PUBLIC EMPLOYEES AS A REFLECTION OF A RELIGIOUSLY DIVERSE CULTURE

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For decades, scholars and jurists have debated over whether government violates the Establishment Clause when it endorses religion or if coercion is required. In Kennedy v. Bremerton School District, *the Supreme Court put this argument to rest, at least as to public employees. It grounded its decision in some form of originalism. While that will be sufficient to satisfy some readers, others will want to be assured of the wisdom of the rule originalism demands. This Essay argues that a coercion test for the private religious exercise of public employees is appropriate for a pluralistic society.*

It offers four reasons. First, a no-endorsement test applied to private religious exercise would yield absurd results; namely, preventing those of minority faiths from pursuing public employment. Second, a coercion test for public employees will ensure the public sector—most importantly, schools—reflects our religiously diverse society, which is important for preparing people to live in that society. Third, a coercion test is administrable because it lacks the pliability of the no-endorsement test. And fourth, a coercion test is more consistent with the principle of preserving religious voluntarism.

INTRODUCTION

Until recently, the United States Supreme Court had provided muddled guidance for how and in what circumstances public employees could exercise their religion while in the workplace. In *Kennedy v. Bremerton School District*,[1] the Court finally provided at least some clarity by concluding that public employees may exercise their religion so long as they do not coerce others to do the same.[2] This

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1 142 S. Ct. 2407 (2022).

2 *Id.* at 2430–33.

Essay argues that such clarity was long overdue and is welcome for normative reasons, not just as a matter of originalism.

Prior to *Kennedy*, the Court had long noted that "public employees do not surrender all their First Amendment rights by reason of their employment."[3] From there, however, the Court had sown as much confusion as certainty, for both public employers and their employees. Most of this confusion came from the Court's attempts to provide a one-size-fits-all test for determining when government violates the Establishment Clause.[4]

As laudable as that goal was, the Court's decisions had done little to provide proper guidance for public employees desiring to exercise their religion and public employers fearful of violating the Establishment Clause. The Court had offered several opinions that provided some direction but none directly on point. One case involved mandatory student prayer.[5] Another involved laws requiring teachers to open each school day with Bible readings.[6] Others involved prayers at graduations and sporting events, or voluntary religious exercise and speech by students.[7] Still others involved school funding or equal access for religious groups.[8] None answered how the Constitution applies when public employees exercise their religion. And all of it resulted, as Professor Thomas Berg noted, in public employers going "far beyond what the Supreme Court has required in keeping religious views out of public arenas."[9]

In *Kennedy*, the Supreme Court offered clarity and determined that "historical practices and understandings" and "original meaning and history" supported a noncoercion rule, not a no-endorsement rule.[10] This Essay argues that normative reasoning justifies such an

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3 Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

4 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

5 Engel v. Vitale, 370 U.S. 421, 422 (1962).

6 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

7 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23 (1995); Lee v. Weisman, 505 U.S. 577, 580 (1992).

8 *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 231 (1990); *Lemon*, 403 U.S. at 606.

9 Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 749 (1997).

10 *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428, 2430 (2022). I want to emphasize that it is not clear to me exactly what form of originalism the Court was performing in *Kennedy*. It seemed to offer three separate formulations: (1) that the Establishment Clause must be interpreted by "reference to historical practices and understandings," *id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)); (2) that any interpretation of the Establishment Clause must "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers," *id.* (alterations in original) (quoting *Town of Greece*, 572 U.S. at 577); and (3) that any analysis should focus on "original meaning and history." *Id.* As I am writing about them separately, each of these

outcome as well. While normative reasoning may be irrelevant to the Supreme Court's analysis, Professor Douglas Laycock hit on something important many years ago when he opined:

> For whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor. "Because the Constitution says so, and because all our liberties depend on maintaining the authority of the Constitution's guarantees," should be sufficient reason to vigorously protect religious liberty. . . .
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> Of course it is more satisfying, and sometimes clarifying, to have a reason. And unfortunately, "because the Constitution says so" does not appear to be a sufficient reason to persuade many Americans to support a constitutional right unless they are also persuaded of the wisdom of the right at issue.[11]

So while the historical principles and understandings of the Constitution's text may help the Court determine the scope of the Establishment Clause, it is helpful for many to know that the outcomes the text demands are both moral and practical for the society in which we live. That is true in this case.

