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# First Amendment Imbalance: Kennedy v. Bremerton School District

Steven K. Green
*Willamette University College of Law*

# FIRST AMENDMENT IMBALANCE: *KENNEDY V. BREMERTON SCHOOL DISTRICT*

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For several years, prior to the COVID shutdowns, I conducted workshops for the Oregon School Boards Association on First Amendment issues arising in public schools. The annual workshops were for newly elected school board members from across the state. A significant number of the attendees hailed from smaller communities in the eastern and southern parts of Oregon, those politically conservative bastions in an otherwise politically blue state. When the topic turned to prayer and Bible reading, I strove to provide a balanced, but legally resolute account of the rules governing student and teacher religious expression during the school day. Projecting a PowerPoint image of a teacher praying with her students,[1] I explained the concerns about student impressionability and subtle coercive pressure in such situations, as well as how such exercises might trench upon parental rights to control the religious upbringing of their children.[2] To a person, the attendees would nod their heads in agreement, reflecting a collective intuitive sense about the delicate issues involved. That unanimity of thought quickly fell away, however, with my next slide showing a football coach kneeling in prayer with his



* Fred H. Paulus Professor of Law, Willamette University College of Law. In full disclosure, I collaborated on an amicus brief at the Supreme Court in *Kennedy v. Bremerton School District*. *See* Brief of Church-State Scholars as Amici Curiae in Support of Respondent, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

1 The 1963 photograph, taken concurrently with litigation in the *School District of Abington Township v. Schempp* case, 374 U.S. 203 (1963), can be found on the cover of my book, THE THIRD DISESTABLISHMENT: CHURCH, STATE, AND AMERICAN CULTURE, 1940–1975 (2019).

2 *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.").

players, with several board members expressing the belief that such common activity was somehow different. The second slide provided a nice segue for a larger discussion about how teachers and coaches serve as role models for their students, and of the various forms of subtle coercive pressure that exist in school environments. I cannot say that I was always successful, but usually a majority of attendees concluded that the rules governing teacher religious expression should apply with equal, if not greater, rigor in situations involving coaches and their players due to the significant influence that coaches commonly have over their student athletes as mentors and role models.[3]

This Essay seeks to unpack the competing legal claims presented by a public-school employee engaging in religious expression in conjunction with their work duties and in the presence of students. The competing First Amendment issues are several: nonestablishment, free exercise, free speech (including the government-employee speech doctrine), and parental expressive rights. These various issues came to a head in 2022 in *Kennedy v. Bremerton School District* where a Court majority affirmed the right of a high school football coach to engage in demonstrative prayers on the football field at the conclusion of a game.[4] In so holding, the majority prioritized free exercise and private free speech claims over the remaining values of nonestablishment, government control of employee speech, and parental rights. In reaching its conclusion, the majority ignored precedent and misconstrued the facts by recharacterizing Coach Joseph Kennedy's overt prayers undertaken while engaged in his official duties as "private" constitutionally protected speech.[5] In the process, the Court disregarded its longstanding acknowledgment of the heightened constitutional concerns about the coercive nature of religious expression within public-school contexts.[6] Even if one accepts the majority's skewed version of the facts, the Court should have deferred to the School District's interests in avoiding an Establishment Clause

3 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) (acknowledging the additional concerns about student coercion associated with participating in athletic events); *see also Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting) ("Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face 'immense social pressure' from their peers in the 'extracurricular event that is American high school football.'" (quoting *Santa Fe*, 530 U.S. at 311)).

4 *Kennedy*, 142 S. Ct. at 2432–33.

5 *Id.* at 2424–25.

