Final Report of the LGA Judicial Review/Constitutional Method *ad hoc* Committee

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Introduction

On June 23, 2022, the U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Association, Inc., et al. v. Bruen*. *Bruen* considered the scope of the Second Amendment's right to keep and bear arms, as incorporated through the Fourteenth Amendment, and recognized the right includes the right to carry a hand-gun for self-defense outside the home. The Court's analysis departed from the means-ends scrutiny analysis used in evaluating other constitutional rights and instead adopted a text-history approach. Shortly thereafter, on June 27, 2022, the U.S. Supreme Court issued its opinion in *Kennedy v Bremerton School District*. *Kennedy* considered the interplay of the First Amendment's Establishment and Free Exercise Clauses, as incorporated through the Fourteenth Amendment, applied to a high school football coach praying at mid-field after games and likewise did not use a means-ends scrutiny analysis. Instead, the Court considered history and tradition in reaching its decision.

The Court's rejection of means-ends scrutiny in evaluating constitutional rights in *Bruen* and *Kennedy* represents a potential sea-change in constitutional method with unknown implications. In light of these changes, the LGA Board established an *ah hoc* committee to provide a guidance to LGA members addressing the change in constitutional review.

Work of the *ad hoc* Committee

The *ad hoc* committee worked with the University of Virginia's State and Local Government Law Clinic to assist with research and to leverage the University of Virginia Law Library's resources. Professor Andrew Block, director of the State and Local Government Law Clinic, and two University of Virginia 3L students Jacob Mitchell and Antonella Nicholas worked with the *ad hoc* committee over many months to develop a memorandum regarding the change in constitutional method, with a focus on the First Amendment's religion clauses and the Second Amendment. Mr. Mitchell and Ms. Nicholas worked extremely hard and with input from the committee prepared the attached memorandum. The memorandum provides an overview of the various theories of constitutional interpretation; *Bruen*'s text-history test and defense of local government gun regulations following *Bruen*; and, emerging themes in the jurisprudence of the First Amendment religion clauses. Additionally, the memorandum has an appendix of historic Virginia gun regulations and laws, local ordinances, and other resources that can be referenced for the "history" portion of the text-history test. The *ad hoc* committee is deeply grateful for the University of Virginia's State and Local Government Law Clinic's assistance and Mr. Mitchell and Ms. Nicholas's work.

Since the memorandum was completed, the Supreme Court decided, *Groff v. DeJoy*, 143 S. Ct. 2279 (June 29, 2023). *Groff* is a Title VII case, but as it impacts religious accommodations, the committee felt it should be addressed in its work product. *Groff* concerned the meaning of Title VII and its prohibition on employment discrimination based on religion and an employer's, including a local government with fifteen or more employees, requirement to reasonably accommodate an employee's religious practice unless the accommodation would cause an "undue hardship on the conduct of the employer's business." Mr. Groff is a postal

service worker who sought an accommodation from working on Sundays. A unanimous Court held that *TWA v. Hardison*, where the Court stated that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturday's off is an undue hardship," has been misread and misapplied by Circuit Courts over the approximately fifty years since it was issued. The Court "clarified" that the correct standard is that an "employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff*, 143 S. Ct. at 2295. The Court also stated in *Groff* that the *Lemon* test was "abrogated" as opposed to *Kennedy's* statement that the Court had "abandoned" the *Lemon* test. *Id.* at 2289. The Court remanded the case to the Third Circuit for further proceedings. How the recently clarified undue hardship test will be applied is left to the EEOC and lower courts to apply in a "common-sense manner." *Id.* at 2296.

Also since the memorandum was completed, the U.S. Department of Education has issued *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, copy attached after the memorandum, and available at https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html, which may be useful.

In the Second Amendment context, the Supreme Court granted *certiorari* in *U.S. v Rahimi* and will consider in the fall whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders violates the Second Amendment on its face. The Fifth Circuit held that it does using the text-history test. 61 F.4th 443 (5th Cir. 2023). This case will provide further clarification on the reach of the text-history test and its application.

Conclusion

The *ad hoc* committee is extremely thankful for the hard work Professor Block, Jacob Mitchell, and Antonella Nicholas provided in preparing and researching the memorandum. The *ad hoc* committee hopes its work product will serve as a useful guidance document for the myriad of Constitutional issues that local governments will address in the years to come and are appreciative of the opportunity to serve the LGA.

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UNIVERSITY of VIRGINIA
SCHOOL of LAW

State and Local Government Policy Clinic
Andrew Block, Director

MEMORANDUM

To: Ryan Samuel
From: Professor Andrew Block, Jacob Mitchell, Antonella Nicholas
Re: Potential Shifts in First and Second Amendment Jurisprudence
Date: May 29, 2023

A. INTRODUCTION

Over the decade, the Supreme Court has decided several First and Second Amendment cases affecting gun rights and religious freedoms. Many of these new decisions seem to be at odds with prior decisions, yet do not alter judicial precedent conclusively, leaving litigants uncertain as to the current state of the law.

This memorandum analyzes recent Supreme Court cases that implicate the First and Second Amendments, catalogs potential doctrinal shifts in these areas, and offers guidance to local governments on how to respond to them.

First, because many of the Supreme Court's recent decisions in these areas hinge on the Court's method of constitutional interpretation, we provide a brief overview of competing methods of interpretation. Next, we discuss the Court's most recent Second Amendment decision, *New York State Rifle & Pistol Association Inc. v. Bruen,* and the text-history-tradition approach that has emerged from that case. We then examine recent Supreme Court cases implicating the religious clauses of the First Amendment in which text-history-tradition might apply. Specifically, we discuss those involving legislative prayer, employee prayer, grant-making, and religious exemptions. Finally, the Appendix includes examples of historical state gun laws and local ordinances in the Commonwealth of Virginia that may inform jurisprudence concerning state gun regulations in Virginia.

B. CONSTITUTIONAL INTERPRETATION

This section briefly summarizes competing theories of constitutional interpretation, including living constitutionalism and originalism. This section also compares these traditional theories of constitutional interpretation to the Court's newest purported analytical test for Second

Amendment cases, the "text-history-tradition" test,[1] and discusses the extent to which this mode of analysis will be relevant to other individual rights cases.

A. Theories of Constitutional Interpretation: Living Constitutionalism versus Originalism

A court's power to interpret the Constitution flows from its power of judicial review, which is the authority to review the constitutionality of government action.[2] In order to determine whether an action is constitutional, a court must interpret and construct the text of the Constitution.[3] When the Constitution's text does not answer the legal question at hand, judges may rely on alternative modes or methods of interpretation to help them determine the meaning of certain words and passages and their legal effect. [4]

Legal scholars and the Justices of the Supreme Court disagree on how to interpret and construct the Constitution when the Constitution's text does not provide explicit answers on an issue. Two of the major competing theories of interpretation are living constitutionalism and originalism. While both are important to understanding judicial decision-making, originalism is more relevant to the decisions of the current Supreme Court due to the conservative majority who employ the theory. For that reason, this section focuses on originalism and only briefly discusses living constitutionalism.

i. Living Constitutionalism

Living constitutionalism "refers to the view that the content of constitutional doctrine ought to change over time."[5] Some living constitutionalists also believe that "changes in doctrine should respond to changes in circumstances and values."[6] Thus, living constitutionalists believe that constitutional interpretation should not necessarily be bound by the Framers' views of certain rights and freedoms. Rather, the meaning of the Constitution and our interpretation should evolve, adapt, and respond to changes in the world around us.

ii. Originalism

Unlike living constitutionalists, originalists treat the meaning of the Constitution as fixed, either at the time of the Constitution's ratification or at the time of its drafting.[7] Indeed, the proposition

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[1] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."). The term "text-history-tradition" comes from Justice Kavanaugh's concurrence. *Id*. at 2161 (Kavanaugh, J., concurring).
[2] CONG. RSCH. SRV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 1 (2018).
[3] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 9–10 (2015) for the difference between constitutional interpretation and construction.
[4] *Id.* at 5, 9–10.
[5] *Id.* at 14.
[6] *Id.*
[7] Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, Georgetown University Law Law Faculty and Other Works, 29 (2011), https://scholarship.law.georgetown.edu/facpub/1353.

that one should interpret the Constitution by determining its fixed original meaning is central to the two theses of originalism: the "fixation thesis" and the "contribution thesis."[8] The fixation thesis holds that the meaning of the Constitution was fixed at the time of ratification or framing of the particular section of the Constitution at issue.[9] The contribution thesis provides that original meaning should make a substantial contribution to the content of constitutional doctrine."[10] In this way, the meaning of words in the Constitution are "determined by the original communicative context and linguistic facts at the time of writing,"[11] and judges should be bound by this meaning.[12]

Yet, it is important to understand that originalism is a family of theories from which several versions of originalism abound.[13] While the fixation and contribution theses are common to all originalists, other aspects of originalist interpretation, such as what determines the original meaning, [14] may differ based on the decision-maker's particular brand of originalism. For example, original public meaning originalists determine the meaning of the Constitution's text based on "the conventional semantic meaning of the words and phrases at the time each provision was framed and ratified."[15] Original intentions originalists determine the meaning based on the intentions of the framers, drafters or ratifiers.[16]

iii. Example of Originalist Reasoning: District of Columbia v. Heller

Conservative judges tend to employ originalist reasoning in their judicial opinions, including the conservative justices who sit on the Supreme Court today. One example of a "paradigmatically"[17] originalist decision is Justice Scalia's decision in *District of Columbia v. Heller*.[18]

In *District of Columbia v. Heller*, the Supreme Court struck down a Washington D.C. gun law prohibiting the possession of handguns and requiring lawfully owned firearms in the home to be unloaded and dismantled or protected by a trigger lock.[19] Justice Scalia, writing for the majority, interpreted the Second Amendment to protect the right to bear arms of a "well regulated militia," and also to protect the gun rights of individuals using guns for "traditionally lawful purposes," including for self-defense inside the home.[20] The Court ruled that D.C.'s ban on handgun

[8] *Id.* at 33.
[9] *Id.* at 29.
[10] *Id.* at 32.
[11] Solum, *Fixation Thesis*, *supra* note 3, at 2.
[12] Cass R. Sunstein, *Originalism*, 93 Notre Dame L. Rev. 1671, 1674 (2018).
[13] Solum, *What is Originalism*, *supra* note 7, at 33.
[14] *Id.* at 29.
[15] *Id.* at 28.
[16] *Id.*
[17] *Id.* at 22.
[18] 554 U.S. 570 (2008).
[19] Heller, 554 U.S. at 628.
[20] *Id.* at 577.

possession in the home, and the requirement that lawful guns be disassembled or trigger-locked, violated the Second Amendment.

Justice Scalia's decision methodologically examined the text of the Second Amendment to determine its original public meaning. Justice Scalia proceeded according to the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[21] For example, the Court examined the semantic context of the operative words in the Second Amendment, "bear" and "arms," by considering their usage at the time the Second Amendment was drafted and ratified.[22] Interpreting the word "bear," for example, Justice Scalia wrote, "at the time of the founding, as now, 'to bear' meant 'to carry.'"[23] To determine the meaning of the word "arms," he pulled definitions from dictionaries from the 1770s.[24] Only after "[p]utting all of these textual elements together" did Justice Scalia conclude that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[25] Thus, *Heller* exemplifies how a court would determine the meaning of the Constitution using an original public meaning method of interpretation.

B. Merging History with Tradition

i. Bruen's Text-History-Tradition Approach

Recently, several Justices, primarily those in the Supreme Court's conservative faction, have embraced a different method of interpretation to a certain extent that merges history with tradition. Whereas previously the Court might be content to rely upon originalist reasoning to interpret the Constitution based on the "normal and ordinary" meaning of the text at the time of drafting or ratification,[26] Justice Clarence Thomas's recent majority decision in *New York State Rifle and Pistol Association v. Bruen* exemplifies a potential new approach.[27] In *Bruen*, Justice Thomas merges history with tradition, adopting an originalist formula of "text, history and tradition," as described by Justice Brett Kavanaugh in a separate concurrence to the opinion.[28] This text-history-tradition test interjects into an analysis of a government regulation the question of whether and how the conduct being regulated has been governed in the past, which requires a review of historical tradition.

In *Bruen*, the majority found that a New York law requiring individuals to obtain a license to carry concealed weapons in public places was unconstitutional. Writing for the majority, Justice Thomas relied upon tradition to reach this decision, arguing that in order to justify a regulation of

[21] *Id.* at 576.
[22] Solum, *What is Originalism?*, *supra* note 7, at 25.
[23] Heller, 554 U.S. at 584.
[24] *Id.* at 581.
[25] *Id.* at 592.
[26] *Id.* at 576.
[27] New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022).
[28] Bruen, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

firearms, "[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[29] Justice Thomas presented historical background on firearm regulation in the United States to find that it does not support New York's gun safety law. He reviewed sources on the topic from the 1200s to the early 1900s and concluded that while there have been some limited and "well-defined restrictions" on carrying firearms in public in the United States, those restrictions do not reach the level of a tradition against carrying guns in public for self-defense.[30]

ii. Comparing Text-History-Tradition to Originalism

Justice Thomas's text-history-tradition approach in *Bruen* differs from traditional originalism, such as the original public meaning originalism that Justice Scalia employed in *Heller*, in that determining our nation's "tradition" of regulation is an analysis that is distinct from determining the original meaning of a text or regulation. Original meaning looks at a snapshot in time—what was the original public meaning a text would have had at the time it was passed into law? In contrast, tradition considers the continuity of practices over time, including how traditions have changed and morphed over a period of years. According to legal scholars Randy Barnett and Lawrence Solum, the constitutional traditions relevant to text-history-tradition include practices or customs that are generally accepted in the United States, and which have been established for quite some time.[31]

iii. Applicability of the Text-History-Tradition Approach to other Areas of Law

The extent to which the Court will employ the text-history-tradition approach in cases that do not implicate the Second Amendment, or even whether the approach will become a mainstay amongst conservative Justices in Second Amendment cases, is still unclear. The multiple concurrences in *Bruen*[32] and the novelty of the text-history-tradition approach raise many questions as to what role the test will play in future cases.[33] As of now, recent First Amendment cases do not explicitly employ the text-history-tradition analysis of *Bruen*; however, some areas of First Amendment jurisprudence appear to match *Bruen*'s interest in historical practices and understandings.[34]

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[29] *Id.* at 2126
[30] *Id.* at 2138
[31] Lawrence B. Solum & Randy E. Barnett, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. UNIV. L. REV. (2023), available at SSRN: https://ssrn.com/abstract=4338811.
[32] *See id.* at 2161 (Kavanaugh, J., concurring).
[33] *See* Jack M. Balkin, Text, *History and Tradition: Discussion Questions on New York State Rifle And Pistol Association, Inc. v. Bruen*, BALKINIZATION (July 6, 2022), https://balkin.blogspot.com/2022/07/text-history-and-tradition-discussion.html.
[34] *See infra First Amendment.*

Against this backdrop, we can be sure that extending text-history-tradition to other areas of the law would raise issues as to the workability of the test. For instance, the text-history-tradition analysis gives judges more flexibility to incorporate various historical facts and contexts into analyses of our nation's traditions on certain types of regulations. How can courts protect themselves from using "bad history" in these analyses? Would an analysis that incorporates history that is later found to be flawed be subject to stare decisis? What should a court do if a regulation has no analogue in history? These questions and more would need be resolved in future applications of the test.

Another major question that exists regarding text-history-tradition is how judges would find, analyze and consult historical tradition. In general, text-history-tradition as promulgated in *Bruen* seems to require courts to search the historical record on an issue, or, at the very least, rely heavily on parties' briefs or outside experts to ascertain tradition. In his dissent in *Bruen*, Justice Stephen Breyer addressed this issue, stating that Justice Thomas's test "imposes a task on the lower courts that judges cannot easily accomplish."[35] Indeed, "[c]ourts are, after all, staffed by lawyers, not historians."[36] On the other hand, proponents of the text-history-tradition approach like Justice Thomas argue that it reduces the uncertainty of having judges apply a means-end analysis that asks judges to balance the state's interest against an individual's right to be free from a regulation.

iv. Takeaways for Local Governments

As demonstrated above, the future of constitutional analysis in individual rights cases, including First Amendment cases, is uncertain after *Bruen*. Still, local governments must be aware that the Court could incorporate the text-history-tradition mode of analysis into other areas of jurisprudence in the future and should prepare for shifts in the adjudication of individual rights accordingly.

If text-history-tradition is extended beyond *Bruen*, it will be important for local governments to anticipate that historical analogy and analogical reasoning may play a greater role in future cases. Judges may reason by analogy to decide whether today's regulations are sufficiently similar to past regulations and seek a historical record necessary to divine the tradition behind a particular regulation or conduct. Local governments could start to consider what traditions exist around various state and local regulations, consult historical experts if feasible, and remain alert to future individual rights decisions. Depending on how far *Bruen* is extended, text-history-tradition could impact the efforts to protect individual rights, or regulate specific conduct, in communities across Virginia, and indeed the country.

C. SECOND AMENDMENT

[35] Bruen, 142 S. Ct. at 2176 (Breyer, J., dissenting).
[36] *Id.*

This section offers a more in-depth discussion of the Supreme Court's Second Amendment decision in *Bruen* and the background, facts, and reasoning in the case that make it such an intriguing potential flashpoint for individual rights jurisprudence.