This Essay argues that the result the Supreme Court reached in *Kennedy v. Bremerton School District* regarding the religious exercise and religious speech of public employees avoids absurd results, is manageable, properly reflects a society as religiously diverse as our own, and is consistent with the principle of preserving religious voluntarism. For some, it is enough that the opinion is consistent with some form of original meaning or historical practices. Others need more. My hope is that this Essay will provide it.

I. THE LONG LACK OF CLARITY FOR PUBLIC EMPLOYEES AND EMPLOYERS

A. The Early Cases

Nearly sixty years ago, the Court held in *Engel v. Vitale* that a board of education violated the Establishment Clause by mandating that school employees lead students in prayers to "Almighty God" at the

three formulations of originalism may be the same, but they each seem to suggest a different methodology, ranging from some sort of application of past practices to original intent originalism to original public meaning originalism.

11 Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314–15 (1996) (footnote omitted).

beginning of every school day.[12] The prayers asked students and teachers to "acknowledge" their "dependence upon" God and to "beg" God's "blessings upon" teachers, parents, students, and the country.[13] The law required teachers to say the prayer in front of captive students; it encouraged students to say the prayer.[14]

The Court reached its conclusion by focusing on coercion.[15] It argued: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[16] Coercion was the Court's primary worry in that case, but it emphasized coercion was not the only way in which government might violate the Establishment Clause. The majority noted government can violate the clause even absent a "showing of direct governmental compulsion" or laws that "operate directly to coerce nonobserving individuals."[17] It also suggested, albeit vaguely, other potential tests.[18]

A year later, in *School District of Abington Township v. Schempp*, the Court invalidated a Pennsylvania law that required school teachers or other public employees to read "[a]t least ten verses from the Holy Bible . . . without comment, at the opening of each public school on each school day."[19] In doing so, the majority quoted the same language regarding coercion from *Engel*, suggesting it was applying the coercion test as its standard for identifying an Establishment Clause violation.[20]

Then, in the same opinion, the Court seemed to adopt a different standard: for a law to "withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[21]

If that was not confusing enough, *Schempp* was not done. The majority continued and concluded that the "distinction between" the Free Exercise Clause and the Establishment Clause "is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[22]

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12 370 U.S. 421, 422, 424 (1962).
13 *Id.* at 422.
14 *Id.* at 430; *see also id.* at 442 (Douglas, J., concurring).
15 *Id.* at 431.
16 *Id.*
17 *Id.* at 430, 430–31.
18 *See id.* at 424, 429.
19 374 U.S. 203, 205 (1963).
20 *Id.* at 221 (quoting *Engel*, 370 U.S. at 430–31).
21 *Id.* at 222.
22 *Id.* at 223.

We can forgive public employers and lower courts if they were confused. In *Schempp* alone, the Court suggested at least four distinct tests for finding an Establishment Clause violation.

B. The Lemon *Test*

Eight years later, the Court decided *Lemon v. Kurtzman*, which provided the oft-maligned three tests for determining if an Establishment Clause violation has occurred.[23] *Lemon* did most of its work in the school funding cases, which are mostly irrelevant in the public-employee religious exercise context.[24] But closer to home, the Court applied the *Lemon* test to strike down the posting of the Ten Commandments on school room walls.[25] It applied it again in striking down quiet time in schools explicitly designed "for meditation or voluntary prayer."[26] The Court has never applied it in cases that apply directly to public employees engaged in private religious exercise.[27]

C. The Rise of Coercion-Endorsement Confusion

Without overruling *Lemon*, the Court focused on coercion in *Lee v. Weisman*,[28] which raised Establishment Clause concerns over Rhode Island permitting principals to invite members of the clergy to give invocations and benedictions at middle and high school graduation

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23 403 U.S. 602 (1971). *See, e.g.*, Kenneth W. Starr, *The Establishment Clause*, 41 OKLA. L. REV. 477 (1988); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RSRV. L. REV. 795 (1993); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992); William P. Marshall, "*We Know It When We See It:" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980); Donald A. Giannella, Lemon *and* Tilton: *The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 148, 170–76; Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

24 *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 391, 394 (1983); New York v. Cathedral Acad., 434 U.S. 125, 126–28 (1977); Wolman v. Walter, 433 U.S. 229, 232–33, 235–36 (1977); Meek v. Pittenger, 421 U.S. 349, 351, 358 (1975).

25 Stone v. Graham, 449 U.S. 39, 39 & n.1, 43 (1980).

26 Wallace v. Jaffree, 472 U.S. 38, 40, 55 (1985).

27 The Court did apply *Lemon* in *Edwards v. Aguillard* to strike down a statute requiring equal treatment of evolution and "creation science," but that did not deal with public-employee religious exercise. Edwards v. Aguillard, 482 U.S. 578, 585, 597 (1987). Other cases involved matters outside the public-employee context.