6 Lee v. Weisman, 505 U.S. 577, 588 (1992); *Edwards*, 482 U.S. at 584.

violation and workplace disruption by holding that they outweighed Kennedy's speech interests. And finally, as even the concurrences acknowledged, the Court failed to provide any guidance for evaluating government employee speech challenges that involve a "brief lull" in job responsibilities, other than to prioritize an employee's religious speech over other forms of speech.[7] In the end, the majority not only ignored crucial facts in the case and a significant body of constitutional jurisprudence, it created an imbalance within the First Amendment, as well as much uncertainty about the breadth of the *Kennedy* decision as it affects the workplace management for one of the nation's largest government employers, the public schools.[8]

## I. THE *KENNEDY* "FACTS"

The first difficulty in unpacking the competing First Amendment claims surrounding Coach Kennedy's dismissal involves the rendition of the crucial facts. Reading the summaries contained in the majority and dissenting opinions, one could conclude the Justices were discussing different cases. Justice Gorsuch's majority opinion focused on a narrow set of facts that immediately led up to Kennedy's suspension and termination: the events at three football games in October 2015 where, following the final whistle and exchange of handshakes, Kennedy "knelt at the 50-yard line, where 'no one joined him,' and bowed his head for a 'brief, quiet prayer.'"[9] In two of the instances, student players from the opposing team and then members of the audience joined Kennedy after he commenced praying, but not student athletes from his own school.[10] "[Coach] Kennedy did not seek to direct any prayers to students or require anyone else to participate."[11] As Justice Gorsuch summed up the facts:

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7 *Kennedy*, 142 S. Ct. at 2433, 2433–34 (Alito, J., concurring); *id.* at 2433 (Thomas, J., concurring).

8 *See* Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC. EXPERT F. (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [perma.cc/S3XY-GU7E]; Isabella Henry, Note, Kennedy v. Bremerton School District*: Throwing a Red Flag for the Public-Employee Speech Arena to Challenge the Court's Hail Mary*, 82 MD. L. REV. 1067, 1068 (2023); Ann L. Schiavone, *A "Mere Shadow" of Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40, 40–42 (2023). For a contrary view, see Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097 (2023).

9 *Kennedy*, 142 S. Ct. at 2418 (quoting Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1019 (9th Cir. 2021)).

10 *Id.*

11 *Id.* at 2429–30.

> Joseph Kennedy [thus] lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied.[12]

Accordingly, Kennedy's religious "speech was private speech, not government speech," not attributable to the school nor subject to the government-employee speech doctrine or any Establishment Clause constraints.[13] As a result, the District suspended Kennedy for the content of his expression in violation of his free speech and free exercise rights.[14]

In contrast, Justice Sotomayor emphasized a larger set of facts that had led the School District to send Kennedy several warning letters about his religious activities *prior* to the October football games:

> The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion.[15]

Apparently, as recently as September 2015, Kennedy had led his team members in an audible prayer on the field following a game, an incident that had initiated the School District's warning letters that he subsequently ignored.[16] In addition, as Justice Sotomayor noted, Kennedy had previously led his players in prayer in the locker room while also delivering "motivational" talks to the students that were laced with religious admonitions.[17] These earlier actions revealed that the October prayers were but part of a pattern of religious activities Kennedy undertook while engaged in his coaching duties. But because these facts did not lead directly to Kennedy's dismissal, Justice Gorsuch found them to be irrelevant, or at least not controlling.[18]

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12 *Id.* at 2415.

13 *Id.* at 2424.

14 *Id.* at 2424, 2433.

15 *Id.* at 2434 (Sotomayor, J., dissenting).

16 *Id.* at 2436.

17 *Id.* at 2436, 2445 n.3.

18 *Id.* at 2422 (majority opinion) ("The contested exercise before us does not involve leading prayers with the team or before any other captive audience.").