A. Overview of Second Amendment Jurisprudence

The Supreme Court's 2022 decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* marks a significant change to Second Amendment jurisprudence.[37] The regulation of firearms before *Bruen* was governed by two landmark Supreme Court cases: *District of Columbia v. Heller*[38] and *McDonald v. City of Chicago.*[39] *Bruen* builds upon the Court's interpretation of the Second Amendment in those cases but changes the analytical framework for evaluating Second Amendment claims.

In 2008, the Court sided in *Heller* with a D.C. citizen who sued the District of Columbia over its ban of handguns in the home. In doing so, the Court protected an individual's right to own handguns for self-defense in the home. The majority opinion, penned by Justice Scalia, interpreted the Second and Fourteenth Amendments to allow an individual to possess and bear arms for self-defense.[40] However, Justice Scalia also emphasized the limited nature of the decision's protection of Second Amendment rights. Scalia noted, "Like most rights, the right secured by the Second Amendment is not unlimited . . . [It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[41] *Heller* then left the door open for certain gun regulations, including bans on guns in "sensitive places" like schools and churches."[42]

Two years later, the Court once again found itself wading into Second Amendment waters with *McDonald v. Chicago.* This case arose after plaintiffs sued the city of Chicago over a handgun ban similar to D.C.'s ban from *Heller*. The *McDonald* majority applied the right to self-defense to state and local governments by way of the Fourteenth Amendment.[43] The Court explained that "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States."[44] However, as in *Heller*, the Court also stressed the limited nature of the ruling by reiterating that a wide variety of state and local restrictions on gun use are permissible.

Twelve years after *McDonald*, the Court heard *New York State Rifle & Pistol Ass'n v. Bruen*, allowing it to consider the extent to which a state could limit the right to possess firearms outside the home. As we indicated above, the Court employed a novel test in which "the government

[37] *See generally,* New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022).
[38] District of Columbia v. Heller, 554 U.S. 570 (2008).
[39] McDonald*,* 561 U.S. 742 (2010).
[40] Heller, 554 U.S. at 594–95.
[41] *Id.* at 626.
[42] *Id.* at 626–27.
[43] McDonald, 561 U.S. at 791
[44] *Id*.

must demonstrate that the [firearm] regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[45]

The following paragraphs detail the facts and reasoning of *Bruen*.

B. New York State Rifle & Pistol Ass'n v. Bruen

i. New York's Firearm Regulatory Scheme

The State of New York regulated the possession of firearms inside and outside the home using a licensing process. In order to possess a firearm inside one's home or place of business, an applicant must make a showing of several criteria, including his or her good moral character, the absence of a history of mental illness or crime, and that "no good cause exists for the denial of the license."[46] In order to carry a firearm outside his home for self-defense purposes, an applicant must apply for an unrestricted license to carry a concealed handgun.[47] The New York regulation required applicants to prove that there was "proper cause" for the licensing officer to issue the unrestricted license.[48]

The proper-cause requirement aimed to address handgun violence in urban areas.[49] "Proper cause" means that an applicant could "demonstrate a special need for self-protection distinguishable from that of the general community."[50] In order to show a special need, applicants must present evidence of "particular threats, attacks, or other extraordinary danger to personal safety." An individual who did not meet the proper cause standard may receive a restricted license which only allowed him to carry firearms in public for the purposes of hunting, target shooting, or employment.[51]

Importantly, New York's licensing process for carrying a firearm in public was discretionary. Even if applicants satisfied certain threshold statutory criteria, authorities may still deny an applicant a license based on the fact that the applicant had not demonstrated "proper cause" to be able to carry in public.[52] This process differed from the nondiscretionary process of 43 other states (as of 2022), which *requires* licensing officials to grant licenses if applicants meet objective statutory requirements.[53]

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[45] Bruen, 597 U.S. at 2130.
[46] *Id.* at 2122-23.
[47] *Id.* at 2123.
[48] *Id.*
[49] *Id.* at 2131.
[50] Bruen, 597 U.S. at 2123.
[51] *Id.*
[52] *Id.* at 2124.
[53] *Id.*

ii. Factual Summary

Plaintiffs were New York residents who possessed restricted licenses for hunting and target shooting.[54] Both applied for unrestricted licenses to carry a handgun in public for self-defense purposes.[55] One plaintiff cited a string of robberies in his neighborhood as proper cause for unrestricted concealed carry; the other plaintiff applied for an unrestricted license for the purpose of general self-defense. [56] New York licensing officials denied the applications of both plaintiffs.

Plaintiffs claimed that the licensing officials violated their Second and Fourteenth Amendment right to bear arms by denying their applications for unrestricted firearm-carry based on their failure to show proper cause.[57]

iii. Holding

The Supreme Court held that a firearm regulation is constitutional if it is consistent with the text and historical understanding of the Second Amendment. New York's proper-cause requirement is inconsistent with the text and history of the right to bear arms because it prevents "law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."[58]

iv. Constitutional Framework of Bruen

In the early years after *Heller*, lower courts struggled to make sense of how to evaluate gun regulations. Eventually, courts coalesced around a two-prong balancing test.[59] In his dissent in *Bruen*, Justice Breyer pointed out as much: "[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment."[60] The first step of this framework requires courts to determine whether a law governs conduct falling outside the scope of the Second Amendment "as originally understood."[61] If the conduct falls outside this scope, the Amendment does not protect that conduct, and the government regulation is constitutional. If, however, the conduct falls within the Amendment's scope, a court proceeds to step two. At this second step, courts engage in means-ends scrutiny, asking whether the government's interest is sufficiently weighty to justify the burdening of a constitutional right.[62]

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[54] *Id.* at 2125.
[55] *Id.*
[56] Bruen, 142 S. Ct. at 2125.
[57] *Id.*
[58] *Id.* at 2117.
[59] *Id.* at 2125.
[60] *Id.* at 2174 (Breyer, J., dissenting).
[61] *Id.* at 2126.
[62] Bruen, 142 S. Ct. at 2126-27 ("If a 'core' Second Amendment right is burdened, courts apply 'strict scrutiny' and ask whether the Government can prove that the law is 'narrowly tailored to achieve a compelling governmental interest.' Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is 'substantially related to the achievement of an important governmental interest.'").

In *Bruen*, Thomas declared that the two-step approach, despite its popularity among lower courts, was "one step too many."[63] Instead, the Court analyzed the New York firearm regulation as follows:

The Court first asked whether the Second Amendment's "plain text" covers the conduct that the law seeks to regulate.[64] If the Second Amendment's plain text does *not* cover that conduct, the regulation does not violate the Second Amendment. If the Second Amendment's plain text *does* cover that conduct, the conduct is presumptively protected by the Constitution.[65] In this case, in order to justify the regulation, the government must demonstrate that the law is consistent with the text and historical understanding of the Second Amendment and "the Nation's historical tradition of firearm regulation."[66]

The Court acknowledged that determining whether a law is consistent with the text and historical understanding of the Second Amendment and our Nation's history of firearm regulation often will require reasoning by analogy. Additionally, "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"[67] The relevant similarities between a modern firearm regulation and a historical firearm regulation are how and why the regulations burden someone's right to armed self-defense.

Importantly, the relevant historical analogue does not have to be an exact copy of the modern regulation: "[A]nalogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[68]

v. Applying the Bruen *Framework to the New York Regulation*

First, the Court determined whether the conduct being regulated—respondent's right to public carry—was covered by the Second Amendment's text. For several reasons, the Court concluded that the text of the Second Amendment covers the possession of a firearm in public. For one, Justice Thomas reasoned that the plain text of the Second Amendment does not distinguish between possessing a firearm inside the home and outside the home. He also explained that the definition of "bear" "naturally encompasses public carry,"[69] and that "[i]ndividual self-defense is 'the central component' of the Second Amendment right." Given the centrality of self-defense concerns, Justice Thomas reasoned that it would be odd if one did not have the same firearm rights for self-defense in public as one has inside the home. Thus, the Second Amendment's

[63] *Id.* at 2127.
[64] *Id.* at 2130-31.
[65] *Id.* at 2130.
[66] *Id*. at 2130.
[67] *Id.* at 2132 (quoting Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).
[68] Bruen, 142 S. Ct. at 2133.
[69] *Id.* at 2134.

plain text presumptively protects the respondent's right to carry firearms in public for the general purpose of self-defense.

Even though the New York regulation burdened constitutionally protected conduct, under the *Bruen* framework, it may still pass constitutional muster if the government can show that the regulation is consistent with the nation's history and tradition of firearm regulation.[70] The Court proceeded to a historical analysis of the laws that the respondents proposed were analogous to the New York regulation in an effort to determine whether New York's proper-cause regulation meets the history and tradition standard.

The Court analyzed the respondents' historical sources by categorizing them by historical period: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[71] Laws from these historical periods do not all provide the same strength of evidence that these laws are representative of the history and traditions of the United States. Indeed, according to the majority, "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[72] The upshot is that if a government proffers regulations from medieval and English common law, or from a time period post-enactment of the Second Amendment, such regulations provide less persuasive evidence that they constituted part of the nation's history and traditions.[73]

Importantly, the Court characterized the New York regulation as one attempting to limit the possession of handguns in Manhattan for the purpose of reducing handgun violence in urban areas.[74] The Court's analysis of potential historical analogues considered whether there is a basis for regulating handguns through the proper-cause regulation for this purpose.[75]

The Court concluded that although the government's proffered historical regulations demonstrated that restrictions on the right to bear arms existed, and although these restrictions were promulgated in order to address a similar "general societal problem" as we see today—gun violence[76]—these regulations did not seek to restrict the rights of ordinary, law-abiding citizens from carrying a gun in public. Rather, the regulations intended to restrict firearm possession of individuals who carried guns with the intent to do harm,[77] such as terrorizing the public.[78] Or the

[70] *Id.* at 2135.
[71] *Id.* at 2136-37.
[72] *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634-35).
[73] *See infra* for more on the Court's historical analysis.
[74] Bruen, 142 S. Ct. at 2131 ("New York's proper-cause requirement concerns the same alleged societal problem addressed in Heller: 'handgun violence,' primarily in 'urban area[s].'").
[75] *Id.* at 2131-32 ("Following the course charted by Heller, we will consider whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation.").
[76] *Id.* at 2131-2132
[77] *Id.* at 2138.
[78] *Id.* at 2143.

regulations were aimed at restricting individual access to unusual weapons that were not in common use by the populace.[79] Indeed, the Court found that there were not broad laws across the United States during the relevant periods of Anglo-American history that prohibited the public carry of commonly used firearms, such as pistols, nor which required law-abiding citizens to show they had a special need for protection.[80]

In contrast to historical precedent, New York's discretionary concealed-carry licensing process limited handgun use of individuals who intend to possess firearms for self-defense purposes. Thus, the Court found that the New York licensing process was not consistent with the nation's historical tradition of firearm regulation.

vi. Concurrences and Dissent

The concurrences and dissent in *Bruen* offer insights into the scope and applicability of the test-history-tradition test expounded by Justice Thomas. First, in a concurring opinion joined by Chief Justice Roberts, Justice Kavanaugh provides perhaps the best look into the potential future of the test and its limitations. Kavanaugh took the stance that despite the majority's novel analytical framework of the Second Amendment, the Court's decisions in *Heller* and *McDonald* remain untouched.[81] He claims, "[f]irst, the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court's decision does not affect the existing licensing regimes – known as shall-issue regimes – that are employed in 43 States."[82]

In Kavanaugh's view, *Bruen* does not prevent states from imposing licensing requirements on gun ownership through requirements like background checks, firearms training, mental health checks and fingerprinting schemes. Kavanaugh noted that, "properly interpreted, the Second Amendment allows a 'variety' of gun regulations."[83]

The remaining two concurrences address separate issues. Justice Samuel Alito's concurrence was directed in large part at Justice Stephen Breyer's dissent, while Justice Amy Coney Barrett dove deeper in a third concurrence into the historical analysis required by text-history-tradition. First, Alito disagreed with Breyer and New York that "the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law."[84] Alito also attempted to narrow the scope of the holding, reiterating that the majority opinion "decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kind of weapons that people may possess."[85] Alito viewed the

[79] Bruen, 142 S. Ct. at 2142.
[80] *Id.* at 2156.
[81] *Id*. at 2161 (Kavanaugh, J., concurring).
[82] *Id.*
[83] *Id*. at 2161 (Kavanaugh, J., concurring).
[84] *Id*. at 2158 (Alito, J., concurring).
[85] *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

majority opinion as consistent with *Heller* and *McDonald* regarding "restrictions that may be imposed on the possession or carrying of guns."[86]

In her concurrence, Justice Barrett pointed out "just a few unsettled questions" the Court did not resolve.[87] In particular, she claimed the Court's decision in *Bruen* "should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."[88] Justice Barrett mulled over the correct time frame for deciding the meaning of the Second Amendment, questioning whether history from the time of 1791 when the Second Amendment was ratified was appropriate or whether post-enactment history and tradition, including precedent from the Reconstruction period, might be more relevant.[89]

In a dissent joined by Justices Sotomayor and Kagan, Justice Breyer outlined the gun violence problem as he saw it to frame what was at stake in *Bruen*. He noted that states have tried to reduce the likelihood of gun violence "by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds."[90] However, according to Justice Breyer, *Bruen* "severely burdens the States' efforts to do so."[91] The dissent emphasized that "the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular."[92]

Breyer disagreed with the text-history-tradition approach endorsed by the majority, which he viewed as a "rigid history-only approach."[93] The dissent also raised a number of questions that the majority's approach left unanswered, such as how judges will choose between competing historical records and experts, how judges will decide what constitutes an outlier and how many cases, laws, or other historical examples must be present to demonstrate a historical tradition.[94] Breyer wrote that the test "imposes a task on the lower courts that judges cannot easily accomplish," since "[j]udges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means')" but are "far less accustomed to resolving difficult historical questions."[95] Breyer explained, "Courts are, after all, staffed by lawyers, not historians."[96]

C. Major Takeaways from Bruen

[86] *Id.*
[87] *Id.* at 2163 (Barrett, J., concurring).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 2163 (Breyer, J., dissenting).
[91] Bruen, 142 S.Ct. at 2163 (Breyer, J., dissenting).
[92] *Id.* at 2165 (Breyer, J., dissenting).
[93] *Id.* at 2177.
[94] *Id.*
[95] *Id.*
[96] *Id.*

i. Bruen *deals with discretionary, "may-issue" licensing processes, not mandatory "shall-issue" processes*

The Court struck down New York's discretionary application process as unconstitutional. The court explicitly states that the other 43 states who employed a mandatory, or nondiscretionary process, were in the clear. Indeed, the Majority states that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a [permit].'"[97] "Shall-issue" licensing regimes do not categorically prevent citizens from being able to carry guns outside the home for the purposes of self-defense.[98]

ii. Bruen *stands for the proposition that carrying a firearm for self-defense outside the home is conduct that is presumptively protected under the Second and Fourteenth Amendment*

In *Heller*, the Court held that the possession of a firearm for self-defense inside the home was protected by the Second Amendment. *Bruen* expands that protection to firearm possession for the purpose of self-defense outside the home. Now, in order to pass constitutional muster, the government must show that the regulation of firearm possession both inside and outside the home is consistent with the history and tradition of the nation's firearm regulations. As *Bruen* demonstrates, this is a high bar to pass.

iii. Bruen*'s treatment of history and analogy*

The Court provided the following guidance for analogical reasoning based on historical comparisons:[99]

First, in determining whether historical firearm regulations are so analogous to a modern regulation as to demonstrate the modern regulation's consistency with the nation's history of firearm regulation, courts should consider the relevant similarities between the two: (1) how the regulations burden a law-abiding citizen's right to armed self-defense and (2) why the regulations burden a law-abiding citizen's right to armed self-defense.

Second, the Court offers advice on how to parse through historical evidence:[100]

- When the challenged law "addresses a societal problem that has persisted since the 18th century" and there is no historical analogue that is distinctly similar to the challenged law, that is evidence that the regulation is *inconsistent* with the Second Amendment.
- When the challenged law "addresses a societal problem that has persisted since the 18th century," but in earlier generations, the problem was addressed in materially different ways, that is evidence that the regulation is *inconsistent* with the Second Amendment.

[97] Bruen, 142 S. Ct. at 2138 n.9.
[98] *Id.* at 2138 n.9.
[99] *Id.* at 2131.
[100] *Id.* at 2131.

- When the challenged law addresses a societal problem that has persisted since the 18th century, and in earlier generations, "jurisdictions [] attempted to enact analogous regulations," but those regulations were struck down on constitutional grounds, that is also evidence that the regulation is *inconsistent* with the Second Amendment.

Third, the Court distinguishes between different eras of history and explains which are most valuable to the court and why. The eras of history the Court delineates are: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[101] The court states that using evidence from the early Republic is particularly valuable to a historical analysis of a modern regulation, while using evidence from early modern England and the post-enactment era is less relevant to the analysis.