28 505 U.S. 577 (1992).

ceremonies.[29] The Court struck down the program, reasoning: "[T]he State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."[30]

After *Lee v. Weisman*, it appeared that public employers needed to apply the coercion test when determining if they were at risk of violating the Establishment Clause, although the *Lemon* test was still an option and the concept of endorsement was still very much alive and working in the background.

Eight years later, the Court invalidated a Texas high school's policy of commissioning student prayers at the school's football games.[31] In that case, the Court suggested it would apply a coercion test to determine if the school district had violated the Establishment Clause: "[O]ur analysis is properly guided by the principles that we endorsed in *Lee* [*v. Weisman*]."[32] And the Court did apply the coercion test, using it to invalidate the school's program.[33] Along the way, however, it invoked language from Justice O'Connor's plurality opinion in a different case in which she reiterated her view that an Establishment Clause violation can occur if government endorses religion.[34] Indeed, the Court spoke in terms of both endorsement and coercion throughout the opinion, suggesting the schools had violated both.[35]

The problem with all of this history is that the Court was never clear about which test applies to what situation. What we learn is that there appeared to be three tests by which government could violate the Establishment Clause: endorsement, coercion, and one of the *Lemon* prongs. The Court had kept *Lemon* but had never applied it in situations involving public-employee private religious exercise. Its other decisions seem to rely on coercion and endorsement without clarity on which controls when. All of this left public employers understandably confused regarding what to do when their employees engaged in private religious exercise.

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29 *See id.* at 580–83.

30 *Id.* at 598.

31 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315, 317 (2000).

32 *Id.* at 302.

33 *Id.* at 316–17.

34 *Id.* at 302 (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J.) (plurality opinion)). Justice O'Connor first elaborated on the no-endorsement test in *Lynch v. Donnelly*, 465 U.S. 668, 690–94 (1984) (O'Connor, J., concurring).

35 *Santa Fe*, 530 U.S. at 302, 305, 307–08, 310–12, 316–17.

II. A NO-ENDORSEMENT RULE FOR PUBLIC EMPLOYEES YIELDS ABSURD RESULTS

For years, the debate raged among scholars over whether government coercion or endorsement violated the Establishment Clause.[36] These debates almost always arose in the context of school or legislative prayers or monuments on government property.[37] Public employees were largely ignored, and the question of how a no-endorsement rule might apply to their private religious exercise was not thoroughly explored.

The Court finally addressed it in *Kennedy*, and the familiar arguments for coercion or endorsement arose.[38] The Court rejected a no-endorsement rule in the context of public employees. It did so because a majority of the Justices believed the "historical practices and understandings" of the Establishment Clause did not support a no-endorsement rule.[39] It seemed to reject the no-endorsement rule altogether in all contexts,[40] although there is reason to believe that cannot be the case. Or if it is, that the concept of coercion will, over time, expand to include what we might traditionally think of as endorsement. For example, if the City of Chicago were to purchase a massive billboard tomorrow that read "BUDDHISM IS THE ONLY TRUE RELIGION," it is plausible that a court might find that to be an endorsement of religion and a violation of the Establishment Clause. Or it might characterize it as a form of coercion. The Court did not address the outer boundaries of coercion, and I will not here either.

The important point is that the Court determined that the "original meaning and history" of the Establishment Clause supported a no-coercion rule, not a no-endorsement test.[41] That alone will satisfy

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36 *See* Berg, *supra* note 9.

37 *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 71–73 (2007); NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 237–44 (2005).

38 *See, e.g.*, Brief *Amicus Curiae* of United States Conference of Catholic Bishops in Support of Petitioner, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418); Brief for Amici Curiae Elisabeth P. DeVos and Defense of Freedom Institute for Policy Studies in Support of Petitioner, *Kennedy*, 142 S. Ct. 2407 (No. 21-418); Brief of Members of the U.S. House of Representatives as *Amici Curiae* Supporting Respondent, *Kennedy*, 142 S. Ct. 2407 (No. 21-418); Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc. *et al.* in Support of Respondent, *Kennedy*, 142 S. Ct. 2407 (No. 21-418); Brief of American Atheists as *Amicus Curiae* in Support of Respondent, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

39 *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

40 *Id.* at 2427.