### *A. The Majority's Ruling*

The majority's sanitized set of facts thus preordained the way it applied the applicable constitutional rules. Even though Kennedy's supervisory responsibilities had not ended with the concluding game whistle and his coaching duties continued while he was praying, because "he was not engaged in speech 'ordinarily within the scope' of his duties as a coach" his speech was "private."[19] Feigning to apply the government-employee speech standard from *Pickering v. Board of Education* and its progeny, Justice Gorsuch held that Kennedy was speaking "in his capacity as a private citizen" on "a matter of public concern," necessary elements to trigger the application of that standard.[20] So, in determining whether an employee's speech is entitled to protection or subject to constraint, the question is not whether the expression occurred while they were in the workplace and otherwise engaged in their work duties (as were Sheila Myers in *Connick v. Myers*[21] and Richard Ceballos in *Garcetti v. Ceballos*[22]), but whether the speech was of a "private" nature (as was Ms. Myers's), but nonetheless on a matter of "public concern."[23] What made Coach Kennedy's religious expression a matter of public concern is unclear, other than the fact that the parties agreed it was,[24] and that it was public and religious. It is also unclear why Coach Kennedy's religious expression was any more of public concern than Ms. Myers's survey of fellow attorneys about the workplace conditions of the district attorney's office or Mr. Ceballos's exposure of police misconduct.[25] That is because any real examination of the "content, form, and context" of his expression, taking into account "the whole record" of his religious activities,[26] would have revealed that Coach Kennedy's prayer was not a matter of *public* concern but was "'private' and 'personal'" to him, as he otherwise asserted.[27]

The majority's mere repetition of the standard from *Pickering-Garcetti-Lane* obfuscated the rationale behind why the Constitution should protect some forms of government-employee speech, but not

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19 *Id.* at 2424 (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

20 *Kennedy*, 142 S. Ct. at 2424–25; Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

21 461 U.S. 138, 146–49 (1983).

22 547 U.S. 410, 413 (2006).

23 Deputy District Attorney Richard Ceballos's expression also met the first criterion, but the Court held that negated whether it was a matter of public concern, which it otherwise was. *Id.* at 421.

24 *Kennedy*, 142 S. Ct. at 2424.

25 *Id.*

26 *Connick*, 461 U.S. at 147–48.

27 *Kennedy*, 142 S. Ct. at 2422 (relating that Kennedy claimed only the opportunity to say a "short, private, personal prayer"); Lupu & Tuttle, *supra* note 8.

others. The short answer is that it should if the speech in question reveals some subject matter that would be in the public interest to know, such as disclosures from a government whistleblower.[28] Marvin Pickering, a public-school teacher, was fired for writing a letter to a newspaper criticizing his school board's alleged mishandling of public funds.[29] In holding that his speech was protected, the Court affirmed "[t]he public interest in having free and unhindered debate on matters of public importance" as being "the core value of the Free Speech Clause of the First Amendment."[30] In contrast, Sheila Myers's speech, the Court noted, was essentially a personal grievance about a job reassignment which lacked any public interest (putting aside one claim about pressure to work on Connick's reelection as district attorney).[31] In essence, her claim was "an attempt to turn [her] displeasure [with her transfer] into a cause célèbre," the Court noted.[32] No one cared about her grievance other than Myers. So, as the Court reiterated in its most recent government-employee speech holding, "[s]peech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[33] Coach Kennedy apparently wanted to have it both ways; his religious expression was "private"—as he asserted in several places, all he wanted was the opportunity for a brief, *private* prayer[34]—but then that private prayer opportunity was also a matter of public concern.[35] Of course, by the final football game it *was* of public interest because Kennedy had made it so by publicizing his plight to local media.[36] That aside, it is difficult to reconcile Kennedy's speech with that of Myers who also thought hers was a matter of public concern. Kennedy, like Myers, simply "attempt[ed] to turn [his] displeasure

28 The following analysis borrows from Caroline Mala Corbin's excellent article, "Government Employee Religion." Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193 (2017).

29 Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968).

30 *Id.* at 573.

31 *Connick*, 461 U.S. at 148.

32 *Id.*

33 Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

34 Kennedy asserted that all he wanted was to be able to engage in "private religious expression alone," to say "a short private, personal prayer." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2417 (2022).

35 *Id.* at 2424.

36 *Id.* at 2437 (Sotomayor, J., dissenting) ("Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game.").