- *Medieval to early modern England:* The common law practices of England are only relevant to the extent that they can be attributed to the Framers.[102] "'The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*,' not as they existed in the Middle Ages."[103]
- *The American Colonies and the early Republic*: The Court finds evidence from this period particularly relevant, since it encompasses the drafting and ratification of the Second Amendment.[104]
- *The late-19th and early-20th centuries*: History from these eras is "secondary"[105]– this history is only relevant in so far as it confirms the message of more legitimate sources of history. Justice Thomas notes that post-ratification discussions of Second Amendment rights are not always consistent with the original meaning of the text of the Amendment.[106]

Finally, the Court notes that there must be a critical mass of historical regulations that are consistent with the modern regulation in order for the modern regulation to be constitutional. If the government identifies one historical regulation that is consistent with the modern regulation, but that historical regulation is contrary to most of the other early regulations of the states, the government's proffered regulation is not necessarily indicative of a historical tradition because it might be an outlier. As the Court stated, "we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."[107]

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[101] *Id.* at 2136-37.
[102] *Id.* at 2136.
[103] Bruen, 142 S. Ct. at 2139.
[104] *Id.* at 2137 ("[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.").
[105] *Id.* at 2136.
[106] *Id.* ("[W]e must also guard against giving postenactment history more weight than it can rightly bear.")
[107] *Id.* at 2142.

iv. Sensitive Places under Bruen[108]

The Court stated that there was no occasion to comprehensively define "sensitive places" in *Bruen*.[109] Still, the *Bruen* decision offers some guidance as to how the Court may rule on laws regulating gun possession in sensitive places in the future.

First, the Court rejects the view that the entire island of Manhattan can be considered a sensitive place. The Court seems concerned that defining sensitive places too broadly eviscerates the breadth of the right to bear arms. This suggests that the court will reject regulations of gun possession in sensitive places when these places are defined as "sensitive" based on broad, nonspecific criteria.

Second, the Court notes that the 18th and 19th-century historical record indicates that the government regulation of the possession of arms in certain sensitive locations occurred without dispute. These locations included legislative assemblies, polling places, and courthouses. Thus, the Court "assume[s]" that it is "settled" that prohibitions on firearms in these locations are consistent with the history and tradition of the Second Amendment. Analogous modern regulations may be deemed constitutionally permissible.[110]

D. Defending Gun Regulations after Bruen

Local governments may wish to consider the following issues in defending a gun regulation after *Bruen*:

1. Armed self-defense is essential conduct protected by the Second Amendment. A party arguing that regulation of firearms is consistent with the nation's history and traditions of firearm regulation may wish to emphasize that its regulation still allows for armed self-defense. For example, "if a prohibition on one particular class of weapons leaves open a range of adequate alternatives, then the burden on 'armed self-defense' is lessened and perhaps negligible."[111]
2. Because the Court did not explain exactly how to engage in an analogical and historical analysis of firearm laws, we can expect judges to exercise discretion in applying *Bruen* to new cases.[112]

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[108] Bruen, 142 S. Ct. at 2133-34.
[109] *Id.*
[110] *Id.* at 2133 ("[C]ourts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.").
[111] *After the Highland Park Attack: Protecting Our Communities from Mass Shootings*, *Hearing before the Senate Judiciary Committee* 17, 117th Cong. (2022) (written testimony of Joseph Blocker, Lanty L. Smith Professor of Law at Duke University Law School) https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Blocher%20-%202022-07-20.pdf.
[112] *Id.* at 10-12.

3. The Court offered no clear guidance on whether gun possession could be regulated in "sensitive places." This might be an area where the state has more room to maneuver around a constitutional challenge.[113]
4. The Court states that our history and traditions indicate that weapons in common use cannot be considered dangerous and unusual, and therefore cannot be banned on those grounds. Thus, "technologies that a state wishes to prohibit may need to be banned before they are in wide circulation."[114]

E. Local Government Resources

If *Bruen* is adopted more broadly, local governments should respond by taking a closer look at the historical record that accompanies certain laws, especially those that place restrictions on individuals' rights. Where there is not an exact duplicate in history or tradition, courts are to analyze whether a contemporary regulation has a close historical analogue. In order to respond appropriately, local governments need to identify instances in which the historical record is unclear or poorly documented, or where competing accounts of history, outliers in regulations or different regulatory approaches in different historical periods exist.

For difficult cases, local governments might seek to retain a historical expert or rely on the assistance of a specialized law library. Ultimately, state and local governments might choose to develop their own internal law library resources for state and county attorneys. As a preview of the type of historical research that may be necessary to analyze laws through the lens of text-history-tradition, the Appendix includes examples of historical state gun laws and local ordinances in the Commonwealth of Virginia that may inform jurisprudence concerning state gun regulations in Virginia, beginning from the time of the ratification of the U.S. Constitution, Art. 1. Sec. 13 of the Virginia State Constitution, and the ratification of the Fourteenth Amendment.[115]

F. Virginia Laws Subject to **Bruen**

In preparation for the potential impact of *Bruen* in Virginia, a deeper investigation of state laws that may be implicated by a new approach brings forth an obvious candidate: Virginia Code § 15.2-915, which grants localities in Virginia the ability to restrict firearms in various locations within a locality.[116] Under the statute, a locality "may adopt an ordinance that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof" in the following places:

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[113] DARRELL MILLER ET AL., *State Firearms After Bruen*, *in* GUN POLICY IN AMERICA 14 (2022).
[114] *Id.* at 14
[115] *See also* EVERYTOWN CENTER FOR THE DEFENSE OF GUN SAFETY, *Sensitive Places*, https://everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/sensitive-places/ for a collection of historical gun regulations for the purpose of defending modern gun regulations against Second Amendment challenges.
[116] Va. Code § 15.2-915(E).

(i) Any building, or part thereof, owned or used by such locality, or by any authority or local governmental entity created or controlled by the locality, or by any authority or local governmental entity created or controlled by the locality, for governmental purposes;
(ii) Any public park owned or operated by the locality, or by any authority or local governmental entity created or controlled by the locality;
(iii) Any recreation or community center facility operated by the locality, or by any authority or local governmental entity created or controlled by the locality; and
(iv) Any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.[117]

In buildings that are not owned by a locality, or by any authority or local governmental entity created or controlled by the locality, such ordinance shall apply only to the part of the building that is being used for a governmental purpose and when such building, or part thereof, is being used for a governmental purpose.[118]

Applying the text-history-tradition test in a challenge to Va. Code § 15.2-915, a court would require the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[119] For example, a locality defending its use of Va. Code § 15.2-915 would need to present historical evidence evincing a tradition of firearm restriction in line with a restriction in any of the places enumerated in the statute, such as in "any public park owned or operated by the locality."[120] Can a locality meet such a burden? As discussed above, the Appendix reviews examples of historical state and local laws and ordinances pertaining to guns that could inform how a court in Virginia might examine a statute like Va. Code § 15.2-915 under *Bruen,* and likewise how a locality might frame an argument to meet the burden imposed by text-history-tradition.

D. FIRST AMENDMENT

This section discusses the Supreme Court's recent First Amendment decisions and their implications for local governments. We analyze (1) legislative prayer, (2) employee prayer, (3) grant-making, and (4) religious exemptions.

A. Introduction to the First Amendment

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise of [of religion]." On the other hand, the Establishment Clause of the First Amendment prohibits Congress from making laws that respect the establishment of religion. Thus, while a government may allow the free exercise of religion, it may not coerce

[117] *Id.*
[118] *Id.*
[119] Bruen, 141 S. Ct. at 2129-30.
[120] Va. Code § 15.2-915(E).

individuals to participate in religious expression, or "otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[121] Taken together, "the common purpose of the Religion Clauses "is to secure religious liberty."[122] At the same time, the Religion Clauses "aim to foster a society in which people of all beliefs can live together harmoniously."[123]

B. Emerging Themes in First Amendment Jurisprudence

The Supreme Court and lower federal courts have struggled to develop a cohesive approach to cases concerning the First Amendment and religion.[124] The Supreme Court appears particularly divided in cases in which regulations on an individual's exercise of religion appear to evince some hostility toward religion.[125] The lack of clarity in freedom of religion jurisprudence can be challenging for state and local governments, as they must respond to challenges and defend certain regulations. However, several important themes have emerged over the last few years that may help local governments understand how First Amendment jurisprudence is changing, and what to expect in the future.

i. Emphasis on the Free Exercise Clause

First, the Supreme Court seems to place less emphasis on the Establishment Clause and more emphasis on the Free Exercise Clause in deciding religious freedom cases.[126] This development appears to prioritize individual freedom to exercise one's religion over one's right to be free from a government that entangles itself with religion. State and local governments may respond to this development by heightening their attention to the rights of individuals to practice and express their religious beliefs in the public sphere.

ii. The Role of History

Another emerging theme is the potential encroachment of history and tradition into the interpretation of the Establishment Clause. For instance, some scholars speculate that Justice Thomas's text-history-tradition approach to the Second Amendment analysis in *Bruen* may bleed over into First Amendment cases, including freedom of religion and freedom of speech cases.[127] This speculation is, in part, because in *Bruen*, Justice Thomas claimed (perhaps erroneously) that the Court's new test already "accords with how we protect other constitutional rights," including

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[121] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (citing Lee v. Weisman, 505 US. 577, 587 (1992)).
[122] *Id.* at 313 (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)).
[123] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019)
[124] See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418 (2022) (abandoning the long-standing *Lemon* test).
[125] Holly Hollman, Understanding America's First Freedom, AMERICAN BAR ASSOCIATION HUMAN RIGHTS MAGAZINE, (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/understanding-americas-first-freedom/ (pointing to Town of Greece v. Galloway and American Legion v. American Humanist Association).
[126] *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Montana Dept. of Revenue, 140 S.Ct. 2246 (2020); Carson v. Makin, 142 S. Ct. 1987 (2022).
[127] Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y 6–10 (2023).

"the freedom of speech in the First Amendment."[128] Thus, Justice Thomas suggests that an emphasis on history and tradition is already innate to First Amendment analyses. This speculation may also be due to the fact that in *Kennedy v. Bremerton School District*, a recent First Amendment case, the Court appears to emphasize historical meanings and understandings; in that case, the Court determined that whether an entity violates the Establishment clause will depend on "historical practices and understandings."[129]

On the other hand, *Bremerton* may not be indicative of a larger trend toward history and tradition. Indeed, some scholars argue that although the invocation of "history and tradition" in *Dobbs*, *Bruen*, and *Bremerton* has generated considerable buzz over the last few years, "a close look at the cases themselves does not reveal a dramatic shift in the roles that history and tradition play in constitutional jurisprudence" in part because judges who subscribe to an originalist approach have always been compelled to examine history and tradition in some form in deciding individual rights cases.[130]

While the applicability and workability of the test-history-tradition approach in First Amendment cases remains to be seen, local government should keep in mind that if the text-history-tradition approach is adopted in First Amendment cases, judges will have more latitude to examine historical contexts in determining whether the government has infringed upon one's right to exercise their religion.

iii. Uptick in Religious Freedom Cases

Finally, there is an expectation of an uptick in freedom of religion cases, regardless of whether text-history-tradition comes to play a central role in the analysis of such cases. This area of the law seems to be a particular focus of the current conversative majority of the Supreme Court given recent cases on employee prayer[131] and religious exemptions.[132] In addition, at least one sitting Supreme Court justice, Justice Samuel Alito, has spoken about the importance of safeguarding the free exercise of religion.[133] With an increased focus on religious freedom, we may see the Court take up more cases on the conflict between the Establishment Clause and the Free Exercise Clause.

C. Legislative Prayer

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[128] Bruen, 142 S. Ct. at 2130.
[129] *See generally,* Bremerton, 142 S. Ct. at 2407. Justice Neil Gorsuch, joined by Justice Thomas in a concurrence to *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1610 (2022) also emphasized the importance of a "historically sensitive understanding of the Establishment Clause."
[130] *See* Solum & Barnett, *supra* note 31 at 40.
[131] Bremerton, 142 S. Ct. at 2416.
[132] Fulton v. City of Philadelphia 141 S. Ct. 1868 (2021).
[133] Kalvis Golde, *At Federalist Society convention, Alito says religious liberty, gun ownership are under attack*, SCOTUSblog (Nov. 13, 2020), https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/.

The first topic of First Amendment cases we are examining is legislative prayer. Legislative prayer exists at every level of government in the United States, ranging from local school board and city council meetings to Congressional hearings. As a general rule, state and local legislative bodies may open meetings with prayers given by state-employed or volunteer clergy without running afoul of the Establishment Clause.[134] Trickier questions arise when considering whether elected officials themselves may offer prayers in government meetings, with no distinction drawn between local and state meetings, and whether they may restrict who is allowed to open meetings with prayers to only themselves. Furthermore, so long as clergy-led or legislator-led prayer is not restricted to a particular faith, the content of the prayers is typically irrelevant to constitutional analysis.

i. Clergy-led Prayer

The Supreme Court's longest-held precedent on legislative prayer is the 1983 case, *Marsh v. Chambers*, in which the Court found that the Nebraska legislature's practice of opening sessions with a prayer by a state-paid chaplain did not violate the Establishment Clause.[135] The Court based its decision in part on the history and common usage of legislative prayer in the United States since colonial times, which has persisted ever since in coexistence with the "principles of disestablishment and religious freedom."[136] For example, the Court noted that Congress has paid a chaplain and opened sessions with prayers for almost 200 years, ever since the First Continental Congress.[137]

Yet, *Marsh* introduced questions about whether a general exception to Establishment Clause doctrine existed. The Court relied upon the historical analysis to distinguish legislative prayer from school prayer and noted that the participants involved in city council meetings are usually adults, who are less susceptible to religious indoctrination than children. In addition, attendees at city council meetings may choose to participate in the prayer or not, unlike the mandatory participation of children in school prayer.[138]

The Supreme Court's decision in *Town of* Greece *v. Galloway*, decided nearly 30 years later, expanded on *Marsh* to provide some clarity on the outer limits of permissible legislative prayer.[139] The Court considered a local town board's practice of beginning meetings with a prayer led by a local clergy member. From 1999-2007, every single clergyman who gave the prayer was Christian, even though the town claimed to maintain an unbiased selection method for the role.[140] Still, the Court upheld the constitutionality of the practice under the Establishment Clause because the policy did not discriminate against minority or alternative

[134] Marsh v. Chambers, 463 U.S. 783 (1983).
[135] Marsh, 463 U.S. at 792.
[136] *Id.* at 786.
[137] *Id.*
[138] *Id.* at 795.
[139] Town of Greece v. Galloway, 572 U.S. 565 (2014).
[140] *Id.* at 571.

faiths and did not coerce participation from participants at the meetings.[141] As in *Marsh*, the Court found that the practice was consistent with the longstanding practices of Congress and state legislatures in the United States.[142]

Town of Greece further clarified that the constitutional analysis of legislative prayer, at least in the context of clergy-led prayer, does not depend on whether the setting is a state legislature or a local city or town meeting. [143] In a dissent to the opinion, Justice Kagan disagreed with this approach, arguing instead that the facts of *Marsh* should distinguish that case from *Town of Greece*.[144] Kagan viewed the prayers in *Marsh* as an internal act directed at the lawmakers, which was different from the prayers in *Town of Greece*, in which "[a] chaplain face[d] the Town's residents—with the Board watching from on high – and call[ed] on them to pray together."[145] According to Kagan's dissent, legislative prayer in the setting of a town meeting may be problematic even when led by clergy.

ii. Legislator-led Prayer

Distinct from the clergy-led prayer at issue in *Marsh* and *Town of Greece*, a more complicated fact pattern has emerged in cases involving legislator-led prayer. A circuit split currently exists, as the Fourth Circuit in *Lund v. Rowan County* and the Sixth Circuit in *Bormuth v. County of Jackson* have come out differently on the issue.[146] In both cases, town board members offered opening prayers and seemingly requested the audience members' participation. The Fourth Circuit held in *Lund* that while prayer led by legislators may be constitutionally permissible, Rowan County's prayer practice violated the Establishment Clause because the board members only gave Christian prayers in which they promoted Christianity.[147]

Yet, the Sixth Circuit upheld similar legislator-led prayer practices in *Bormuth*. The plaintiff in that case, a Pagan and Animist, objected to the legislator-led prayer and was met with antagonism by the Jackson County, Michigan board of commissioners.[148] Despite this perceived contempt, the Sixth Circuit upheld the prayer practices in *Bormuth* because they accorded with long-standing First Amendment tradition in the United States and the board's actions could be described as responding to the petitioner's negative attitude toward the board, rather than evincing hostility to a particular religion.[149]

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[141] *Id.* at 591–92.
[142] *Id.* at 576. ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings'").
[143] Town of Greece, 572 U.S. at 575-76.
[144] *Id. a*t 632-34 (Kagan, J., dissenting).
[145] *Id.* at 634.
[146] Lund v. Rowan Cty., 863 F.3d 268, 271–73 (4th Cir. 2017) (en banc); Bormuth v. Jackson, 870 F.3d 494, 497–98 (6th Cir. 2017) (en banc).
[147] Lund, 863 F.3d at 289.
[148] Bormuth, 870 F.3d at 498–99.
[149] *Id.* at 530–31.

iii. Takeaways

Given this background, state and local governments must heed the following practices to conform legislative prayer with constitutional principles:

- Legislative prayer should be tailored to the gravity of the session.
- A legislative body should not direct or require the public to participate in the prayer.
- A legislative body should not single out or chastise dissidents for criticism.
- A legislative body should grant open requests to offer a prayer by participants, regardless of the religious beliefs of the person seeking the request. A neutral policy to rotate or blindly select clergy to provide a prayer is the best practice, which includes accepting and selecting requests from small or fringe religious denominations, agnostic organizations and atheist groups.
- Prayer should not discriminate among faiths. Legislator-led prayer should be especially careful not to denigrate any particular religion.
- Legislative prayer should likewise not overly promote a particular religion or present a prayer as though it represents the overall views of the legislative body. In this respect, legislative prayer should not preach conversion or proselytize or advance any particular faith or belief system.[150]
- A legislative body should also be careful not to schedule prayer in temporal proximity to administrative or judicial activities in order to avoid the appearance of promoting or associating a particular religion with these activities.
- Legislative prayer should not include the presentation or preaching of religious dogmas.[151]

From the Supreme Court's decisions in *Marsh, Town of Greece* and *Bormuth*, it seems that history and tradition have played a large part in the constitutional analysis of legislative prayer. The Courts in each case considered the history of legislative prayer, such as its practice at the First Continental Congress and continued practice over time, as a prerequisite for deciding the constitutionality of the practice in the cases. The incorporation of this historical analysis softens the potential application or effects of another explicit text-history-tradition approach being applied to cases in this area of the law.

