Football, Facebook, and the First Amendment:

Applying *Kennedy v. Bremerton School District* to Social Media

By Maclain Conlin

In *O'Connor-Ratcliffe v. Garnier,*[1] the Ninth Circuit held last year that a public official's decision to operate a social media page can constitute state action (and thereby become subject to federal judicial scrutiny) *even if that official did not act pursuant to the duties or authority of her office.* This decision contradicts the original meaning of Section 1983, but the most concerning part of the ruling is that it disregards a decision from the Supreme Court that was issued only a month before, namely *Kennedy v. Bremerton School District.* This article examines the Court's holding in *Kennedy,* and explains why it requires that the Ninth Circuit's decision be overruled. Moreover, it explains the consequences of *Garnier* for federalism and the separation of powers.

I. The Facts and Holding of *Kennedy*

In *Kennedy,* a public high school football coach engaged in a private prayer at midfield at the end of several games. Joseph Kennedy's employment was subsequently terminated by the Bremerton School District, which feared that his actions violated the Establishment Clause. The key threshold question for the Court was whether or not Coach Kennedy's prayers constituted state action.[2] If they did, then disciplining him may have been *required* by the Establishment Clause.[3] If they did not, then his termination likely violated the Free Exercise Clause, because the Constitution does not normally permit the state to punish private religious conduct.[4]

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[1] 41 F.4th 1158 (9th Cir. 2022).
[2] *Kennedy,* slip op., 16. ("At the first step of the…inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?")
[3] See *Engel v. Vitale*, 370 U.S. 421 (1962).
[4] See *Sherbert v. Verner*, 374 U.S. 398 (1963).

In deciding this question, the Court relied heavily on its ruling in *Garcetti v. Ceballos,*[5] which held that a public employee engages in state action when he acts "pursuant to [his] official duties."[6] Moreover, it is vital that the activity at issue be "commissioned or created"[7] by the government.

Turning to the facts at issue, the Court held that Coach Kennedy's prayers did not constitute state action because they were not "ordinarily within the scope of his duties as a coach."[8] More specifically,

> [h]e did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not owe their existence to Mr. Kennedy's responsibilities as a public employee.[9]

The Court went on to note that Coach Kennedy's prayers occurred during a brief interval at the end of each game when public employees, including coaches, were permitted to attend to personal matters, confirming the point that he was not acting pursuant to his official functions. Justice Gorsuch concluded by warning of attempts to create "excessively broad job descriptions"[10] to deprive government employees of their constitutional rights.

Conversely, the Ninth Circuit did not engage in the same minute inquiry. In fact, it used a different test altogether, holding that whenever there is a "substantial nexus"[11] between a public employee's given conduct and his official duties, that conduct may qualify as state action.

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[5] 547 U.S. 410 (2006).
[6] *Kennedy,* 16.
[7] *Ibid.*
[8] *Id.* at 17.
[9] *Id.*
[10] *Id.*
[11] *Garnier,* 1169.

This directly contradicts Justice Gorsuch's careful reasoning in *Kennedy.* In that case, Coach Kennedy's private prayers undoubtedly possessed a "substantial nexus" to his official duties. After all, his prayers often occurred within minutes of "instructing players" and "discussing strategy" and they were performed at midfield in full view of his team and fellow employees. But this "nexus" or "connection" did not convert Coach Kennedy's private conduct into state action. Because his decision to pray at midfield at these particular times was not part of his duties or authority as a coach, it remained constitutionally protected private conduct.

II. The *Kennedy* Test Should Be Applied to Public Officials' Social Media Pages

On October 31, 2023, the Supreme Court heard oral arguments in *O'Connor-Ratcliffe v. Garnier,* an appeal from the Ninth Circuit's ruling. The Court should reverse the decision of the lower court, and apply the *Kennedy* test, for three reasons: first, the *Kennedy* decision itself requires this result; second, this test is consistent with America's constitutional structure, including our tradition's emphasis on judicial restraint, federalism, and the separation of powers; and third, this test is consistent with the original meaning of Section 1983.

A. Kennedy, of its own weight, requires this result

In *Kennedy,* the Court created a broad rule that applies to all claims of state action. There is no indication in the opinion that this test is inapplicable to other parts of the Constitution, and even if there were, both *Kennedy* and *Garnier* deal with the Free Speech Clause. In his concurrence, Justice Alito emphasized that the Court did not mandate one form of judicial scrutiny for these kinds of cases, but even his opinion did not contest that the "duties or authorities" test is required as a threshold inquiry before First Amendment scrutiny is triggered at all.