[with the District's action] into a cause célèbre."[37] But by simply accepting the parties' stipulation that Kennedy's "private" prayer was a matter of *public* concern, Justice Gorsuch abdicated the Court's duty to show his expression was otherwise a matter of public interest—that is a question of fact that should be resolved by a judicial factfinder, not a litigant.[38]

Some may criticize this understanding of a matter of public concern/interest as being too narrow and failing to protect non-work-related expression that the employee may feel is important. Admittedly, it may be difficult to arrive at an agreeable definition of what is of public interest.[39] First Amendment values may also be advanced by protecting a speaker's self-actualization and individual autonomy. But in attempting to provide some guidance, the Court had previously noted that matters of predominately private interest do not suffice: "[O]n a matter of purely private concern, the employee's First Amendment interest must give way."[40] So, regardless of how much San Diego police officer John Roe may have thought that there was a public interest in viewing his sexually explicit videos, the Court held they were not a matter of public concern constitutionally.[41] Rather, the "public concern" requirement focuses on the value of speech to audiences. As Professor Caroline Corbin has observed:

> The Supreme Court has stressed that government employee speech warrants protection because government employees often have special insight on political issues: '[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.' After all, '[g]overnment employees are often in the best position to know what ails the agencies for which they work.' In short, in explaining why the Free Speech Clause protects government employee speech—if it's speech on matters of public concern—the Supreme Court has emphasized its importance to democratic self-governance.[42]

Justice Gorsuch's syllogistic reasoning thus implodes the rationales behind the government-employee speech doctrine. A teacher's on-the-job religious expression, regardless of the context, will

37 *Connick*, 461 U.S. at 148.

38 *Kennedy*, 142 S. Ct. at 2424; *Lane*, 573 U.S. at 241.

39 The *Connick* Court said to examine "the content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. *Connick*, 461 U.S. at 147–48.

40 Borough of Duryea v. Guarnieri, 564 U.S. 379, 398 (2011).

41 City of San Diego v. Roe, 543 U.S. 77, 84–85 (2004).

42 Corbin, *supra* note 28, at 1217 (first quoting *Lane*, 573 U.S. at 240; and then quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)).

always be "private" and thus not attributable to the school—unless the school administration has a policy that *directs* teachers to pray or proselytize (which, of course, would violate the Establishment, Free Exercise, and Free Speech Clauses)—but apparently for Justice Gorsuch will be a matter of "public concern" because of the public controversy surrounding such issues and/or the shared public interest in protecting religious expression. In fact, the more overt that religious expression is, and in the presence of students, then the more obvious it does not represent school policy or is government speech, such that it is now both *private* and a matter of *public* concern.[43] This circular logic undermines the purposes behind the government-employee speech doctrine. "To make the constitutional cut, public employee speech has to be valuable to its audience."[44]

Admittedly, if a school district had a policy or practice of discriminating against employees based on their religious beliefs or practices, that would be a matter of public interest that should be exposed. At a minimum, the district would be acting in violation of Title VII, and the Court has decried "official expressions of hostility to religion."[45] But the facts in *Kennedy* clearly fail to show any official policy or practice of discriminating against Coach Kennedy based on his religion.[46] On the contrary, the District agreed to allow Kennedy to pray privately in his office or locker room prior to or following the games. Rather than discriminating against Kennedy because of his religious beliefs, the District went out of its way to accommodate those beliefs.[47]

Apparently after the *Kennedy* decision, school employees get to decide when and where they switch on their private religious expression, even if they are otherwise engaged in their official duties. As discussed, the undisputed facts indicated that the School District

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43 Here, I am envisioning a school policy that may accommodate employees' religious requests by allowing them to engage in group prayer or scriptural readings in a teachers' lounge during noninstructional time or to use a prayer mat in a private space to pray to Mecca at appointed times.

44 Corbin, *supra* note 28, at 1217.

45 42 U.S.C. § 2000e (2018); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732, 1729–32 (2018).

46 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2436 (2022) (Sotomayor, J., dissenting) (quoting Joint Appendix at 45, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)) ("The District reiterated that 'all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities.'"). The majority side-stepped applying this standard by remarking that "[p]rohibiting a religious *practice* [i.e., forbidding Kennedy from demonstrably praying on the fifty-yard line while engaged in his official duties] was thus the District's unquestioned 'object.'" *Id.* at 2423 (majority opinion) (emphasis added).