D. School Employee Prayer

i. Introduction to School Employee Prayer

In general, public-school employees may pray in the workplace as long as their prayer is private.[152] However, a government entity may limit employee prayer in order to ensure that the

[150] Town of Greece, 572 U.S. at 583–85.
[151] *Id.* at 589-90.
[152] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022).

entity does not violate the Establishment Clause. Thus, a teacher may pray quietly at her desk during the lunch hour,[153] but she may not incorporate her prayers into classroom teaching.

The Supreme Court has held that the following government integrations of prayer into public school activities are unconstitutional violations of the Establishment Clause:[154]

- Opening the school day with nondenominational prayer, even when saying the prayer was voluntary[155]
- Mandatory moment of silence for prayer[156]
- Nonmandatory recitation of Bible verses and prayer[157]
- Incorporating a nondenominational general benediction into a graduation ceremony[158]
- Including prayers in student football games, even when delivered by students rather than staff and even when students themselves initiated the prayer[159]

In *Kennedy v. Bremerton School District*, the Court considered the extent to which a public-school employee could pray in the workplace without making a school district vulnerable to an Establishment Clause violation. Specifically, *Bremerton* forced the Court to consider how the Religious Clauses applied to a public-school football coach who offered a short prayer at the 50-yard line post-game. *Bremerton* was a significant case because it clarified how to analyze whether a government entity has violated the Establishment Clause.

Before *Bremerton*, courts would determine whether a government entity had violated the Establishment clause by following the analysis set out in *Lemon v. Kurtzman*. According to *Lemon*, a government entity had violated the Establishment Clause if the entity's action appeared to be an endorsement of religion.[160] *Bremerton* abandoned the *Lemon* test. After *Bremerton*, a court must determine whether a government policy violates the Establishment Clause "by reference to historical practices and understandings."[161] The analysis must be "focused on original meaning and history."[162]

Employing this analysis, the *Bremerton* Court ruled in favor of the coach: (1) the school district's decision to prohibit the coach from offering a post-game prayer while his student-players were

[153] *See id*. at 2431 (Teachers are not required to "eschew any visible religious expression," such as praying quietly over their lunch or wearing a yarmulke to school.).
[154] *See id.* at 2442–43 (Sotomayor, J., dissenting).
[155] Engel v. Vitale, 370 U.S. 421 (1962).
[156] Wallace v. Jaffree, 472 U.S. 38 (1985).
[157] Abington Township v. Schempp, 374 U.S. 203 (1963).
[158] Lee v. Weisman, 505 U.S. 577 (1992) (a nondenominational prayer delivered by a rabbi at graduation violated the Establishment Clause).
[159] Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).
[160] American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (citing County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989)).
[161] *Id.* at 2428 (citing Town of Greece, 572 U.S. 565, 576 (2014)).
[162] *Id.*

otherwise occupied with post-game festivities violated the Free Exercise and Free Speech clauses of the First Amendment; (2) the coach's prayer did not violate the Establishment Clause.

Because of the significance of *Bremerton*, we include an extensive overview of the facts and reasoning. Following the analysis of the case is a list of takeaways that may help local governments understand significant aspects of the Court's reasoning as they prepare for future litigation on this topic.

ii. Kennedy v. Bremerton School District

a. Facts

Joseph Kennedy was the coach of the Bremerton High School football team. For over seven years, Mr. Kennedy would kneel at the 50-yard line and say a short, 30-second prayer of thanks after the football players and coaches had shaken hands after a game.[163] At first, Mr. Kennedy would pray alone. Eventually, players from Mr. Kennedy's team, and even members of the opposing team, would join him. When others were present, Mr. Kennedy would add short, motivational speeches to his prayer. He would also pray with the members of the team prior to, and after, football games in the locker rooms.

When Bremerton School District ("the District") learned of these practices, the superintendent sent Mr. Kennedy a letter asking him to cease actions that incorporated prayer and religious expression into his coaching duties and to cease demonstrative religious activity in front of students. As a result, he stopped his locker room talks.[164] Mr. Kennedy also stopped incorporating religious expression into his post-game 50-yard-line talks with the players. However, he did not cease his post-game prayer at the 50-yard line. Rather, Mr. Kennedy asked the district if he could continue his practice of saying his own "private religious expression" in which he "wait[s] until the game is over and the players have left the field and then walk[s] to mid-field to say a short, private, personal prayer."[165] He told the district that he did not encourage nor discourage students from praying with him. The District denied his request, forbidding him from engaging in overt religious activity that would appear as an endorsement of a religion while he was acting in the capacity of a public school employee.[166] The District made this directive on the grounds that such activity would violate the Establishment Clause.[167]

Despite the District's directive, Mr. Kennedy continued to bow his head and kneel midfield and offer a short, quiet, post-game prayer three more times. His players did not accompany him; they were singing the school fight song to the audience and were otherwise occupied with post-game

[163] Bremerton, 142 S. Ct. at 2416.
[164] The record showed that these talks were a "school tradition" that predated Mr. Kennedy. *Id.* at 2416.
[165] *Id.* at 2417.
[166] *Id.* at 2417-18.
[167] *Id.*

festivities.[168] Players from the other team and members of the community joined him on two of those occasions, however.[169]

The District told Mr. Kennedy that "the only option it would offer [him] was to allow him to pray after a game in a 'private location' behind closed doors and 'not observable to students or the public.'"[170] When Mr. Kennedy did not comply with the District's instruction not to engage in public religious displays, the District placed him on administrative leave and forbade him from participating in football activities.[171] According to the District's performance evaluations of Mr. Kennedy, the District failed to rehire him not only because of his religious expression, but also because he failed to supervise students after football games.[172]

Mr. Kennedy sued the District for violating the First Amendment's Free Speech and Free Exercise Clauses. In rejoinder, the District argued that suspending Mr. Kennedy was necessary to comport with the Establishment Clause.

b. Free Exercise Analysis: Was the District's Policy Neutral and Generally Applicable?

According to the Court, a plaintiff bears the burden of alleging a government's violation of his right to freely exercise his religion.[173] A plaintiff may allege this violation by "showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[174] A policy is not neutral if it is directed at a specific religious practice—that is, if the policy "'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object.'"[175] A policy is not "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[176] A policy that provides for individualized exemptions is also not a policy that is generally applicable.[177]

In *Bremerton*, the government policies at issue were those prohibiting Mr. Kennedy from continuing his sincere religious practice of praying quietly, without his players, at the 50-yard line post-football game and the requirement that Mr. Kennedy supervise student-athletes after games.[178]

The Court found that Mr. Kennedy satisfied his burden to show that the District's policies were neither neutral nor generally applicable.[179] First, the Court stated that the prohibition on Mr.

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[168] *Id.* at 2418.
[169] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418 (2022).
[170] *Id.*
[171] *Id.* at 2418-19.
[172] *Id.* at 2419.
[173] *Id.* at 2421-22.
[174] *Id.* at 2422 (citing Employment Division v. Smith, 494 U.S. 872, 879-882 (1990)).
[175] Bremerton, 142 S. Ct. at 2422.
[176] *Id.* at 2422 (citing *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1877 (2021)).
[177] *Id.*
[178] *Id.* at 2422-23.
[179] *Id.* at 2422.

Kennedy's prayer was not neutral precisely because it was directed at Mr. Kennedy's religious practice of praying midfield.[180] Second, the Court explained that the policy of requiring Mr. Kennedy to supervise students post-game was not generally applicable because the District allowed other members of the school's coaching staff to attend to matters like visiting with friends or taking phone calls instead of supervising student-athletes immediately post-game.[181] Because the policy was not "applied in an evenhanded, across-the-board way," it was not generally applicable.[182]

c. Strict Scrutiny Analysis and Establishment Clause Analysis

Once a plaintiff shows that a government policy is not neutral or generally applicable, the burden shifts to the government to satisfy "strict scrutiny" by demonstrating that its policy was justified by a compelling state interest and was narrowly tailored in support of that interest.[183] If the government's policy cannot survive strict scrutiny, the court will find that the policy violates the Free Exercise Clause.[184]

In order to show that a compelling state interest justified its policies, the District argued that its interests in avoiding an Establishment Clause violation trumped Mr. Kennedy's Free Exercise and Free Speech rights.[185]

The District relied on *Lemon v. Kurtzman* for the proposition that permitting Mr. Kennedy's prayer practices would violate the Establishment Clause. In prior cases, the court used *Lemon* to determine whether a law violated the Establishment Clause. *Lemon* requires courts to inquire into whether the statute's purpose is secular or religious, whether its principal or primary effect advances or inhibits religion, and whether it fosters "an excessive government entanglement with religion."[186] In later iterations of *Lemon*, the Court clarified that in determining the effect of a statute, a court should assess whether "a reasonable observer" would find the statute to be an endorsement of religion.[187] Accordingly, the District argued that a reasonable observer would find that the District had endorsed religious activity by failing to stop Mr. Kennedy's religious expression on the 50-yard line.[188]

The Court rejected the District's argument that Mr. Kennedy's rights must yield automatically to the District's anti-establishment interests. First, the Court clarified that the Establishment Clause, Free Speech Clause, and Free Exercise Clause "have complementary purposes, not warring ones

[180] *Id.* 2422-23.
[181] Bremerton, 142 S. Ct. at 2423.
[182] *Id.* Indeed, the District had conceded before the Ninth Circuit that this policy was not generally applicable.
[183] *Id.* at 2422.
[184] *Id.*
[185] The Bremerton court found that Mr. Kennedy was engaged in private speech. *Id.* at 2424. The Bremerton Court combined the strict scrutiny analysis of the District's policy's burden on Mr. Kennedy's Free Exercise and Free Speech Rights.
[186] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
[187] American Legion, 139 S. Ct. at 2080 (citing County of Allegheny, 492 U.S. at 592).
[188] Bremerton, 142 S. Ct. at 2426–27.

where one Clause is always sure to prevail over others."[189] Thus, a policy enacted pursuant to an entity's interest in avoiding an Establishment Clause violation is not automatically compelling enough to justify the policy's burden on an individual's free exercise and free speech rights.

Second, the Court expressly abandoned the *Lemon* test entirely. The Court stated:

> [T]he "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned Lemon and its endorsement test offshoot [Citations omitted]. The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. [Citations omitted]. This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in which ... religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" [Citations omitted]. An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. [Citations omitted]. Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." [190]

In place of the *Lemon* test, the Court clarified that the analysis as to whether a government policy violates the Establishment Clause requires "reference to historical practices and understandings" [191] and must be "focused on original meaning and history."[192] The decision as to whether policies are permissible or impermissible must "accord with history and faithfully reflect the understanding of the Founding Fathers."[193] The Court has applied this history-focused analysis in cases evaluating Establishment Clause challenges to legislative prayer[194] and public displays that include religious symbolism.[195] The Court did not describe exactly which historical practices and understandings a court should reference when determining whether a government policy violates the Establishment Clause.

The District also argued that a failure to suppress Mr. Kennedy's religious activity would violate the Establishment Clause because his religious expression coerced students to pray.[196] First, the District argued that Mr. Kennedy's role as a coach meant that he wielded "enormous" authority over students and his student-athletes, which may have compelled them to pray alongside him.[197]

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[189] *Id.* at 2426.
[190] *Id.* at 2427.
[191] *Id.* at 2428 (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).
[192] *Id.*
[193] *Id.*
[194] *See* Town of Greece, 572 U.S. at 577.
[195] *See American Legion*, 588 U.S. at 2087.
[196] Bremerton, 142 S. Ct. at 2428-279.
[197] *Id.* at 2430.

Second, the District argued that "any visible religious conduct by a teacher or coach should be deemed [] impermissibly coercive on students."[198]

The Court agreed that, "consistent with a historically sensitive understanding of the Establishment Clause," a government may not coerce students to pray, require religious observance, or force students or other individuals to engage in religious exercise.[199] Problematic coercion includes compulsory attendance and participation in a religious exercise such as a graduation ceremony in which a clerical member publicly recited prayers,[200] or a football game in which a school district broadcasts prayers over the public address system.[201] Notably, these examples of impermissible government coercion involve activities that students are explicitly or implicitly required to attend.

The Court nevertheless rejected the District's coercion arguments. As to the District's first argument, the Court found no evidence in the record of coercion.[202] For example, the record did not indicate that anyone expressed concern about Mr. Kennedy's quiet prayers, nor that any students felt pressured to engage in prayer with him.[203] Additionally, no evidence existed that Mr. Kennedy sought to direct student prayers or to request or require that any student participate.[204]

The Court also rejected the argument that "any visible religious conduct by a teacher or coach should be deemed [] impermissibly coercive on students."[205] A rule like that would mean that a school's permitting a teacher to wear religious attire, such as a yarmulke, or to pray privately over their lunch, would constitute an establishment violation.[206] The Court viewed that result as hostile to religion in a manner that is antithetical to the historical understanding of the Establishment Clause.[207] Moreover, it "would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'"[208] The Court also emphasized that high school students are mature enough to recognize that a school does endorse speech or activity that it merely permits, and that even if some students take offense to a teacher's private prayer, "offense does not equate to coercion."[209]

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[198] *Id.* at 2431.
[199] *Id.* at 2429.
[200] Lee, 505 U.S. at 580.
[201] Santa Fe Independent School Dist., 520 U.S. at 294.
[202] Bremerton, 142 S. Ct. at 2429.
[203] *Id.* at 2430.
[204] *Id.* at 2430.
[205] *Id.* at 2431.
[206] *Id.*
[207] *Id.*
[208] Bremerton, 142 S. Ct.. at 2431.
[209] *Id.* at 2430.

Thus, the Court found that the District failed to offer a compelling interest that justified its policy burdening Mr. Kennedy's right to exercise his religion freely. As a result, the District violated Mr. Kennedy's First Amendment rights.

d. Freedom of Speech: *Public vs. Private Speech*

The *Bremerton* Court also found that the District's policy violated Mr. Kennedy's free speech rights because it impermissibly burdened his private speech. The Court determined that Mr. Kennedy's speech was private speech because his prayers at the 50-yard line were not within the scope of his duties as a coach.[210] The Court found that his prayers were not within this scope for two reasons.

First, the Court noted that the "substance" of the prayer indicated that he acted as a private citizen.[211] The Court did not restate Mr. Kennedy's prayer; rather, it differentiated his praying from his coaching duties: "[h]e 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."[212] Because the prayer did not incorporate his coaching obligations, it was private speech.

Second, the circumstances surrounding Mr. Kennedy's speech indicated that it was private speech, not government speech. The Court found dispositive the fact that Mr. Kennedy did not deliver the prayer to the students, and that he prayed during the post-game period when the students were engaged in other post-game festivities. Moreover, during the post-game period in which Mr. Kennedy said his prayer, coaches were "free to attend briefly personal matters."[213] These circumstances suggest that Mr. Kennedy was not fulfilling the duties of his employment but was acting as a private citizen.

Thus, the District violated Mr. Kennedy's First Amendment right to free speech.

iii. Bremerton's Takeaways and Implications

The Court's decision in *Bremerton* changes how courts and litigants should approach Establishment Clause claims. First, in evaluating whether a government entity has violated the Establishment Clause, litigants should abandon the *Lemon v. Kurtzman* "endorsement" test. Instead, litigants should analyze an entity's action or lack thereof by reference to the historical practices and understandings of the Establishment Clause. Second, litigants may consider whether a given action is coercive to students in evaluating whether permitting the action violates the Establishment Clause. Coerciveness, however, must be evaluated with reference to the original meaning of the Establishment Clause. The *Bremerton* opinion offers little guidance to local governments on how to deal with the tension between an employee's Free Exercise

[210] *Id.* at 2424 (citing Lane v. Franks, 2573 U.S. 228, 240 (2014) for the proposition that the"critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties.").
[211] *Id.* at 2425.
[212] *Id.* at 2424.
[213] *Id.* at 2425.

rights and the Establishment Clause besides stating that the Establishment Clause and Free Exercise Clause are complementary.