B. This test is consistent with America's constitutional structure

"Two of America's most important institutional features are federalism and the separation of powers."[12] At the Constitutional Convention, many advocated for the creation of a strong central government capable of promoting America's national interests.[13] However, the Framers also recognized that a strong federal government could pose a danger to individual liberty. Thus, they sought to check power against power, dividing authority between the states and the Federal Government, and further dividing federal power among three jealous branches.

The federal judiciary was not exempt from this skepticism or the limitations it imposed. In Federalist No. 78, Alexander Hamilton warned that granting the federal judiciary excessively broad authority would undermine the separation of powers. He quoted Montesquieu's maxim that, "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other [branches]."

To understand why these points are relevant to the question in *Garnier,* we can turn to the Court's holding in *Rucho v. Common Cause.*[14] In that case, the Court refused to intervene in cases of partisan gerrymandering because there was no clear yardstick for when gerrymandering becomes "excessive." The Court held that the federal judiciary may only act when there are "legal standards to guide [it] in the exercise of such authority."[15] Chief Justice Roberts noted that relying on subjective standards to decide constitutional cases would essentially transform the Supreme Court into a lawmaking body, free to choose evidence at will to fashion its own preferred outcomes.

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[12] Lowi, Ginsberg, Shepsle, Ansolabehere & Han, *American Government,* 80.
[13] Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning,* 52 UCLA L. Rev. 217, 234–38 (2004).
[14] 588 U.S. ___ (2019).
[15] *Id.* Maj. Op., p. 34.

The same problem lies in the Ninth Circuit's "substantial nexus" test. By failing to provide clear standards for when certain conduct qualifies as state action, this test would, if adopted, permit federal courts to insert their own public policy views into state and local government. A local school board candidate could have their social media page (their foremost outlet for public expression) altered by a federal court order based upon a subjective standard that could have equally produced the opposite result. After all, most accounts maintained by a government official will likely have *some* relation to their job, as most social media users discuss what they do for a living. How can a court decide when this "nexus" has become "substantial"? The Ninth Circuit's standard closely resembles the "a little is permissible but not too much" test that was rejected in *Rucho.*

This would not only create uncertainty in elections across the country, but would also assume an unprecedented role for the federal judiciary in the everyday democratic process. These harms can be prevented by simply upholding the *Kennedy* test, which establishes a clear marker for state action: conduct that is part of an official's duties or authority, and nothing else.

C. This test is consistent with the original meaning and plain text of Section 1983

A second element of the separation of powers is subject-matter jurisdiction, which requires that federal courts have clear authorization from Congress before hearing a case. This flows from Article III, Section 1 of the Constitution, which gives Congress the power to create and regulate "inferior Courts."

Such authorization is not present here. In *Garnier,* the plaintiffs brought a challenge under Section 1983, which permits lawsuits intended to enforce constitutional rights. However, the Section's scope is limited to defendants who acted under "color of…statute." The law was passed to target the discriminatory "Black Codes" of the South, and its proponents repeatedly

emphasized that it only applied to the actions of Southern governments. Representative Samuel Shellabarger of Ohio, for example, declared on the House floor that the bill covered "only [wrongs] done under color of State authority" and would "defeat[] an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated."[16]

All acts of public officials that are performed "under color of…statute" must be a part of their duties and authority. After all, if a sheriff, for example, ventures beyond the authority that the law vests in him, he would not be acting as a sheriff, but would be reduced to a private citizen. By neglecting this text, the Ninth Circuit's test also fails to apply the limitations of Section 1983, and thereby assumes another power for the federal courts that was never granted by Congress.

III. Conclusion

Social media has transformed our world in countless ways, opening up wonderful new possibilities of communication and information-sharing while also generating fresh problems that will take decades to resolve. However, for all its impact, the advent of social media cannot alter long standing constitutional rights. Public officials, when they act as private citizens, have a right to communicate their views. By commanding federal district court judges to scrutinize the account of every public official who mentions their profession on their page, the Ninth Circuit's ruling will inevitably have a chilling effect on the speech of government employees. The Constitution does not permit that, and neither should the Supreme Court.

[16] Brief of Tennessee, et. al., as *amicus curiae* in *Garnier,* 6.