47 *Id.* at 2438 (Sotomayor, J., dissenting).

offered to accommodate Coach Kennedy's religious needs by allowing him to pray privately before or after the games in the locker room or even in an empty stadium.[48] Despite claiming that he only wished to engage in "'private religious expression' alone," he insisted that his "sincerely-held religious beliefs" "'compelled' [him] to offer a 'post-game personal prayer' of thanks at midfield" in front of an audience.[49] Apparently, he would break his "commitment to God" by praying elsewhere or a little later in time.[50] The majority sidestepped the obvious Establishment Clause ramifications of this stance (see discussion below) by highlighting how at the same time other coaches and staff could briefly attend to personal matters such as checking sports scores on their smart phones or greeting friends.[51] The false equivalency between Kennedy's demonstrative prayers and those examples is obvious, and it does not address why the midfield location was a necessary component even if brief private expression was allowed during the postgame period. As Professors Lupu and Tuttle noted, despite the proffered accommodations by the School District, "Kennedy had been defiant, reaching out for publicity and refusing to move his post-game prayers any further from the players than the fifty-yard line, immediately after the games."[52] The ramifications for now protecting a school employee's preference of when, how, and where to engage in their "private" religious expression, regardless of their employer's reasonable accommodations, are many.

This is not to argue that a school employee's private religious expression should never be protected. Teachers retain some First Amendment rights while engaged in their duties, and rightfully so. Teachers, just like their students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[53] Academic freedom is just one compelling justification for affording protection. Teachers "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[54] Protecting a teacher's truly private religious expression is also important, and accommodations of a school employee's religious needs may be mandated by Title VII[55] and the Religious Freedom Restoration Act.[56] The problem lies with the

48 *Id.*
49 *Id.* at 2417 (majority opinion).
50 *Id.*
51 *Id.* at 2423, 2425.
52 Lupu and Tuttle, *supra* note 8.
53 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
54 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
55 42 U.S.C. § 2000e (2018).
56 42 U.S.C. §§ 2000bb–bb-4 (2018).

rigidity of the "one size fits all" *Pickering-Garcetti* formula which does *not* fit all sizes or situations.[57] As stated, a teacher's religious expression will by its very nature be "private" expression and unrelated to the academic message the school seeks to project (or one would hope so). Rather than attempting to force a square peg into a round hole by declaring it is a matter of public concern, as the *Kennedy* majority did,[58] or conversely, that it was "government speech," as the School District asserted,[59] the approach should rely on a modification of *Lane v. Franks*, one that asks not whether the *substance* of the expression was "ordinarily within the scope of an employee's duties,"[60] (as the majority asked[61]), but whether the expressive *moment* occurred when the employee was carrying out their duties in any significant manner. A school employee reading his or her Bible in the teacher's lounge or praying to Mecca in an empty room should be protected, regardless of whether it "can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[62]

But when teachers, including coaches, are on the clock and supervising students, their ability to engage in demonstrative religious expression whenever they desire must come second to concerns about endorsement, student impressionability, and coercion, which this Essay turns to next.

## II. THE DISTRICT'S INTERESTS

Once finding that Kennedy's prayer was both private and public and implicated the *Pickering* analysis, the majority segued to consider

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57 The formula has received significant criticism from the academy. *See, e.g.*, Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008) (describing *Garcetti* as "unsound as a matter of First Amendment policy"); Henry, *supra* note 8, at 1095 ("In *Kennedy*, the Court failed to recognize that the 'lessons' it relied on from *Lane* and *Garcetti* are ill equipped to address the heightened constitutional concerns within public schools.").

58 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022).

59 Brief for the Respondent in Opposition at 21–25, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

60 Lane v. Franks, 573 U.S. 228, 240 (2014).

61 *Kennedy*, 142 S. Ct. at 2424 (citation omitted) (quoting *Lane*, 573 U.S. at 240)) ("When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.").