The following are the key takeaways of *Bremerton*:

1. The Court's Free Exercise and Establishment Clause analyses were intensely fact-specific.
2. One way to allege a violation of one's free exercise rights is to show that a policy was either not neutral or not generally applicable. Fulfilling either of these requirements, the plaintiff will succeed in alleging a constitutional violation unless the government policy survives strict scrutiny, i.e., the policy serves a compelling governmental purpose and is narrowly tailored to achieve that purpose.
3. The Establishment Clause, Free Exercise Clause, and Free Speech Clause have complementary purposes. A government entity's purported desire to comply with the Establishment Clause does not automatically trump an individual's Free Speech and Free Exercise rights. In other words, a government policy enacted pursuant to its interest in avoiding a violation of the Establishment Clause does not automatically survive strict scrutiny.
4. The *Bremerton* Court abandoned the use of *Lemon v. Kurtzman* to determine whether a government entity has violated the Establishment Clause. Instead, the Court's determination as to whether an entity has violated the Establishment Clause will depend on "historical practices and understandings."[214] This analysis reflects the analysis the Court has adopted for Establishment Clause violations in legislative prayer cases such as *Greece v. Galloway* and for certain public display cases.[215]
5. The Court did not offer examples of historical practices or understandings that would clarify how to analyze whether a given policy violates the Establishment Clause, other than noting that "a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'"[216]
6. A government entity cannot coerce students or other individuals into prayer. However, the Court requires specific evidence of coercion in the record to find a violation of the Establishment Clause.
7. A teacher's visible prayer is not automatically coercive. Whether a government policy is coercive is fact-specific and should be rooted in the original meaning of the Establishment Clause. In determining whether a policy is coercive enough to violate the Establishment Clause, the *Bremerton* Court also analogized to cases in which the Court

[214] Bremerton, 142 S. Ct. at 2428 (citing Town of Greece, 572 U.S. at 576).
[215] *See, e.g.,* American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019).
[216] Bremerton, 142 S. Ct. at 2431.

made findings of coercion, many of which involved school-sponsored prayer at events in which student attendance was explicitly or implicitly compulsory.

8. In determining whether a government policy violates the Establishment Clause, the Court distinguished the facts of *Bremerton* from other cases in which the Court found that government entities violated the Establishment Clause.
9. An employee's religious expression is protected by the First Amendment's guarantee of freedom of speech if he is acting in the capacity of a private citizen. An employee is acting as a private citizen when his actions are not encompassed by the duties of his government office or position. In *Bremerton*, the substance and circumstances of the prayer were dispositive in determining that it constituted protected private speech: (1) Substance – the prayer did not instruct players on strategy or seek to direct the players as a coach would; (2) Circumstances – the prayer occurred after the game was over, during a time period when coaches and staff were allowed to engage in brief personal matters.

E. Grantmaking and Public Benefits

Grantmaking and public benefits cases also deal with the interplay of the Free Exercise and Establishment Clauses. Cases falling into this category raise the following questions: (1) Can a public benefit program direct funds to religious institutions without violating the Establishment Clause? (2) Does a public grant program that excludes religious entities because of their religious character violate the Free Exercise Clause?

Recent grantmaking and public benefits cases have been more straightforward than cases involving employee prayer. First, the Court has written three opinions in the last several years applying the same principles to similar sets of facts. Second, history, tradition and original meaning do not play as great a role in the analysis of these cases. Thus, there seems to be less room for ambiguity.

i. Espinoza, Trinity Lutheran, and Carson

The Court has handed down a trio of recent cases involving state-run public benefit and grant programs. These cases hold that (1) public benefit programs may direct funds to religious institutions without violating the Establishment Clause, and (2) excluding religious entities because of their religious character violates the Free Exercise rights of excluded entities. The following paragraphs summarize those cases. The next subsection explains the Court's Free Exercise analysis in those cases.

First, in *Trinity Lutheran*,[217] the Court considered a Missouri program that offered grants to nonprofits that installed certain playground equipment. The program refused to offer grants to entities that were controlled or owned by a church or other religious entity. Thus, the state denied the grant application of Trinity Lutheran Church Child Learning Center, a nonprofit entity which

[217] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017).

applied for a grant for its playground. The Court held that such a denial amounted to discrimination based on religion, which violated the First Amendment.

Second, in *Espinoza v. Montana Department of Revenue*,[218] the Court considered a state program which provided public funds to support tuition payments at private schools, but which excluded private religious schools. The religious schools could not receive funds pursuant to the Montana State Constitution's "no-aid" provision for religious entities. The Court held that the exclusion violated the Free Exercise Clause because it "bar[red] religious schools from public benefits solely because of the religious character of the schools."[219]

Finally, in *Carson v. Makin*,[220] the Court considered a Maine tuition assistance program for parents in underpopulated counties who did not have access to a public secondary school for their children. If parents in these counties decided to place their child in a private school, the state would compensate them for some of the costs of sending their child to that school. Only nonsectarian private schools were eligible to receive funds. That meant that a family living in a town without a public school, and wishing to send their child to a religious school could not take advantage of the program. The Court held that such a denial amounted to a violation of the Free Exercise Clause.

ii. Free Exercise and Establishment Clause Analyses

In *Carson v. Makin*, the Court applied the principles it laid out in *Espinoza* and *Trinity Lutheran.* Specifically, it stated that a program whose effect is to "disqualify" or exclude schools based on their religious character is subject to strict scrutiny. That is because "[t]o condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."[221] Indeed, according to *Trinity Lutheran*, "[t]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'"[222] Imposing the condition that an entity must not be religious in order to obtain a public benefit "inevitably deter[s] or discourage[s] the exercise of First Amendment rights."[223]

In order to satisfy strict scrutiny, the government action must support compelling interests and the action must be narrowly tailored in pursuit of that interest. Such a standard is "stringent" and "only a state interest 'of the highest order'" will be accepted.[224] Such an interest may not include a state's intention to avoid violating the Establishment Clause.[225] In *Trinity*, "in the face of the

[218] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020).
[219] *Id.* at 2255.
[220] Carson v. Makin, 142 S. Ct. 1987, 1997 (2022).
[221] Trinity Lutheran, 137 S. Ct. at 2022.
[222] *Id.*
[223] *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 405 (1963)).
[224] *Id.* at 2024.
[225] *Id.*

clear infringement on free exercise," the state interest in avoiding a violation of the Establishment Clause is not compelling.[226]

Additionally, in *Espinoza*, the Court found that Montana's exclusion of religious schools from its scholarship programming did not serve a compelling interest because the Montana no-aid provision provides greater protection against the enmeshment of church and state than the Federal Constitution does.[227] The Court stated: "[a] State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause.'"[228] In *Carson*, Maine's program also provides more protection against the collusion of Church and State. Thus, for the same reasons as *Espinoza*, the state interest in achieving the separation of church and state was not compelling enough to justify the violation of participants' free speech rights.

iii. Takeaways and Implications

In sum, in *Carson, Espinoza, and Trinity Lutheran*, the Court explained that exclusion of religious entities from public grantmaking and benefit programs burdens those entities' rights to free exercise because they indirectly penalize their exercise of religion by deterring or discouraging it. The Court has not found that a state's anti-establishment interests in excluding religious entities from these programs is compelling enough to permit this burden on the excluded entities' free exercise rights. These cases seem to demonstrate the Court's recent willingness to privilege individual First Amendment rights over the government's interest in complying with the Establishment Clause.

F. Religious Exemptions in the Workplace

i. First Amendment Considerations

The First Amendment protects individuals who seek to observe their religion in the workplace through the Free Exercise Clause.[229] However, there are certain limits to this protection. Indeed, the Supreme Court has carved out instances in which workplace accommodations might be unreasonable,[230] and there still may be instances in which an employers' overt sponsorship or promotion of a religion might infringe upon the First Amendment's Establishment Clause. Title VII of the Civil Rights Act of 1964 also protects employees by prohibiting both public and private employers from discriminating against employees on the basis of religion and requiring employers to provide reasonable accommodations of employee religious practices.[231] State law

[226] *Id.*
[227] Espinoza, 140 S. Ct. at 2260.
[228] *Id.*
[229] U.S. Const. amend. I.
[230] *See* Employment Division v. Smith, 494 U.S. 872 (1990).
[231] 42 U.S.C. §§ 2000e – 2000e17 (as amended).

may provide additional protection. Against this legal backdrop, when might a state agency or local government's policies impermissibly burden the exercise of religion for employees who seek workplace exemptions and accommodations?

Examples of these religious exemptions and accommodations might include:

1. Scheduling changes, such as early departures, flexible work breaks or certain days off during the week to accommodate practices like prayer or attendance at religious ceremonies or services.
2. Permitted display of religious icons or images on desks or in office windows, including those possibly visible to the public.
3. Religious dress, such as headscarves, turbans or burqas, or other dress accommodations if a uniform or dress code is required.
4. Requested days off during non-federal religious holidays, such Good Friday or Jewish holidays.
5. Job reassignments or task changes to avoid violating a religious custom.
6. Other modifications to workplace practices, policies and procedures in the observance of a religious practice or custom.

In 1990, the Supreme Court ruled in *Employment Division v. Smith* that the First Amendment's Free Exercise Clause provides that employees have no constitutional basis to request an exemption from a "neutral, generally applicable law."[232] *Smith* unwound the Court's precedent to apply strict scrutiny to free exercise cases set in *Sherbert v. Verner.*[233] In *Smith,* the Court had to decide whether Native Americans who ingested peyote on religious grounds were subject to drug laws and could be fired by a drug rehabilitation facility.[234] The Court held that so long as a state's law is a "neutral, generally applicable law" that only incidentally affects certain religious practices, accommodation is not required under the Free Exercise Clause.[235] Rather, accommodation for religious practices that does not align with these general requirements must ordinarily be found in "the political process."[236] *Smith* drastically reduced the scope of protection for religious exercise under the First Amendment and was widely criticized, leading to the Religious Freedom Restoration Act (RFRA) in 1993 and the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000.[237]

[232] 494 U.S. 872 (1990).
[233] 374 U.S. 398 (1963).
[234] Smith*,* 494 U.S. 872 at 874 (1990).
[235] *Id.* at 881.
[236] *Id.* at 890.
[237] Holly Hollman, *Understanding America's First Freedom,* AMERICAN BAR ASSOCIATION HUMAN RIGHTS MAGAZINE (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/understanding-americas-first-freedom.

In contrast to *Smith*, the Court's 2021 unanimous decision in *Fulton v. City of Philadelphia* represents a potentially expanded scope of protection for religious exercise in the workplace.[238] The case concerned the alleged violation of Catholic Social Services' (CSS) free exercise rights by the city of Philadelphia when the latter denied CSS's going-forward contract with the city based on CSS's refusal to place children with same-sex foster parents.[239] Chief Justice Robert's majority opinion in *Fulton* sidestepped *Smith* by finding that a contract provision allowing the commissioner of Philadelphia's Department of Human Services to grant exemptions in her "sole discretion" was not "generally applicable" and thus not subject to the *Smith* rule.[240] The Court instead held that the provision triggered strict scrutiny, which Philadelphia's decision not to exempt CSS failed because Philadelphia's refusal to exempt CSS impermissibly burdened the exercise of its religion.[241]

Thus, *Fulton* left *Smith* intact. Justice Amy Coney Barrett noted in a concurrence in *Fulton* that revisiting *Smith* was unnecessary and questioned what rule or approach might best replace the *Smith* rule.[242] But despite the seemingly narrow grounds of the decision, some commentators have interpreted *Fulton* as a significant expansion of the right to free exercise of religion.[243] In total, at least six justices in *Fulton* expressed criticisms or reservations about the core *Smith* rule.[244] For example, Justices Clarence Thomas, Samuel Alito and Neil Gorsuch concurred only in the result and instead argued separately that *Smith* should be revisited.[245] Therefore, while *Smith* remains good law, *Fulton* places *Smith* in jeopardy and might signal a return to a strict scrutiny approach in the constitutional analysis of religious workplace exemptions and accommodations.

ii. Title VII Considerations

Title VII prohibits employment discrimination on the basis of race, color, religion, sex and national origin.[246] Amendments to Title VII in 1972 extended coverage to all state and local governments, governmental agencies and political subdivisions as employers with 15 or more employees for more than 20 calendar workweeks.[247] In this respect, Title VII requires state and local governments as employers to "reasonably accommodate the religious practice of an

[238] Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104 (2020).
[239] *Id.*
[240] *Id*. at 1882.
[241] *Id.*
[242] *Id.* at 1883 (Barrett, J., concurring).
[243] Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE J. F. 1106 (2022).
[244] In *Fulton*, Justice Alito, joined by Justices Thomas and Gorsuch, supported overruling *Smith*. *See* Fulton, 141 S. Ct. at 1924 (Alito, J., concurring) ("Smith was wrongly decided.").
[245] *Id.*
[246] 42 U.S.C. §§ 2000e – 2000e17 (as amended).
[247] 42 U.S.C. § 2000e(b).

employee or prospective employee, unless to do so would cause an undue hardship to the employer."[248]

Trans World Airlines, Inc. v. Hardison stands for the principle that Title VII requires an employer to reasonably accommodate an employee's religious belief if the employer can do so without "undue hardship."[249] According to *Hardison*, an "undue hardship" occurs when an accommodation requires an employer to "bear more than a *de minimis* cost."[250] This standard represents a low bar for employers to meet. However, the Supreme Court recently agreed to hear a case called *Groff v. DeJoy*, which has the potential to change how courts decide Title VII cases.[251] The plaintiff in *Groff v. DeJoy,* a U.S. Postal Service carrier who was disciplined for refusing to work on Sundays, seeks to undo the undue hardship standard set in *Hardison*.[252] USPS claims that accommodating Groff's workday request would place an undue hardship on the organization by requiring Groff's co-workers to fill in for him, imposing other personnel and overtime costs and reducing employee morale.[253] The case is set to come before the Supreme Court sometime in 2023 or 2024.

iii. Takeaways

To avoid violating the Free Exercise Clause of the First Amendment and Title VII, employers should evaluate situations in which an employee requests a religious exemption carefully and engage in good faith to accommodate the employee.

Specifically for Title VII considerations, the U.S. Equal Employment Opportunity Commission (EEOC), the agency that enforces Title VII, defines an accommodation that causes an undue hardship to employers under the current standard as one that:

1. Is costly;
2. Compromises workplace safety;
3. Decreases workplace efficiency;
4. Infringes on the rights of other employees; or
5. Requires other employees to do more than their share of potentially hazardous or burdensome work.[254]

G. Religious Exemptions for Vaccines

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[248] *Office of Diversity, Inclusion and Civil Rights*, U.S. Department of the Interior, "Disability and Religious Accommodations," https://www.doi.gov/pmb/eeo/disability-and-religious-accommodations.
[249] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1997).
[250] *Id.* at 84.
[251] Groff v. DeJoy, 35 F.4th 162, (3rd. Cir. 2022), cert. granted January 13, 2023.
[252] *Id.*
[253] *Id.*
[254] *U.S. Equal Employment Opportunity Commission*, "Religious Discrimination," https://www.eeoc.gov/religious-discrimination. *See also* EEOC Section 12: Religious Discrimination Guidance https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_673998317380416107498965 53.

i. Introduction to Vaccine Cases

The COVID-19 pandemic provided opponents of vaccine mandates the opportunity to present renewed challenges to the government's authority to mandate vaccinations against communicable diseases. Importantly, vaccine and vaccine exemption litigation raises several statutory and constitutional issues, including challenges under RFRA and state versions of that Act, the Civil Rights Act, the Americans with Disabilities Act, and the First Amendment's Free Exercise Clause.

Challenges to vaccine mandates raise the following issues: (1) Do vaccine mandates violate the religious freedom of employees who do not wish to get vaccinated? (2) To what extent must an employer allow for vaccine exemptions? This section will focus on how courts examine Free Exercise Clause challenges to vaccination mandates.

ii. Case Law

The most significant[255] case on the constitutionality of mandatory vaccinations is *Jacobson v. Massachusetts*.[256] In *Jacobson*, the Supreme Court ruled that a Massachusetts law giving local health boards the authority to require citizens to get vaccinated when it was necessary for public health and safety during a smallpox outbreak was a constitutional exercise of the state's police power. Indeed, the Court reasoned that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[257] Moreover, the court explained that it was significant that the challenger presented no reason for his refusal to obey the vaccination laws–that is, he presented no evidence that vaccination would impair his physical health or safety.[258] The Court stated that it would not allow a minority of persons to dominate the legitimate actions of the state to protect the general welfare by refusing vaccination simply because the minority did not wish to be vaccinated.[259]

The Court affirmed the reasoning of *Jacobson* in *Zucht v. King*, explaining that *Jacobson* "settled" that the state's police power gives it the authority to pass mandatory vaccination laws.[260] Courts have relied on *Jacobson* and its reasoning[261] to uphold mandatory vaccination requirements in the workplace and in school, including COVID-19 vaccination requirements. *See Klaassen v. Trustees of Indiana University,* 7 F.4th 592 (7th Cir. 2021); *Children's Health*

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[255] *See* James M. Beck, Not Breaking News: Mandatory Vaccination has been Constitutional for Over a Century, ABA Articles, Oct. 28, 2021, https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/.
[256] 197 U.S. 11 (1905).
[257] 197 U.S. at 27.
[258] *Id.* at 38-39.
[259] *Id*. at 28.
[260] 260 U.S. 174, 176 (1922).
[261] *See* Beck, *supra* note 256 for other cases upholding Covid-19 vaccination requirements, including state appellate cases.