41 *Id.* at 2428, 2429.

many who like the outcome or want to see the Court turn more to original public meaning when interpreting constitutional provisions.

But there are important reasons why the no-endorsement test would not work if applied to the private religious exercise of public employees. Chief among them is that it would yield absurd results. Consider the *Kennedy* case itself. The school district's rule, as upheld by the Ninth Circuit, was that public employees would be forbidden from participating in many forms of religious exercise any time students or the public might observe them.[42] This was true even if the public employee's religious exercise was private.[43] This could include praying over meals; wearing religious garb, such as turbans, yarmulkes, hijabs, crosses, jewelry, or sacred garments; offering a religious greeting to a coworker; fasting during Ramadan; offering a silent Buddhist chant;[44] pointing to heaven in gratitude after a score; and even eating kosher or halal meals if the type of meal is obvious.

Ensuring government does not violate the Establishment Clause is an important and worthy goal. The clause is a crucial component of protecting religious freedom for all. In its first Establishment Clause decision of the modern era, the Court stated its rule in broad terms: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[45] Under the no-endorsement test as applied to public employees, however, we see that neutrality lost. Those who pray in any demonstrative way, those who wear sacred garb, those whose religion cannot be completely closeted away, those whose inner religious commitments are a part of their outward identity could all be excluded from government service by a no-endorsement rule.

For proof of this, we need only look north. The Canadian province of Québec serves as an example of the types of absurd outcomes that stem from a worry that public employees' private religious exercise might present an implied endorsement of religion. Moving well past the theory undergirding our Establishment Clause, Québec law considers the "laicity" or secularism of the state to be a fundamental freedom.[46] In 2017, lawmakers in Québec, fearful that allowing public officials to express their religious beliefs would be seen as an impermissible endorsement by the government of religion, passed a law aimed at "foster[ing] adherence to State

42 *Id.* at 2419, 2426–27.

43 *Id.* at 2426.

44 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1021 (9th Cir. 2021) (distinguishing an assistant coach's unobservable, silent Buddhist chant after a game from Kennedy's public prayer).

45 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

46 *See* Charter of Human Rights and Freedoms, R.S.Q., c. C-12 (Can.), pmbl., § 9.1.

religious neutrality."[47] The legislature prohibited the wearing of any face coverings by public officials while performing their duties.[48]

The Act, highly criticized for its discriminatory impact against Muslims, was struck down by numerous Canadian courts.[49] In response, the Québec legislature passed an even more widely restrictive bill prohibiting most public officials from wearing any religious symbol at any time while performing their job.[50] The Act's capacious definition of a religious symbol includes "any object . . . that (1) is worn in connection with a religious conviction or belief; or (2) is reasonably considered as referring to a religious affiliation."[51]

The implications of the Act are stunning: religious public employees cannot wear a cross, turban, yarmulke, hijab, or any head covering while on the job. And as a result, a practicing member of any religion that requires religious garb or symbols is effectively forbidden from seeking a government career. Muslims, Hindus, Christians, Sikhs, Jews, and any number of other religious minorities are faced with a Hobson's choice: give up their livelihoods or contradict the clear teachings of their religion. The result has been widespread protests by religious minorities and those who support them.[52] It has also resulted in many religious minorities not pursuing government careers, including many highly influential paths such as law.[53]

Only two kinds of people are left unscathed by the Act: those whose religious beliefs require absolutely no outward expression and those who claim to have no religion at all. Ironically, though Québec has sought to avoid all conceivable endorsement of religion, its actions have had the practical effect of endorsing symbol-less religions and no religion, at the exclusion of all others.

This outcome—which most people in the United States would find absurd—arises from applying the no-endorsement test in the wrong context. The no-endorsement test prohibits state action that "has the purpose or effect of 'endorsing' religion."[54] Applying it to a public employee is difficult, however, for nearly any outward religious

47 Act of Oct. 18, 2017, S.Q. 2017, c 19, at 879 (Can.).

48 *Id.* § 10.

49 *See, e.g.*, Nat'l Council of Canadian Muslims (NCCM) v. Att'y Gen. of Québec, 2018 QCCS 2766, paras. 81–83 (Can. Que.).

50 An Act Respecting the Laicity of the State, S.Q. 2019, c 12, s 6 (Can.).

51 *Id.*

52 *See* Dan Bilefsky, *Quebec's Ban on Public Religious Symbols Largely Upheld*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/world/canada/quebec-religious-symbols-ruling.html [https://perma.cc/XDF5-ZPSY].