62 *Lane*, 573 U.S. at 241 (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

whether the School District's interests as an employer outweighed Kennedy's expressive interests. But because the controversy implicated the Free Exercise and Free Speech Clauses, the Court declined to apply the *Pickering* balancing test (as if *Pickering* and its progeny did not otherwise involve First Amendment claims).[63] According to the majority, since the School District's directive and ultimate termination relied expressly on Kennedy's religious expression, it was not neutral with respect to religion, thus deserving of strict scrutiny analysis. But in the end, the majority was relieved from applying either strict scrutiny or the balancing test because the District's rationales for disciplining Kennedy were wanting.[64]

Turning to the Establishment Clause as possible grounds, Justice Gorsuch noted that no one observing Kennedy's fifty-yard line prayer would have assumed that the District endorsed his histrionics, and, he continued, the Court "long ago abandoned [the] *Lemon* [test] and its endorsement test offshoot."[65] As for the remaining viable Establishment Clause test—coercion—there was "no evidence that students [were] directly coerced to pray with Kennedy."[66] Accepting Kennedy's protestations uncritically, the majority asserted that he "repeatedly stated that he 'never coerced, required, or asked any student to pray,' and that he never 'told any student that it was important that they participate in any religious activity.'"[67] This ignored the District Court's findings that "that players had reported 'feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time . . . .'"[68] And because the District had not disciplined Kennedy for the earlier prayers or motivational speeches in the locker room—with Justice Gorsuch minimizing the latter as a "tradition [that] predated Mr. Kennedy at the school"—those arguably more coercive events did not matter.[69] This is at tension with Kennedy's own admission that he also hoped that his prayerful

63 *See Kennedy*, 142 S. Ct at 2445 (Sotomayor, J., dissenting) ("The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel.").

64 *Id.* at 2426 (majority opinion).

65 *Id.* at 2427.

66 *Id.* at 2429 ("[I]n this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.").

67 *Id.* (quoting Joint Appendix at 170, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)).

68 *Id.* at 2440 (Sotomayor, J., dissenting) (quoting Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1239 (W.D. Wash. 2020)).

69 *Id.* at 2429 (majority opinion).

actions served as a model for his players and he asked the District not to prevent students joining him in his prayers.[70]

Missing from the majority's Establishment Clause analysis is any meaningful consideration of the school prayer cases.[71] Justice Gorsuch did not discuss either *Engel v. Vitale* or *School District of Abington Township v. Schempp*, other than to quote from Justice Goldberg's concurrence in *Schempp* where he warned about the "mere shadow[s]" of "false choice[s] premised on a misconstruction of the Establishment Clause."[72] Only *Lee v. Weisman*—the graduation prayer case—and *Santa Fe Independent School District*—involving prayers at a football game—received any passing attention, but chiefly to contrast the "official" nature of the prayers in both cases and that they were broadcast over public address systems to "captive audience[s]."[73] Rather, the majority paid more attention to, and found greater commonality with, more recent cases involving religious expression in government settings *outside* the public school context where no religious coercion existed.[74]

The majority avoided this consideration by casting the case as involving "private religious expression" that just happened to take place in a school environment rather than as a school employee's overt religious expression that occurred while on duty and in the presence of students. The majority's brushing aside of the Court's sixty years of jurisprudence examining the pressures and concerns about religious activity in educational contexts is both disappointing and troubling. As the Court had long noted, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[75] Public schools have a "heightened" interest under the Establishment Clause in "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[76] Research shows that children are susceptible to peer

70 *Id.* at 2441, 2444 (Sotomayor, J., dissenting).

71 *See* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

72 *Kennedy*, 142 S. Ct. at 2432 (quoting *Schempp*, 374 U.S. at 308).

73 *Id.* at 2431–32.

74 *Id.* at 2427–28, 2430–31 (first citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014); then citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019); and then citing Shurtleff v. Boston, 142 S. Ct. 1583, 1605–06 (2022)). Even the sole dissenter in *Schempp*, Justice Stewart, acknowledged that "[i]t is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults." 374 U.S. at 316 (Stewart, J., dissenting).