Defense, Inc. v. Rutgers, the State University of New Jersey, 2021 WL 4398743 (D.N.J. Sept. 27, 2021). *See also Valdez v. Grisham*, 2021 WL 4145746 (D.N.M. Sept. 13, 2021) (stating that it was not deeply rooted in our Nation's history and tradition to work in a hospital unvaccinated during a pandemic) and *In re City of Newark*, 2021 WL 4398457, at *4 (N.J. Super. Ct. App. Div. Sept. 27, 2021) (upholding vaccination mandate for public employees).

The Supreme Court has not yet ruled squarely on whether mandatory COVID-19 vaccines violate the Free Exercise Clause, but it did deny emergency injunctive relief to healthcare workers in Maine with religious objections to Maine's COVID-19 vaccination requirement.[262] The Maine law provided exemptions to workers for whom the vaccine would be "medically inadvisable" but did not provide for religious exemptions.

Some lower federal courts, however, have concluded that vaccine policies that allow for exemptions based on medical necessity but not for religious regions may violate the Free Exercise Clause.[263] Indeed, in other COVID-19 cases concerning challenges to limitations on in-person gatherings, the Court has indicated that if a government's regulatory policy allows for non-religious exemptions, but does not provide for religious exemptions, that differential treatment will trigger strict scrutiny under the Free Exercise Clause. *See Roman Catholic Diocese of Brooklyn, New York v. Cuomo* (2020)*, South Bay United Pentecostal Church v. Newsom* (2021), *Tandon v. Newsom* (2021). Some commentators[264] believe these rulings reflect the Court's reasoning in *Fulton v. City of Philadelphia*,[265] which we discuss *supra*.

While mandatory vaccination requirements have been upheld as constitutional, governing bodies may also allow citizens to request religious exemptions from vaccine mandates. If a governing body chooses to do this, it must follow Title VII of the Civil Rights Act of 1964, which requires employers to make a reasonable accommodation of an employee's religious needs, unless accommodation imposes an "undue hardship" on the employer.[266]

iii. Bruen's *Influence on the Law of Exemptions*

The impact of *Bruen* on the law of exemptions is unclear. Should judges become more inclined to incorporate and review tradition and history in analyzing whether an employer should grant an exemption or accommodation for religious practices in the workplace or in the vaccine context, jurisprudence on religious exemptions might lean more heavily toward protecting certain religious practices. Courts may find evidence of practices existing in the past that justify current ones with nearly 250 years' worth of history to draw upon. One might even fear that given the

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[262] Does 1-3 v. Mills, 211 L. Ed. 2d 243, 142 S. Ct. 17 (2021).
[263] *See*, e.g., Doster v. Kendall, 596 F. Supp. 3d 995, 1018-20 (S.D. Ohio 2022) (finding that plaintiffs were likely to succeed on the merits of their First Amendment Free Exercise claim).
[264] Jim Oleske, *Fulton quiets Tandon's thunder: a free exercise puzzle*, SCOTUSblog, https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/.
[265] 141 S. Ct. 1868 (2021).
[266] See Trans World Airlines, Inc. v. Hardison, *432* U.S. 63 (1997) and the preceding discussion on undue hardship, *supra*.

widespread influence of Christianity in early America, the practices protected in the past may heavily favor the viewpoints and religious practices advanced by members of the Christian community now. The future of *Bruen's* influence remains to be seen.

V. CONCLUSION

The doctrinal landscape of the First and Second Amendment has shifted quite a bit over the last several years. In the realm of First Amendment jurisprudence, specifically, in the areas of legislative prayer, employee prayer, grantmaking and religious exemptions, the Court seems to prioritize religious exercise concerns over Establishment Clause concerns. In employee cases like *Bremerton*, the Court also emphasizes the role of history and original meaning in determining the limits of the Establishment Clause. Similarly, the Court's most recent Second Amendment case, *Bruen*, requires that litigants use history *and* tradition in interpreting the extent to which an entity can regulate the possession of firearms. While it remains to be seen the extent to which *Bruen's* text-history-tradition analysis will be incorporated explicitly into First Amendment analyses, cases like *Bremerton* make clear that history already plays an important role in those analyses.

In response to these shifts, local governments must remain familiar and in tune with the historical record surrounding certain kinds of regulations, including firearm regulations, and with the original meaning of certain constitutional clauses, like the Establishment Clause. The Supreme Court has not issued explicit guidance on how to apply many of its new tests, such as the text-history-tradition test in *Bruen*. This means that local governments must look to Federal District and Appellate Courts to understand how these new precedents will apply in their jurisdictions. Importantly, because First and Second Amendment jurisprudence has seen so many changes over the last decade, local governments should also keep up to date with pending Supreme Court cases.

APPENDIX

The following appendices list state laws and local ordinances regarding guns that existed in Virginia at the time of the ratification of the U.S. Constitution, Art 1. Sec 13 of the State Constitution, and the 14th Amendment. These lists were compiled by the University of Virginia School of Law Research Librarians, who identified the state laws by searching the indexes and text of statutes and session laws from those time frames, as well as by searching secondary sources and resources such as the Duke Center for Firearms Law's Repository of Historical Gun Laws. While these lists include many laws in force at the time, they may not contain all the laws in force at the time. Additionally, the searches may not reflect every potentially relevant law within those collections. When compiling this list, the research librarians erred on the side of overinclusion; however, they did not include every militia-related statute.

Appendix A lists several Virginia firearm-related laws, starting with laws from the year 1769. Appendix B lists potentially relevant local ordinances from Alexandria, Norfolk, and Richmond. Copies of these local ordinances will be attached to this memorandum electronically in PDF format. Finally, Appendix C provides links and citations to other resources that may be helpful in a local government's effort to research historical firearm laws.

APPENDIX A: STATE FIREARM LAWS

In *Acts of Assembly, Now in Force, in the Colony of Virginia* (1769):

Act of Oct. 27, 1748, ch. 31, 1769 Va. Acts 258, 261. An Act directing the Trial of Slaves committing capital Crimes, and for the more effectual punishing Conspiracies and Insurrections of them, and for the better Government of Negroes, Mulattoes, and Indians, bond or free.
XVIII. . . . [N]o Negro, Mulatto, or Indian whatsoever, shall keep or carry any Gun, Powder, Shot, Club, or other Weapon whatsoever, offensive or defensive, but all and every Gun, Weapon, and Ammunition, found in the Custody or Possession of an Negro, Mulatto, or Indian, may be seized by any Person, and upon due Proof thereof, made before any Justice of the Peace of the County where such Seizure shall be, shall, by his Order, be forfeited to the Seizor, for his own Use . . . .

XIX. Provided, nevertheless, that every free Negro, Mulatto, or Indian, being a Housekeeper, may be permitted to keep one Gun, Powder, and Shot; and all Negroes, Mulattoes, and Indians, bond or free, living at any Frontier Plantation, may be permitted to keep and use Guns, Powder, Shot, and Weapons, offensive or defensive, by License from a Justice of the Peace . . . .

Act of Mar. 25, 1756, ch. 1, 1769 Va. Acts 331. An Act for disarming Papists, and reputed Papists, refusing to take the Oaths to the Government.
[N]o Papist, or reputed Papist, so refusing, or making default as aforesaid, shall or may have, or keep . . . any Arms, Weapons, Gunpowder, or Ammunition, other than such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace at their Court for the Defence of his House or Person . . . .

Act of Apr. 14, 1757, ch. 1, 1769 Va. Acts 334. An Act for Better Regulating and Disciplining the Militia.
I. Whereas it is necessary, in this time of danger, that the militia of this Colony should be well regulated and disciplined, Be it therefore enacted, by the Lieutenant-Governor, Council, and Burgesses, of this present General Assembly . . . that from and after the passing of this Act every . . . officer, bearing any commission in the militia of this Colony, shall be an inhabitant of, and resident in, the County of which he is or shall be commissioned . . . . IV. . . . that every person so as aforesaid enlisted (except free Mulattoes, Negroes, and Indians) shall be armed in the manner following, that is to say: Every soldier shall be furnished with a firelock well fixed, a bayonet fitted to the same, a double cartouch-box. . . .

Act of Nov. 6, 1766, ch. 18, 1769 Va. Acts 474. An Act to continue and amend the Act for the better regulating and disciplining the Militia.
I. . . . [T]he several persons herein mentioned shall be . . . free and exempt from appearing or mustering either at the private or general musters of their respective Counties . . . II. Provided always, that the persons so exempted (not being Quakers) shall provide complete sets of arms, as are by the said Act required for soldiers, for the use of the County, City, or Borough, wherein

they shall respectively reside. . . . VII. And be it further enacted, by the Authority aforesaid, that every person so exempted (not being a Quaker) shall always keep in his house, or place of abode, such arms, accoutrements, and ammunition, as are by the said Act required to be kept by the Militia of this Colony . . . .

In *A Collection of All Such Public Acts of the General Assembly, and Ordinances of the Conventions of Virginia, Passed since the Year 1768* (1783):

Act of May 5, 1777, ch. 7, § 2, 1785 Va. Acts 52. An act for providing against invasions and insurrections.
The several divisions of the militia of any county shall be called into duty by regular rotation . . . . The soldiers of such militia, if not well armed and provided with ammunition, shall be furnished with the arms and ammunition of the country, and any deficiency in these may be supplied from the public magazines, or if the case admit not that delay, by impressing arms and ammunition of private property, which ammunition, so far as not used, and arms, shall be duly returned, as soon as they may be spared.

In William Waller Hening's *Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature*:

Act of July 17, 1775, ch. 1, in 9 Hening's Statutes at Large 9, 12- (1821). An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony.
And be it further ordained, that the soldiers to be enlisted shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch, and canteen; and, until such musket can be provided, that they bring with each of them the best gun, of any other sort, that can be procured . . . .

Act of May 5, 1777, ch. 1, in 9 Hening's Statutes at Large 267, 267-270 (1821). An act for regulating and disciplining the Militia.
[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years . . . shall . . . be enrolled or formed into companies . . . . There shall be a private muster of every company once in every month . . . . Every officer and soldier shall appear at his respective muster-field . . . armed or accoutred . . . . If any soldier be certified to the court martial to be so poor that he cannot purchase said arms, the said court shall cause them to be procured at the expense of the publick , to be reimbursed out of the fines on the delinquents of the county, which arms shall be delivered to such poor person to be used at musters, but shall continue the property of the county . . . . All arms and ammunition of the militia shall be exempted from executions and distresses at all times, and their persons from arrests in civil cases, while going to, continuing at, or returning from, any muster or court martial.

Act of May 5, 1777, ch. 3, in 9 Hening's Statutes at Large 281, 282 (1821). An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes.

Whereas allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the later, Therefore Be it enacted by the General Assembly, that all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall, on or before the tenth day of October next, take and subscribe the following oath or affirmation before some one of the justices of the peace of the county, city, or borough, where they shall respectively inhabit; and the said justice shall give a certificate thereof to every such person, and the said oath or affirmation shall be as followeth, viz . . . And the justices tendering such oath or affirmation are hereby directed to deliver a list of the names of such recusants to the county lieutenant, or chief commanding officer of the militia, who is hereby authorised and directed forthwith to cause such recusants to be disarmed . . . .

Act of Oct. 17, 1785, ch. 77, § 4, in 12 Hening's Statutes at Large 182, 182 (1823). An act concerning slaves.
No slave shall keep any arms whatever, nor pass unless with written orders from his master or employer, or in his company with arms, from one place to another. Arms in possession of a slave contrary to this prohibition, shall be forfeited to him who will seize them.

Act of Dec. 27, 1787, ch. 2, § 1, in 12 Hening's Statutes at Large 432, 432 (1823). An act to amend the several acts respecting the militia.
[T]he governor with the advice of council, shall apply the money by law appropriated to the purchase of arms, in procuring such artillery, small arms, accoutrements and ammunition, as may to him with such advice seem proper; and the small arms so procured shall be distributed to the different counties in proportion to the number of their militia. Every private receiving such arms and accoutrements shall hold the same subject to the like rules, penalties and forfeitures, as are prescribed for a poor private in and by the act of assembly, intituled, "An act to amend and reduce into one act the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections." (*See* Act of Oct. 17, 1785, ch. 1, in 12 Hening's Statutes at Large 9 (1823), An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections.)

Act of Dec. 15, 1788, ch. 42, § 1, in 12 Hening's Statutes at Large 697, 697 (1823). An act concerning the militia.
[E]ach of the militia in the several counties on the western waters, shall keep always ready a good musket or rifle, half a pound of good powder, and one pound of lead, to be produced whenever called for by his commanding officer, or be fined at the discretion of a court martial . . . .

In *A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force* (1794):

Act of Nov. 27, 1786, ch. 21, 1794 Va. Acts 33. An Act forbidding and punishing Affrays.
Be it enacted by the General Assembly, That no man . . . be so hardy to come before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms, on

pain, to forfeit their armour to the Commonwealth, and their bodies to prison, at the pleasure of a Court; nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country, upon pain of being arrested and committed to prison . . . and in like manner to forfeit his armour to the commonwealth; but no person shall be imprisoned for such offence by a longer space of time than one month.

Act of Dec. 17, 1792, ch. 103, §§ 8-9, 1794 Va. Acts 195, 196. An Act to reduce into one, the Several Acts concerning Slaves, Free Negroes and Mulattoes.
VIII. No negro or mulatto whatsoever shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive, but all and every gun, weapon, and ammunition found in the possession or custody of any negro or mulatto, may be seized by any person . . . .

IX. Provided, nevertheless, That every free negro or mulatto, being a house-keeper, may be permitted to keep one gun, powder and shot; and all negroes and mulattos, bond or free, living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive or defensive, by license from a Justice of peace . . . .

Act of Dec. 22, 1792, ch. 146, § 38, 1794 Va. Acts 293, 301. An Act for regulating the Militia of this Commonwealth.
XXXVIII. All arms, ammunition, and equipments of the militia, shall be exempted from executions and distresses at all times, and their persons from arrests in civil cases, while going to, continuing at, or returning from musters, and while in actual service.

In *Third Edition of the Code of Virginia: Including Legislation to January 1, 1874* (1873):
Title 11, ch. 25, § 11: Arms not worth repairing to be sold.
When any arms or accoutrements in the public arsenals are found to be unfit for repair, the governor may authorize the same to be sold, under such regulations as he may prescribe; but all arms condemned as unsafe, before they are offered for sale, shall be unbreeched and broken, so as to prevent their use as fire-arms or weapons.

Title 29, ch. 99, § 5: Hunting on another's land, or in the streets of a city or town, or along a public road, prohibited; penalty; how recoverable.
If any person shall hunt, shoot, fowl or range, with or without dogs, on the lands of another, without the consent of the owner or tenant of such lands, or shoot along any public road, or in the streets of any town or village, in any of the counties of this commonwealth, on the lands comprehended in the survey of any proprietor, he shall be deemed guilty of a trespass . . . and shall, moreover, forfeit as aforesaid, his gun and shooting apparatus . . . .

Title 29, ch. 99, § 12: What kind of gun prohibited.
If any person shall at any time, either in the night or day time, shoot at wild fowl in any county bordering on the Potomac, or on the waters of the same, with any gun which cannot be conveniently discharged from the shoulder at arm's length without a rest, a justice of any such county shall require such gun to be surrendered, and shall order it destroyed. If the offender fail

to surrender the same, he shall be committed to jail, to remain until discharged by the court of such county.

Title 54, ch. 191, § 7: Carrying concealed weapons.
If a person habitually carry about his person, hid from common observation, any pistol, dirk, bowie knife, or any weapon of the like kind, he shall be fined fifty dollars, and imprisoned for not more than twelve months in the county or corporation jail. The informer shall have half of such fine.

Title 56, ch. 206, § 45: His powers, and the powers of his assistants; assistant keepers and guard for the prison, allowed to carry and use arms.
[I]t shall be lawful for any officer of the penitentiary, or any guard provided by law to guard the same, to carry sufficient weapons to prevent escapes, suppress rebellion, and for self-defence, and to use the same against any prisoner for such purposes.

APPENDIX B: LOCAL FIREARM ORDINANCES

Alexandria, Virginia, 1800

An Act to prevent accidents from Horses and Carriages; from Dogs going at large, and from Fire; Section III: No person to discharge any firearms:

Section III: "No person shall discharge any Musket, Fowling-piece, Pistol, or other Fire Arms, within the limits of the corporation, unless in defence of his or her person or property, under the penalty of One Dollar for each offence.

Norfolk, Virginia, 1866

An Ordinance Concerning the Fire Department, in ORDINANCES OF THE CITY OF NORFOLK (1866)

Section 14: That if any person shall set fire to any squibs, crackers, or other fire-words, or discharge any fire arms within the limits of this city, such person shall pay a fine of two dollars for every offence. But this shall not be construed to extend to a military exercise or review.

Richmond, Virginia, 1867

Nuisances, in CHARTER AND ORDINANCES OF THE CITY OF RICHMOND (1867)

Section 11: " . . . If any person shall, without permission in writing from the Mayor, discharge or set off, in any street or alley of the city, any balloon, rocket, torpedo, popcracker, fireworks, or any combination of gunpowder, or any other combustible or dangerous material; or if any person shall, except under the forty-fourth section of the chapter concerning streets, without necessity, fire or discharge in this city any cannon, gun, pistol or other fire-arms of any kind, or shall make therein any unusual noise, whereby the inhabitants thereof may be alarmed, . . .every such person herein offending shall pay a fine of not less than one nor more than twenty dollars.