53 *Id.*

54 *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592–93 (1989) (stating this rule and equating the term "endorsement" with "favoritism" and "promotion").

act could potentially be seen as an endorsement of religion. Drawing the line between permissible and impermissible exercise would be nearly impossible, as *Kennedy* and Québec showed. The difference between a Christian coach praying on the field and a teacher praying over her meal while visible to students is difficult to identify. The Ninth Circuit declared that such expressions are "wholly different" from one another, but it provided no rationale as to why.[55] The result is that declaring one form of religious exercise an endorsement likely means forbidding them all, an absurd outcome.

III. THE COERCION TEST IS APPROPRIATE FOR PUBLIC EMPLOYEES' PRIVATE RELIGIOUS EXERCISE

A. The No-Coercion Rule for Public Employees Is Best for a Religiously Diverse Society

The absurd result the no-endorsement rule for public employees would create extends beyond just protecting religious minorities whose faith requires an outward expression of an inner commitment. It has implications for society as a whole.

Consider the environment the no-endorsement rule would create in public schools. In *Kennedy*, the attempt to avoid endorsement threatened to create a caricature of the world in which children saw only those adults who purport to have no religion, whose religious identities are completely private, or who succumb to pressure to keep their identities closeted. That harms not only the public employees whose religious exercise is burdened but also the students, who will receive less preparation to live in a religiously diverse world. Instead of learning at a young age that they live in a society of people with beliefs very different from their own, they will come to believe that the world is wiped clean of religion. This does not prepare them for interacting with people whose religious beliefs are core to their identity.

Again, we can look to Québec to see the negative consequences of government preventing public employees from reflecting the religious diversity of the society in which it operates. Consider that in Québec in the years since the passing of the bill, many religious minorities have testified that they feel less safe and have experienced incidents of hostility toward them.[56]

The Religion Clauses are grounded in a principle of pluralism. Because they were championed by many of the most ardent and enthusiastic religionists of the time, it would be easy to assume the

55 Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1015 (9th Cir. 2021).

56 MIRIAM TAYLOR, LAW 21: DISCOURSE, PERCEPTIONS & IMPACTS (2022).

clauses were meant to encourage government entanglement with religion. This would be a mistake. The supporters of the clauses all came from very different religious traditions, which they guarded jealously. They may have found common ground in keeping government out of their religions, but they all traveled down different theological paths from there. And they wanted no one to interfere.[57]

It would be an equally egregious mistake to assume the clauses reflected a desire to place secularism on a pedestal over religion. It was not secularists who were the primary champions of the clauses, but those who took their religion the most seriously.[58]

What each group saw was a world in which all of them could live alongside one another in peace. That might mean they would occasionally have to deal with people of very different views. It might mean they would have to associate with those they viewed as foolish, obnoxious, or even theologically dangerous. But at least it would not mean that government would be forcing unanimity of religious opinion on everyone.

It would be a mistake today to adopt a rule regarding public employees that prevents them from reflecting the religiously pluralistic society in which we now live.

B. The No-Coercion Rule Is Administrable

In contrast to the no-endorsement rule, the no-coercion rule is administrable. To succeed on any claim of coercion a party claiming an Establishment Clause violation would need to make an actual showing that the public employees levied coercive pressure against others to join in or abstain from religious exercise. A party's representation that she merely felt compelled to participate or abstain from certain religious practices, without more, would be insufficient. The psychological state of the person claiming coercion, absent other evidence, cannot be the test, for it is unfalsifiable and therefore endlessly pliant.[59]

Rather, the analysis is objective. While there will always be difficult cases, examples of objectively coercive behavior spring quickly to mind. This could include allocating actual benefits or burdens in a discriminatory fashion based on a person's reaction to the challenged religious exercise; directing other individuals to pray; or singling "out

57 *See* Berg, *supra* note 9, at 712.

58 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437–41 (1990).

59 Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (describing the "boundless, and boundlessly manipulable, test of psychological coercion").

dissidents for opprobrium."[60] Public employees actively proselytizing to third parties would fit the standard. So, too, would a coach granting extra playing time to football players who prayed with him or giving extra conditioning assignments to those who did not. Praying in front of a captive audience might also meet the standard, as would requiring students to attend religious services.[61]

On the other hand, examples abound of public employees exercising their faith in a way that includes no indicia of objective coercion. A Christian teacher does not objectively coerce her students when she prays over her lunch in their presence—a practice that even the Ninth Circuit took pains to explain did not violate the Establishment Clause, even under a no-endorsement rule.[62] Yarmulkes worn by Jewish teachers and burqas worn by Muslim postal workers are not coercive in any objective sense, nor are kosher or halal meals. This is true even if students or the public understand that these actions stem from teachers' religious convictions, because nothing about these exercises of religion brings the coercive power of government to bear on the students.

