solicited, or controlled by the government. It was, rather, an attempt by an employee to undermine an action being take by her supervisor. 461 U.S. at 141. The Court held that, because Myers was not speaking as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, she was not entitled to any First Amendment protection for her speech. *Id.* at 147. *Kennedy*, on the other hand, turns the inference the other way. *Connick* asks, was it speech as a citizen on a matter of public concern? If not, then there is no First Amendment right at issue. *Kennedy* asks, was the speech "government speech"? If not, then the speech is protected by the First Amendment.

[8] In *Pickering*, where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher." 391 U.S. at 574.