Section 12: No person, firm, or incorporated company shall keep in any house in the city any loaded shell or shot, or any explosive material of any sort, not authorized by ordinance. And any person, firm or incorporated company violating the provision of this section shall be fined not less than twenty nor more than one hundred dollars; and each day on which the same is so kept in the city shall be a distinct offense and punishable as such.

SEC. V. The fines hereby incurred, ſhall be recoverable by warrant before a ſingle magiſtrate, and ſhall be to the uſe of the mayor and commonalty. *Fines recoverable.*

Paſſed the 5th of February, 1800.

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AN ACT

To prevent accidents from Horſes and Carriages; from Dogs going at large, and from Fire.

SEC. I. BE *it enacted by the Mayor and Commonalty of the town of Alexandria*, That, from and after the paſſing of this act, no perſon ſhall drive any Carriage whatever, within the limits of the corporation, out of an ordinary travelling gait, or in a careleſs or inattentive manner; or gallop, or otherwiſe force any Horſe out of ſuch ordinary travelling gait. Nor ſhall any perſon, within the limits aforeſaid, ride, or take any horſe through the ſtreets without a bridle or halter. Any perſon who ſhall tranſgreſs herein, ſhall forfeit and pay the ſum of Two Dollars for every ſuch tranſgreſſion. *No Horſe or carriage to be driven out of an ordinary travelling gait.*

SEC. II. All owners of Dogs ſhall keep ſuch Dogs chained, or otherwiſe confined; and if any Dog ſhall be found going at large, without his owner, the owner ſhall be ſubject to the penalty of One Dollar. It ſhall be lawful for any perſon, and ſhall particularly be the duty of the conſtables, to kill and deſtroy any Dog found ſo going at large without his owner. *Penalty on owners of dogs ſuffering them to go at large.*

SEC III. No perſon ſhall diſcharge any Muſket, Fowling-piece, Piſtol, or other Fire Arms, within the limits of the corporation, unleſs in defence of his or her perſon or proprety, under the penalty of One Dollar for each offence. *No perſon to diſcharge any fire-arms.*

SEC. IV. It ſhall not be lawful to burn any Lime or Brick-kiln, within the limits of the corporation, unleſs ſuch Lime-kiln be at leaſt two hundred feet diſtant, or ſuch Brick-kiln at leaſt thirty feet diſtant from all buildings. The perſon who ſhall burn any Lime or Brick-kiln within the corporation, at a leſs diſtance from any building than is hereby allowed, ſhall for each offence forfeit and pay Fifty Dollars. *Lime & brick kilns to be burnt at certain diſtances from the houſes, &c.*

SEC. V. No Fuel, Shavings, or other combuſtible matter ſhall be burnt in the open air within the corporation, unleſs in the day time, at the diſtance of two hundred feet, at leaſt, from every building or fence. All Fires made at any greater diſtance, ſhall be carefully extinguiſhed before ſun-down, by the perſon or perſons making the ſame. Whoever ſhall offend herein, ſhall be ſubject to the penalty of Five Dollars. *Provided*, That nothing herein contained, ſhall be conſtrued to prevent the making of fires for boiling pitch or tar, for tarring or paying veſſels, or for heating bands by blackſmiths, to be fitted to wheels, ſo as ſuch fires be extinguiſhed as before directed. *Fires not to be burnt in the open air.* *Proviſo.*

SEC. VI. No perſon ſhall conſtruct the pipe of any Stove through the wall of any houſe, or through any wooden floor, or lath, or wooden partition; or ſet up a Stove on any plank or wooden floor, before it ſhall have been rendered ſecure, by placing at leaſt two rows of bricks between the floor and ſuch Stove. Whoever ſhall in any reſpect offend herein, ſhall forfeit and pay Twenty Dollars for each offence. *Stove-pipes not to be conducted thro' any wall, &c &c.*

SEC. VII. The dimenſions of all Chimneys which ſhall hereafter be erected, ſhall be at leaſt fourteen inches by twelve, and ſhall be conſtructed in ſuch a manner as to allow chimney-ſweepers to paſs through them. *What ſhall be the dimenſions of chimneys.*

SEC. VIII. It ſhall be the duty of the wardens to remove, or cauſe to be removed, all Stoves and Stove-pipes, and to take down, or cauſe to be taken down, all Chimneys put up or erected, contrary to the intent and meaning of this act. *Wardens to remove ſtoves &c. improperly ſet up.*

SEC. IX. The ſeveral fines impoſed by this act, ſhall be to the uſe of the corporation, and ſhall be recoverable by warrant before a ſingle magiſtrate, or by action of debt, or information in any court of record, as the caſe may require. *Penalties, how recoverable.*

Repealing clauſe.

SEC. X. All and every act and acts coming within the purview hereof, are hereby repealed, except as to ſo much thereof as may relate to any offence done, or fine or penalty incurred under the ſame, before the paſſing of this act.

Paſſed the 5th of February, 1800.

—**********—

AN ACT

For appointing Guagers, Meaſurers of Grain, Salt, and Coal; Meaſurers of Lumber, and Corders of Wood; and appointing their ſeveral duties.

Guagers, meaſurers of grain, &c. meaſurers of lumber, and corders of wood when to be appointed.

Section I. BE *it enacted by the Mayor and Commonalty of the town of Alexandria.* That the court of Huſtings ſhall annually, in the month of March or April, appoint one or more fit perſons to act in each of the following capacities; that is to ſay, as guagers of Liquors; meaſurers of Grain, Salt and Coal; meaſurers of Lumber, and Corders of Wood. The perſons ſo appointed ſhall, before entering on their reſpective offices, make oath or affirmation before the court, faithfully to execute their ſeveral duties; and ſhall, moreover, give bond with good ſecurity, in ſuch ſum as the court may think neceſſary, payable to the mayor and commonalty, conditioned for the faithful performance of the ſaid duties.

Duty of guagers.

Their fees.

Section II. It ſhall be the duty of the Guager or Guagers, to guage all ſpirituous and fermented liquors, offered for ſale in caſks; to attend when called on for that purpoſe, and to mark the contents and ullage on each caſk or veſſel ſo guaged. For which ſervices he ſhall be paid by the ſeller of ſuch liquors the following fees, viz. for guaging any number of hogſheads or pipes not exceeding five, twelve and one-half cents each; for any number above five, and not exceeding ten, ten cents each; for any number exceeding ten, ſix cents each: for guaging any number of tierces, barrels, or veſſels containing ſmaller quantities, not exceeding five, eight cents each; for any number above five, and not exceeding ten, ſix cents each; for any number above ten, four cents each—to be paid by the ſeller. If any Guager ſhall make a miſtake of more than two gallons in the contents of any veſſel, he ſhall make full compenſation to the perſon injured thereby. Any perſon who ſhall ſell and deliver any ſpirituous or fermented liquors by the pipe, hogſhead, tierce or barrel, without having them guaged previous to ſuch ſale by a Public Guager, ſhall, for each offence, forfeit and pay Five Dollars.

Penalty for ſelling ſpirituous liquors without having them firſt guaged.

Duty of the meaſurers of grain.

Section III. It ſhall be the duty of the Meaſurers of grain appointed under this act, to provide, at their own expence, a ſufficient number of barred half-buſhels, for the meaſurement of all kinds of grain, except oats and barley, and of half-buſhels without bars, for oats, barley and ſalt, to be regulated by the ſtandard of this Commonwealth; and alſo to provide a ſufficient number of meaſures without bars, for coal, containing two and a-half buſhels, according to the ſaid ſtandard, which ſhall be conſidered as two buſhels. In the meaſurement of all grain, except oats and barley, the Meaſurers ſhall uſe a ſtrike with a ſquare edge, at leaſt three-fourths of an inch thick; in the meaſurement of oats, barley and ſalt, they ſhall uſe a ſtrike rounded on the edge. The Meaſurers ſhall attend at all times when called on, for the purpoſe of meaſuring grain, ſalt, or coal, and ſhall furniſh the buyer and ſeller with a certificate of the quantity meaſured. For which ſervices they ſhall be paid by the ſeller twenty-five cents for each hundred buſhels ſo meaſured, and in the ſame proportion for any greater or leſs quantity.

Their fees.

Penalty on perſons ſelling grain &c without having it meaſured.

Section IV. No perſon who ſhall hereafter import any grain, ſalt, or coal into the town for ſale, ſhall deliver the ſame, or any part thereof, to the buyer, out of the veſſel in which it ſhall be ſo imported, without having it duly meaſured by the Public Meaſurer. Nor ſhall any perſon, in any caſe whatſoever, ſell and deliver any greater quantity of grain or ſalt than two hundred buſhels, or any greater quantity of coal than forty buſhels, without having the ſame previouſly meaſured as aforeſaid. Every perſon who ſhall herein offend, ſhall forfeit and pay Five Dollars for every hundred buſhels ſo ſold and delivered, and in the ſame proportion for any greater or leſs quantity.

Virginia. Laws, etc., and Alexandria. Laws of the mayor and commonalty of the town of Alexandria: to which are prefixed, acts of the legislature of Virginia respecting the town of Alexandria. Printed by John and James D. Westcott, printers to the Corporation, [1800]. Eighteenth Century Collections Online, link.gale.com/apps/doc/CB0132206939/ECCO?u=viva_uva&sid=bookmark-ECCO&pg=19. Accessed 7 Apr. 2023.

THE REVISED

ORDINANCES

OF THE

CITY OF NORFOLK,

TO WHICH ARE PREFIXED

THE ORIGINAL CHARTER OF THE BOROUGH,

And the Amended Charter of 1845 creating the Borough into a City,

AND A COLLECTION OF

Acts and Parts of Acts of the General Assembly,

RELATING TO THE CITY.

PUBLISHED BY AUTHORITY OF THE COUNCILS.
1866.

NORFOLK, VA.
PRINTED AT THE OFFICE OF THE DAILY OLD DOMINION.
1866.

or through a brick or stone wall, or sheet iron, shall forfeit an one dollar for every day he shall suffer it to remain in that state, after notice from the Inspector or any Fire Warden, to have it altered or removed.

10. That no person shall deposite any quick lime in casks in any place within the city, unless the same shall have been examined by the Inspector, or some one of the Fire Wardens, and permission obtained, under the penalty of ten dollars.

11. That if any person having charge of any vessel, lying in any dock, or at any wharf of the city, shall keep fire, or suffer any fire to be kept on board any such vessel, otherwise than in proper chimneys, stoves, or cambooses, he shall forfeit five dollars for every such offence.

12. That it shall be the duty of the Constables of the city to repair immediately, on the alarm of fire to the place where such fire may be, and obey such orders as may be given by the Chief Engineer or Fire Wardens.

13. That if the chimney of any house shall take fire, so as to blaze out, unless it be actually raining, the tenant shall pay the sum of five dollars. *Provided*, prosecution shall be commenced within one month after.

14. That if any person shall set fire to any squibs, crackers, or other fire-works, or discharge any fire arms within the limits of this city, such person shall pay a fine of two dollars for every offence. But this shall not be construed to extend to a military exercise or review.

15. That any person who shall sell fire-works, commonly called squibs, or crackers, in packages or quantities less than a thousand, shall pay a fine of five dollars, one half of which, as well as one half of all other fines, imposed by this Ordinance, shall go to the informer.

16. This Ordinance shall be in force from its passage.

THE

CHARTER AND ORDINANCES

OF THE

CITY OF RICHMOND,

WITH THE

AMENDMENTS TO THE CHARTER.

PUBLISHED BY AUTHORITY OF THE

COMMON COUNCIL OF THE CITY OF RICHMOND.

RICHMOND:
V. L. FORE, PRINTER, 1315 MAIN STREET.
1867.

March 12th 1867

8. On complaint to the Mayor that unslacked lime has been stored on premises within fifty feet of any house in this city, he shall issue a warrant, directed to three freeholders, to examine the said premises. If they deem it dangerous that the lime should be stored on said premises, the owner or occupier shall remove the same within twelve hours after being notified thereof. If he shall fail so to do he shall pay a fine not exceeding ten dollars; and for each hour thereafter that the same continues to be stored, he shall pay a fine of not less than two nor more than twenty dollars.

9. A stove pipe passing in or through a floor, partition, roof or side of a house, shall be enclosed the whole of such passage in earthenware or mortar or tin casing filled with sand, and if passing through a window, shall be enclosed with tin or sheet-iron; it shall extend two feet beyond the roof or side of the house, and if through the side of the house, it shall be capped with a cross pipe at least eighteen inches long; and no stove pipe shall project into a street. If any person put up, construct or use in any building in this city, any stove pipe otherwise than according to and in conformity with the foregoing directions and regulations, he shall be fined not less than five nor more than twenty dollars; and each day that the same shall continue shall be a distinct offence, and punishable as such by a fine of twenty dollars.

10. If any person shall put fire to a chimney to clean it, except in the day time, and whilst the roof of the house to which it is attached is well covered with snow, or whilst it is raining, and the roof thoroughly wet thereby; or if the chimney of any house shall take fire from not having been properly cleaned, the occupier of any such house shall be fined not less than two nor more than five dollars.

11. If any person shall sell or expose for sale in this city any torpedoes, popcrackers, squibs or other fireworks of any kind whatever, except in packages containing each at least one hundred, or shall without permission in writing from the Mayor, discharge or set off, in any street or alley of the city, any balloon, rocket, torpedo, popcracker, fireworks or any combination of gunpowder, or any other combustible or dangerous

material; or if any person shall, except under the forty-fourth section of the chapter concerning streets, without necessity, fire or discharge in this city any cannon, gun, pistol or other fire-arms of any kind, or shall make therein any unusual noise, whereby the inhabitants thereof may be alarmed, or raise or fly a kite in this city; or if any auctioneer shall use any bell or herald to notify the public of any sale, except of real property, every such person herein offending shall pay a fine of not less than one nor more than twenty dollars.

12. No person, firm or incorporated company shall keep in any house in the city any loaded shell or shot, or any explosive material of any sort, not authorized by ordinance. And any person, firm or incorporated company violating the provision of this section shall be fined not less than twenty nor more than one hundred dollars; and each day on which the same is so kept in the city shall be a distinct offence and punishable as such.

13. Every hotel keeper and keeper of a restaurant, lager beer saloon, or other place where ardent spirits, beer, cider or other drinks are sold or given away, shall close the bar where such drinks are sold or given away, every Sunday during the whole day. And any person violating the provision of this section shall be fined not less than twenty nor more than fifty dollars.

14. If any person shall by swimming, bathing, or in any otherwise, indirectly expose his person, or any part thereof, to the public view, or cause any person so to do within this city, or the river adjacent thereto, he shall be fined not less than one nor more than twenty dollars.

15. If after the Council, on the petition of the owners of not less than one-fourth of the ground included in any square in the city, shall have prohibited the erection in such square of any building or of any addition to any building more than ten feet high (unless the outer walls thereof be made of brick and mortar or stone and mortar), it be alleged by any officer of police or any citizen, to the Mayor or any other justice, that any person has erected any building or addition contrary to such prohibition, the said Mayor or justice shall have the said person summoned before him; and upon proof that a building or addition has been erected contrary to such prohibition, shall order him to remove

APPENDIX C: OTHER RESOURCES

Michael Bellesiles, *Gun Laws in Early Americas: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & HIST. REV. 567 (1998), https://www.jstor.org/stable/744246.

Repository of Historical Gun Laws, Duke Center for Firearms Law, Duke University Law School, https://firearmslaw.duke.edu/repository/search-the-repository/.

Sensitive Places, Everytown Center for the Defense of Gun Safety, https://everytownlaw.org/everytown-center-for-the-defense-of-gun-safety/sensitive-places/#historical-laws.

U.S. Department of Education

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Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

May 15, 2023

I. Introduction

Section 8524(a) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act and codified at 20 U.S.C. § 7904(a), requires the Secretary of Education (the Secretary) to issue guidance to State educational agencies (SEAs), local educational agencies (LEAs), and the public on constitutionally protected prayer in public elementary and secondary schools. In addition, section 8524(b), codified at 20 U.S.C. § 7904(b), requires that, as a condition of receiving ESEA funds, an LEA must annually certify in writing to its SEA that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, as detailed in this updated guidance.

The purpose of this updated guidance is to provide information on the current state of the law concerning constitutionally protected prayer and religious expression in public schools. Part I is an introduction. Part II clarifies the extent to which prayer in public schools is legally protected. SEAs and LEAs are responsible, under section 8524(b) of the ESEA, to certify each year their compliance with the standards set forth in Part II.

Part III of this updated guidance addresses constitutional principles that relate to religious expression in public schools more broadly, not limited to prayer, and Part IV discusses requirements under other Federal and State laws relevant to prayer and religious expression. These sections are designed to advise SEAs and LEAs on how to comply with governing law, certifying compliance with Parts III and IV is not a part of the required certification under section 8524(b) of the ESEA.

The principles outlined in this updated guidance are similar to the U.S. Department of Education's (Department's) 2003 and 2020 guidance on constitutionally protected prayer in public schools and with guidance that President Clinton issued in 1995.[1] The Department's Office of the General Counsel and the Office of Legal Counsel in the U.S. Department of Justice have verified that this updated guidance reflects the current state of the law concerning constitutionally protected prayer in public elementary and secondary schools. This updated guidance will be made available on the Department's website (www.ed.gov (https://www.ed.gov/)).