Consider a coach offering a brief, private prayer in the locker room before the game, or making the sign of the cross as a celebration when his team scores a touchdown, or pointing to the sky as a gesture to heaven to celebrate a win. Then imagine the same coach ordering his players to do the same or punishing them if they do not emulate his behavior. The latter is a violation; the former is not. In these cases, what matters is whether public employees use their government positions to coerce others, not whether they happened to be fulfilling their official duties at the time they engaged in the religious exercise.[63]

C. The No-Coercion Rule Is Consistent with Principles of Religious Voluntarism

One way the Free Exercise Clause and the Establishment Clause protect religious liberty is through minimizing the influence the heavy hand of government has on people's religious voluntarism. "By minimizing government influence, they maximize religious liberty."[64]

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60 Town of Greece v. Galloway, 572 U.S. 565, 588, 588–89 (2014) (plurality opinion).

61 *See* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 904 (2019).

62 *See* Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1015 (9th Cir. 2021).

63 Perhaps another way to think about it would be to say that public employees are not engaged in their official duties when practicing their religion. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

64 Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 373 (1992).

The Supreme Court has recognized this principle as well. In its first Establishment Clause decision of the modern era, the Court stated its rule in broad terms: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[65] In both *Sherbert v. Verner* and *Wisconsin v. Yoder*, it explained that religious exemptions "reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences."[66] And in *Schempp*, the Court applied a principle of neutrality in the Establishment Clause context, defining it as a position that neither advances nor inhibits religion.[67]

These statements reflect the value the Court has placed on religious voluntarism—that is, reducing as much as possible government's influence over our religious decisions. The coercion test in the context of public employees privately exercising their religion preserves that principle.[68]

The *Kennedy* case is a good example. Coach Kennedy had already agreed to stop any locker-room or after-game speeches with religious content.[69] He asked only for the right to pray by himself at the end of each game.[70] It was only that private religious exercise that could have caused the Establishment Clause violation that so worried the school district. That behavior brings with it no evidence of coercive pressure and thus would pass the coercion test.

Allowing it would not have affected or distorted Kennedy's religious choices. He already believed he had a duty to God to offer a prayer of gratitude after each game.[71] He had already shown that he would engage in that religious exercise even if the cost was discipline from his employer.[72] But, of course, the threat of termination would certainly deter some religious actors who cannot afford to lose their jobs for their religious exercise.

We should expect the same outcomes with any employees who take their religion seriously. For those who believe they have a spiritual

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65 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

66 Sherbert v. Verner, 374 U.S. 398, 409 (1963); Wisconsin v. Yoder, 406 U.S. 205, 235 n.22 (1972) (quoting *Sherbert*, 374 U.S. at 409).

67 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

68 For various explanations of the principle, see Laycock, *supra* note 37, at 65; Berg, *supra* note 9, at 732; Michael W. McConnell, *supra* note 23, at 117; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1007 (1990); and Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 5 (1989).

69 Joint Appendix at 74, 77, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

70 *Id.* at 71–72.

71 *Id.* at 148–49.

72 *Id.* at 172–74.

necessity or owe a duty to engage in certain religious exercise no matter where they are, their only option is to do it on the job or give up their position. This could include Muslims or Jews who pray throughout the day, Jews who wear yarmulkes, Sikhs who wear turbans, Buddhists who chant, or Christians who offer a prayer before a meal. The noncoercion principle adopted in *Kennedy* will not impact what they already believe to be an imperative.

Of course, public employees are not alone. The religious voluntarism of their students (if they are teachers or school administrators), their coworkers, and the public is also of paramount importance. The concern that seems to drive a desire for the no-endorsement rule is one of the stigmatizing effect a government endorsement of religion might have on those who do not share the endorsed religion.[73] Perhaps, the argument goes, the endorsement may have the effect of incentivizing coworkers and the public generally to alter their own religious exercise.[74] This is an entirely plausible argument, but it is less plausible in the context of public employees than in settings such as legislative prayer, monuments, or government endorsement when government as an institution is the actor.[75]

In the context of public employees, much of what matters is power dynamics. In most instances, public employees privately exercising their religion will have little effect on coworkers or the public at large. If a Muslim woman working as a postal worker wears a hijab, it is hard to imagine coworkers or the public feeling incentivized to follow suit. Her religious exercise will not affect their religious voluntarism. On the other hand, a public employee in a position of power over others, such as a judge or a high-level boss may pose different concerns because even slight acts by them can have an outsized effect on their employees or the public who appears before them.[76]

The student-teacher, or the student-coach, relationship reflects this deeper concern. Coaches and teachers wield a tremendous amount of power over students' lives. Smaller acts may affect religious voluntarism more in that scenario than they might in others. This is the precise concern expressed by Professors Laycock and Lund in their brief in *Kennedy* itself, when they argued that the coach's private

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73 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); Laycock, *supra* note 11, at 321.

74 *See* Laycock, *supra* note 11, at 349; Laycock, *supra* note 37, at 71–72.

75 *Cf.* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2448 (2022) (Sotomayor, J., dissenting) (distinguishing Establishment Clause endorsement problems in the public-school context from those in other contexts such as monuments and legislative prayer); Lee v. Weisman, 505 U.S. 577, 594 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

76 *See* Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 962 (5th Cir. 2022) (Jolly, J., concurring in part and dissenting in part).

religious exercise in front of the students had a coercive effect whether the coach intended it or not, simply by virtue of his relationship over them.[77]

But the no-coercion rule captures all of these concerns over power dynamics. When determining whether coercive pressure existed, courts can evaluate the totality of the circumstances, including the power dynamic between the two parties involved. And government actors can be mindful of the power they enjoy and ensure their private religious exercise might not rise to the level of creating coercive pressure.

To see these dynamics playing out, we can contrast *Kennedy* with *Lee v. Weisman*[78] and *Santa Fe Independent School District v. Doe*.[79] In *Kennedy*, it was plausible some players might have seen Kennedy's behavior and felt inclined to follow his example. But it was just as likely that many players would feel otherwise. Some may have been repulsed by it. Some may have been drawn to the Buddhist coach who offered a chant on the field after the game.[80] Others may have been attracted to the coach who outwardly expresses no religious beliefs at all. Still others may not have cared one whit what any of their coaches were doing religiously once the final whistle had blown, the handshakes were finished, and their fellow classmates in the stands were ready for the postgame parties.

The record in *Kennedy* showed that some players decided to join Kennedy as he prayed.[81] That they made that voluntary choice is not evidence, by itself, of coercive pressure or a distortion of their religious voluntarism. It is only evidence that some students found Kennedy's religious identity attractive, either because they already shared it or because they saw in him something they might have wanted to explore for themselves. The attractiveness of a public employee's religious exercise or identity—or lack thereof—cannot be the basis for an Establishment Clause violation. If it were, the universe of potential violations would be limited only by the number of people employed by the government and those who might find something they do worth emulating or pursuing.

Even if a majority of the students had voluntarily joined Kennedy, that fact alone would not suggest government was distorting religious voluntarism. The concern is that the student majority would place social pressure on religious dissenters, but experiencing social

77 Brief of Baptist Joint Committee for Religious Liberty et al. as Amici Curiae in Support of Respondent at 13, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

78 505 U.S. 577 (1992).

79 530 U.S. 290 (2000).

80 Joint Appendix, *supra* note 69, at 129, 151, 170, 333.

81 *Id.* at 98, 149.

pressure, without actual coercion, is simply part of the price we all pay for living in a pluralistic society. In a country as diverse as the United States, we will all, at different times and places, be on both the receiving and giving end of such pressure. By itself, social pressure does not suggest government interference with religious voluntarism.

That is in stark contrast with what troubled the Court in *Lee v. Weisman*.[82] There, the Court expressed considerable concern with the government's use of "social pressure to enforce orthodoxy."[83] The concern of social pressure, however, arose only because the Court found that the state had already required students to attend graduation ceremonies; they were a captive audience, with no choice but to participate or protest.[84] That is not the case when public employees exercise their religion. To the extent other students voluntarily join, and that joining creates a subjective sense in others to participate, pressure exists, but not pressure from the state.

In *Santa Fe*, what drove the Court to worry about endorsement was state action and the tyranny of the majority.[85] State actors, acting as state actors, created a system of student voting in which they knew the majority would be able to force the minority to participate in religious prayers.[86] For public employees exercising their religion, the government's only involvement is to permit people to exercise their religion, then get out of the way. Unlike in *Santa Fe*, the religious exercise of public employees is not "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer."[87]

If a significant number of students voluntarily joining in prayer were deemed to be the same as the government's actions in *Santa Fe* or *Weisman*, the test would then be dependent on the demographics of a given area, rather than a neutral principle. Public employees would be free to practice their religion if they were an extreme minority but not if they were part of the majority or even a substantial minority. That inconsistency alone would invalidate the rule; it is as unjust as it is unworkable.