A. The Section 8524(b) Certification Process

To receive funds under the ESEA, an LEA must annually certify in writing to its SEA that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, as detailed in Part II of this updated guidance. An LEA must provide this certification to the SEA by October 1 of each year during which the LEA participates in an ESEA program.

Each SEA should establish a process by which its LEAs may provide the necessary certification. There is no specific Federal form that an LEA must use in providing this certification to its SEA. The certification may be provided as part of the application process for ESEA programs, or separately, and in whatever form the SEA finds most appropriate, as long as the certification is in writing and clearly states that the LEA has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, as detailed in this updated guidance.

Section 8524(b) of the ESEA also requires that, by November 1 of each year, each SEA must send to the Secretary a list of those LEAs that have not filed the required certification or that have been the subject of a complaint to the SEA alleging that the LEA has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The SEA must provide a process for filing a complaint against an LEA that allegedly denies a person, including a student or employee, the right to participate in constitutionally protected prayer. The SEA must report to the Secretary all complaints that are filed through the process the SEA provides, including complaints that the SEA may deem meritless. In addition, to the extent the SEA has notice of any public legal charges or complaints, such as a lawsuit filed against an LEA alleging that the LEA denied a person the right to participate in constitutionally protected prayer, the SEA should report the charges and complaints to the Secretary.

The list required by section 8524(b) should be emailed to OESE@ed.gov (mailto:OESE@ed.gov). If an SEA is providing any Personally Identifiable Information the email must be encrypted. If an SEA is unable to electronically send the list, please email OESE@ed.gov (mailto:OESE@ed.gov) to request an alternative submittal method.

The SEA's submission should describe what investigation and/or enforcement action, if any, the SEA has initiated with respect to each listed LEA and the status of the investigation or action. After receiving the SEA's submission, the Department may request additional information about listed LEAs. The SEA should not send the LEA certifications themselves to the Secretary but should maintain these records in accordance with its usual records retention policy.

B. Enforcement of Section 8524(b)

Section 8524(c) of the ESEA, codified at 20 U.S.C. § 7904(c), requires the Secretary to effectuate section 8524(b) by issuing, and securing compliance with, rules or orders with respect to an LEA that fails to certify, or is found to have certified in bad faith, that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The General Education Provisions Act also authorizes the Secretary to take actions against recipients of Federal education funds that are not in compliance with the ESEA and/or other applicable law. *See*20 U.S.C. §§ 1234c–1234f. Such actions include, among other things, entering into a compliance agreement with the recipient to bring it into compliance, issuing a cease and desist order, and withholding funds until the recipient comes into compliance.

If an LEA fails to file the required certification, or is found to have a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, the SEA should ensure compliance in accordance with its regular enforcement procedures.

C. Overview of Governing Constitutional Principles

The First Amendment to the U.S. Constitution both prevents the government from establishing religion and protects religious exercise and religious expression from unwarranted government interference and discrimination.[2] School administrators and teachers have an opportunity to assist America's youth in developing an understanding of these constitutional protections as they apply to people of all faiths and no faith and an appreciation for the core American values and freedoms that undergird them.

A public school and its officials may not prescribe prayers to be recited by students or by school authorities.[3] Indeed, it is "a cornerstone principle of [the U.S. Supreme Court's] Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a

part of a religious program carried on by government.'"[4] Nothing in the First Amendment, however, converts the public schools into religion-free zones, or requires students, teachers, or other school officials to leave their private religious expression behind at the schoolhouse door. The line between government-sponsored and privately initiated religious expression is vital to a proper understanding of what the Religion and Free Speech Clauses of the First Amendment prohibit and protect.[5] Although a government may not promote or favor religion or coerce the consciences of students, schools also may not discriminate against private religious expression by students, teachers, or other employees. Schools must also maintain neutrality among faiths rather than preferring one or more religions over others.[6]

The Supreme Court's decisions set forth principles that distinguish impermissible governmental religious speech from constitutionally protected private religious speech. For example, teachers, coaches, and other public school officials acting in their official capacities may not lead students in prayer, devotional readings, or other religious activities,[7] nor may they attempt to persuade or compel students to participate in prayer or other religious activities or to refrain from doing so.[8] The Supreme Court has held, for instance, that public school officials violated the Establishment Clause by inviting a rabbi to deliver prayers at graduation ceremonies because such conduct was "attributable to the State" and applied "subtle coercive pressure" that effectively required students to choose between praying or openly displaying their opposition to the prayer.[9]

Although the Constitution forbids public school officials acting in their official capacities from directing or favoring prayer, students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[10] The Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[11] Moreover, not all religious speech that takes place in public schools or at school-sponsored events is governmental speech.[12] For example, "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday,"[13] and therefore students may pray with fellow students during the school day on the same terms and conditions that they may engage in other comparable conversations or activities. Students may also speak to, and attempt to persuade, their peers about religious matters just as they may do with regard to, for example, political matters.

School officials may impose reasonable rules of order on student speech and activities as long as they do not discriminate against student speech or activities for being religiously motivated or reflecting a religious perspective. The Supreme Court has repeatedly recognized that schools have a special interest in regulating speech that occurs under their supervision where that speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[14] In addition, although school officials may not promote or favor religion or coerce students to pray, they also may not structure or administer the school's rules so as to discriminate against private student speech or activities that are religiously motivated or that reflect a religious perspective. Where schools permit student expression on the basis of genuinely content-neutral criteria in a context in which the speech is not school-sponsored (or otherwise disseminated under the school's auspices), the speech of students who choose to express themselves through religious means such as prayer is not attributable to the State and may not be restricted because of its religious content.[15] Student remarks are not attributable to the school simply because they are delivered in a public setting or to a public audience,[16] and the Constitution mandates neutrality toward privately initiated religious expression.[17]

When teachers, coaches, and other public school officials speak in their official capacities, they may not engage in prayer or promote religious views. More broadly, "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 their communications from employer discipline."[18] However, not everything that a public school teacher, coach, or other official says in the workplace constitutes governmental speech, and schools have less leeway to regulate employees' genuinely private expression. To be sure, a public school, like any other governmental employer, may reasonably restrict its employees' private speech in the workplace where that speech may have a detrimental effect on close working relationships, impede the performance of the speaker's duties, or otherwise interfere with the

regular operation of the enterprise.[19] In contexts where a school permits teachers, coaches, and other employees to engage in personal speech, however, it may not prohibit those employees from engaging in prayer merely because it is religious or because some observers, including students, might misperceive the school as endorsing that expression.[20] That said, a school may take reasonable measures to ensure that teachers, coaches, and other school officials do not pressure or encourage students to join in the private prayer of those officials or other students.

Top

II. Applying the Governing Constitutional Principles in Particular Public School Contexts Related to Prayer

A. Prayer and Religious Exercise During Non-Instructional Time

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Students also may read from religious materials; say a prayer or blessing before meals; and engage in worship or study religious materials with fellow students during non-instructional time (such as recess or the lunch hour) to the same extent that they may engage in nonreligious activities. Although school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious perspectives in applying such rules and restrictions.

B. Organized Prayer Groups and Activities

Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other noncurricular student activity groups. Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the groups' religious character or perspective. School officials should neither encourage nor discourage participation in student-run activities based upon the activities' religious character or perspective. Schools may take reasonable steps to ensure that students are not pressured to participate (or not to participate) in such religious activities. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding noncurricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups that meet to engage in religious expression such as prayer. School authorities may choose to issue appropriate, neutral disclaimers of the school's sponsorship or approval of noncurricular groups and events.

C. Teachers, Administrators, and Other School Employees

Teachers, school administrators, and other school employees may not encourage or discourage private prayer or other religious activity.

The Constitution does not, however, prohibit school employees themselves from engaging in private prayer during the workday where they are not acting in their official capacities and where their prayer does not result in any coercion of students. Before school or during breaks, for instance, teachers may meet with other teachers for prayer or religious study to the same extent that they may engage in other conversation or nonreligious activities. School employees may also engage in private religious expression or brief personal religious observance during such times, subject to the same neutral rules the school applies to other private conduct by its employees. Employees engaging in such expression or observance may not, however, compel, coerce, persuade, or encourage students to join in the employee's prayer or other religious activity, and a school may take reasonable measures to ensure that students are not pressured or encouraged to join in the private prayer of their teachers or coaches.

School employees may participate in their personal capacities in privately sponsored baccalaureate ceremonies or similar events.

D. Moments of Silence

If a school has a "moment of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may not require or encourage students to pray, or discourage them from praying, during such time periods.

E. Accommodation of Prayer and Religious Exercise During Instructional Time

Students may engage in prayer or religious expression during instructional time to the same degree they may engage in nonreligious private expression during such time. Students may, for example, bow their heads and pray to themselves before taking a test.

F. Student Assemblies and Noncurricular Events

Student speakers at school assemblies and noncurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious perspectives. Where a student speaker is selected on the basis of genuinely content-neutral, evenhanded criteria, and the school does not determine or have control over the content of the student's speech, the expression is not reasonably attributed to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech. By contrast, where school officials determine or have control over the content of what is expressed, such speech is attributable to the school and may not include prayer or content promoting (or opposing) religion.

G. Prayer at Graduation

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely content-neutral, evenhanded criteria, and schools do not determine or have control over their speech, however, that expression is not attributable to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

H. Baccalaureate Ceremonies

School officials may not mandate or organize religious baccalaureate ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official sponsorship or approval of events held by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

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III. Applying Constitutional Principles Regarding Religious Expression Other Than Prayer in Particular Public School Contexts

A. Religious Literature

Public school students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curricula or activities. Schools may impose the same reasonable time, place, or manner restrictions on distribution of religious literature as they do on non-school literature generally, but they may not target religious literature for more permissive or more restrictive regulation.

B. Teaching about Religion

Public schools may not provide religious instruction, but they may teach *about* religion and promote religious liberty and respect for the religious views (or lack thereof) of all. For example, philosophical questions concerning religion, the history of religion, comparative religion, religious texts as literature, and the role of religion in the history of the United States and other countries are all permissible public school subjects. Similarly, it is permissible to study religious influences on philosophy, art, music, literature, and social studies. For example, public schools generally may allow student choirs to perform music inspired by or based on religious themes or texts as part of school-sponsored activities and events, provided that the music is not performed as a religious exercise and is not used to promote or favor religion generally, a particular religion, or a religious belief.

Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events, nor may schools promote or disparage such observance by students.

C. Student Dress Codes and Policies

Public schools generally may adopt policies relating to student dress and school uniforms to the extent consistent with constitutional and statutory civil rights protections. Schools may not, however, target religious attire in general, or the attire of a particular religion, for prohibition or regulation. If a school makes exceptions to a dress code to accommodate nonreligious student needs, it ordinarily must also make comparable exceptions for religious needs. Students may display religious messages on items of clothing to the same extent and pursuant to the same conditions that they are permitted to display nonreligious messages. In addition, in some circumstances Federal or State law may require schools to make accommodations that relieve substantial burdens on students' religious exercise. School officials may wish to consult with their attorneys regarding such obligations.

D. Religious Expression in Class Assignments and Homework

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance, relevance, and other legitimate pedagogical objectives. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and be neither penalized nor rewarded on account of its religious perspective.

E. Excusals for Religious Activities

Public schools have discretion to permit students to attend off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a burden on their religious exercise, including prayer or fasting, at least where doing so would not impose material burdens on other students. For example, it would be constitutional for schools to excuse students from class to enable them to fulfill their religious obligations regarding prayer, religious holidays, or other observances.

Where school officials have a practice of excusing students from class on the basis of requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In some circumstances, Federal or State law may require schools to make accommodations that relieve substantial burdens on students' religious exercise. School officials may wish to consult with their attorneys regarding such obligations.

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IV. Additional Requirements under the Equal Access Act and Other Federal and State Laws

In addition to the constitutional principles discussed above, public schools may also be subject to requirements under Federal and State laws relevant to prayer and religious expression. (Such Federal and State laws may not, however, obviate or conflict with a public school's Federal constitutional obligations described herein.)

For example, the Equal Access Act, 20 U.S.C. § 4071, is designed to ensure that student religious activities are accorded the same access to Federally funded public secondary school facilities as are student secular activities. Under the Equal Access Act, a public secondary school receiving Federal funds that creates a "limited open forum" may not refuse student religious groups access to that forum.[21] A "limited open forum" exists "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). Such meetings, as defined and protected by the Equal Access Act, may include a voluntary and student-initiated prayer service, scripture reading, or other worship exercise. Under the Act, a public secondary school receiving Federal funds must also allow student religious groups to use school media—including the school's newspaper, public address system, and bulletin board—to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools may, however, issue appropriate, neutral disclaimers of the school's sponsorship or approval of noncurricular groups and events. Consistent with the First Amendment, the Equal Access Act also states that it should not be construed (among other things) to authorize a public school or its officials to influence the form or content of any prayer, require any person to participate in prayer, or abridge the constitutional rights of any person. 20 U.S.C. § 4071(d).

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Notes:

[1] *See* U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools (Jan. 16, 2020); U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools (Feb. 7, 2003); President William J. Clinton, Religious Expression in Public Schools, 2 Pub. Papers 1083 (July 12, 1995).

[2] The relevant portions of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. The first two quoted clauses are often referred to as the Establishment Clause and the Free Exercise Clause of the First Amendment, collectively the Religion Clauses. The language "or abridging the freedom of speech," also relevant to prayer and religious expression, is usually referred to as the Free Speech Clause of the First Amendment. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to States and localities, *see, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and therefore they apply to the actions of public schools.

[3] *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

[4] *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (quoting *Engel*, 370 U.S. at 425); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223–25 (1963) (holding that it violated the Establishment Clause for schools to require the selection and reading at the opening of the school day of verses from the Bible and the recitation of the Lord's

Prayer by the students in unison, under the supervision and with the participation of teachers).

[5] *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423–24 (2022) (making the point with respect to the Free Speech Clause); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("'there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect'" (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.))); *accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995).

[6] *Larson v. Valente*, 456 U.S. 228 (1982); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[7] *Schempp*, 374 U.S. 203 (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Engel*, 370 U.S. 421 (invalidating a state law and regulation directing the use of prayer in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that a state statute requiring posting of Ten Commandments on walls of every public school classroom was unconstitutional).

[8] *See Lee*, 505 U.S. at 599 *see also Wallace v. Jaffree*, 472 U.S. 38 (1985); *Kennedy*, 142 S. Ct. at 2429, 2431 (emphasizing that the football coach in that case did not coerce, require, or ask any students to pray, nor seek to persuade them to participate in his private prayer).

[9] *Lee*, 505 U.S. at 592–94; *see also Town of Greece*, 572 U.S. at 590 (describing *Lee* as having held that a religious invocation was coercive as to an objecting student "in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony").

[10] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

[11] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

[12] *Santa Fe*, 530 U.S. at 302 (explaining that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own").

[13] *Id.* at 313.

[14] *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (the rights of students "'must be 'applied in light of the special characteristics of the school environment'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506))); *see also Tinker*, 393 U.S. at 513; *Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 141 S. Ct. 2038, 2045 (2021); *Morse*, 551 U.S. at 403–04.

[15] *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." (citations and quotation marks omitted)); *see also Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1589–90 (2022) (explaining that the Court looks to various factors to determine whether the government intends to speak for itself or to regulate private expression, including "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression"); *Lamb's Chapel*, 508 U.S. at 392–93 ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (quotation marks omitted)); *Widmar*, 454 U.S. at 269–76; *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) ("Even subject-matter limits must at least be reasonable in light of the purpose served by the forum[.]" (quotation marks omitted)). When, by contrast, student speech is made in the context of school-sponsored activities, such as in school-sponsored publications or theatrical productions, educators have more

discretion to regulate such speech and generally do not offend the First Amendment by exercising editorial control over the style and content so long as their actions are reasonably related to legitimate pedagogical concerns. *See Hazelwood*, 484 U.S. at 271–73.

[16] *Santa Fe*, 530 U.S. at 302 *Rosenberger*, 515 U.S. at 834–35; *Mergens*, 496 U.S. at 250 (plurality op.).

[17] *Rosenberger*, 515 U.S. at 845–46 *Everson*, 330 U.S. at 18.

[18] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *accord Lane v. Franks*, 573 U.S. 228, 237 (2014).

[19] *See Kennedy*, 142 S. Ct. at 2423–24; *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–73 (1968); *see also Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648–51 (9th Cir. 2006); *Brown v. Polk Cty.*, 61 F.3d 650, 658 (8th Cir. 1995).

[20] *Kennedy*, 142 S. Ct. at 2426–28.

[21] *See, e.g.*,20 U.S.C. § 4071(c)(3) (Equal Access Act provision stating that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that," inter alia, "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity"); *see also Mergens*, 496 U.S. at 251 (plurality op.) (explaining that this feature of the Equal Access Act helps ensure there will be "little if any risk of official state endorsement or coercion" of students); *cf. Lee*, 505 U.S. at 592 (recognizing "heightened concerns with protecting freedom of conscience from subtle coercive pressure" and noting that prayer exercises in public elementary and secondary schools "carry a particular risk of indirect coercion").

Archived 2020 Guidance (/policy/gen/guid/religionandschools/prayer-guidance-2020.html)

Archived 2003 Guidance (/policy/gen/guid/religionandschools/prayer_guidance-2003.html)

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