In sum, in most instances, third parties will likely not even notice public employees exercising their religion. The rare times they do, it will more often than not appear as nothing more than an oddity to a religious outsider. Some may be offended by it, but that is a burden

82 505 U.S 577 (1992).
83 *Id.* at 594.
84 *Id.* at 594–96.
85 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304–05, 314, 316 (2000).
86 *Id.* at 304.
87 *Id.* at 310.

they will need to overcome in a pluralistic society. Their own religious choices will not be influenced.

It is plausible that certain employees' positions of power make anything they do coercive, creating a heightened responsibility not to practice religion in front of others. That influence, however, is diluted by allowing the same rule to apply to all. When all public employees can live according to their religious identities without restriction or encouragement from government, third parties will be exposed to many different types of believers and nonbelievers. None necessarily enjoys more coercive power than any other. Others can observe them all, then decide for themselves which they find attractive.

In contrast, were public employers allowed to terminate employees for any demonstrable exercise of religion visible to students or the public, employees like Kennedy would face immense pressure to change their religious behavior. A stereotypical and loathsome hallmark of regimes that oppress religious liberty is that they force citizens to choose between their religions and their livelihoods.[88] While some may be willing to sacrifice their jobs, far too many will succumb to government pressure to change their religious practices or hide their faith for fear of censure.

Students, meanwhile, will face strong manipulation. In contrast to what they will experience in the real world, the only examples to which they will be exposed in schools are those whose religious beliefs require absolutely no outward expression, those who purport to have no religion at all, or those willing to abandon their religious identities. Some students with resources will opt out of public schools and attend private religious schools. For the rest, their only option will be to conform to the false reality presented to them by the hand of government. There are some who, when being honest, would no doubt welcome that outcome and perhaps even push for it,[89] but it is not consistent with any notion of true religious voluntarism. From the employees, to the students fleeing to private schools, to those left behind, the heavy hand of government would be distorting everyone's religious choices.

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88 Consider, for example, the English Test Acts and penal laws that excluded Catholics from a number of occupations. An Act for the Well Governing of Corporations 1661, 13 Car. 2 st. 2 c. 1; An Act for Preventing Dangers Which May Happen from Popish Recusants 1672, 25 Car. 2 c. 2; An Act for the More Effectual Preserving the Kings Person and Government by Disableing Papists from Sitting in Either House of Parlyament 1678, 30 Car. 2 st. 2 c. 1.

89 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that the State seemed to want to use public schools to give Amish children a chance to leave their religious upbringing, which would cause the State to "influence, if not determine, the religious future of the child").

CONCLUSION

Both public employees and their employers suffer if the standards used to mitigate their disputes are unclear. Employees will find themselves unsure of their rights, forced to choose between their religion and their career. Employers, eager to avoid the time and expense that attends constitutional litigation, might prohibit more exercise than necessary as a prophylactic measure.

The coercion test allows the court to provide a clear standard while maximizing religious voluntarism. It focuses entirely on actions under public employees' control. It allows employers to act only on objective evidence of coercion, rather than reacting fearfully to mere allegations of constitutional violations.

A coercion standard also maximizes employees' power to conform their religious behavior to the requirements of the Establishment Clause. It is an easy-to-understand standard that provides assurance to both public employees and their anxious employers.

Perhaps most importantly, it is not reliant on the subjective feelings and accusations of third parties. If the Court were to adopt a no-endorsement test in the context of public employees, they would be forced to walk on eggshells. The burden would fall to them to judge how every person present would respond to their religious exercise, every time they engage in such exercise, no matter whether it included saying a private prayer, wearing religious headwear, eating a religious meal, or something else. Worse, it might take only one error of judgment for religious employees to lose their jobs.

All of this would have the effect of distorting public employees' religious choices. Under the coercion test, the choice for religious exercise to occur or not lies entirely with the public employee, with no involvement from the state. A teacher who prays one day, then loses her faith for any number of reasons, may not pray the next, only to return to it again a year later. The choice is hers and hers alone. The choice to participate or associate with that religious exercise rests entirely with students or, outside the school context, other third parties. Government as government would have no involvement.