75 Shelton v. Tucker, 364 U.S. 479, 487 (1960).

76 *Lee*, 505 U.S. at 592.

pressure towards conformity, such that even "subtle and indirect" pressure "can be as real as any overt compulsion."[77] So in *Lee v. Weisman*, the Court's finding of coercion did not turn on any evidence of direct compulsion. According to the *Lee* Court, for a practice to have a coercive effect and be unconstitutional, it need not involve direct coercion in the form of a threatened penalty or legal sanction. Rather, indirect coercion such as peer pressure will suffice, with the Court emphasizing that "prayer exercises in public schools carry a particular risk of indirect coercion."[78]

Coercion concerns are amplified where school staff or officials are the ones leading prayers, due to the compound effects of "students' emulation of teachers as role models and the children's susceptibility to peer pressure"[79] In *Engel v. Vitale*, the first school prayer case, teachers led the students in reciting the Regents' Prayer,[80] and in *School District of Abington Township v. Schempp*, the Court noted that the prayers were often led by homeroom teachers.[81] Granted, unlike the situation in *Kennedy*, the prayers in both cases were part of an official school policy. Although the official nature of the prayer was one factor for the *Engel* Court leading to its unconstitutionality,[82] it was less salient in *Schempp*, and nevertheless, that was not the only basis for striking down the practices in either case. The Court also focused on the inherently coercive nature of the prayers, which the concurrence and dissent in *Schempp* insisted was indirect at best.[83] But as the majority held in *Engel*:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . .[84]

Not only did the majority opinion minimize the element of coercion present in Coach Kennedy's practices, it completely ignored the extensive body of caselaw concerning teacher religious expression in public school contexts. In *Peloza v. Capistrano Unified School District*, the Ninth Circuit rejected a teacher's free speech claims that he had a

77 *Id.* at 593.

78 *Id.* at 592, 592–95.

79 Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

80 370 U.S. 421, 422, 438 (1962).

81 374 U.S. 203, 208–09 (1963).

82 *Engel*, 370 U.S. at 430–31.

83 *Id.* at 430; *Schempp*, 374 U.S.at 228–29 (Douglas, J., concurring); *id.* at 315–16 (Stewart, J., dissenting).

84 *Engel*, 370 U.S. at 430.

right to talk with students during noninstructional time about his religious views, holding that such discussions would violate the Establishment Clause.[85] The court also rejected the claim he was engaged in private expression:

> While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial.[86]

Similarly, in *Roberts v. Madigan*, the Tenth Circuit upheld a school district's disciplining of a fifth-grade teacher for keeping a Bible on his desk and silently reading it in front of his students during the school day.[87] As the court held, "Mr. Roberts' avowed purpose for reading his Bible in class was to model reading for the students. Because Mr. Roberts chose to keep his Bible on his desk continuously and read it frequently, [the principal] feared that Mr. Roberts was setting a Christian tone in his classroom."[88] Again the court gave no weight to arguments that the teacher was engaged in private expression while involved in his official duties.[89]

Most applicable is the 2011 case of *Johnson v. Poway Unified School District*, where the Ninth Circuit applied the *Pickering-Garcetti* analysis to a case involving a high school math teacher's posting of two large religious banners in his classroom.[90] Even though the court found that the teacher's expression involved a matter of public concern because of the religious-patriotic content of the banners, it also held that he was not speaking as a private citizen because his speech "'owe[d] its existence' to his position as a teacher."[91] As the court stated pointedly:

> [T]eachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. Rather, because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general

85 37 F.3d 517, 522 (9th Cir. 1994).
86 *Id.* at 522.
87 921 F.2d 1047 (10th Cir. 1990).
88 *Id.* at 1055–56.
89 *Id.* at 1057.
90 658 F.3d 954 (9th Cir. 2011).
91 *Id.* at 966 (quoting Garcetti v. Ceballos, 547 U.S. 410, 421(2006)).

> presence of students, in a capacity one might reasonably view as official.[92]

The court explained that these concerns are heightened when the expression is of a religious nature, because of the Establishment Clause.[93] *Johnson* was no outlier, as it followed the approach of other circuits concerning in-school teacher religious speech.[94]

Lower courts have also recognized the heightened concerns about endorsement of religion that arise within the school context. In *Doe v. Duncanville Independent School District*, the school promoted a host of religious activities, including allowing a basketball coach to lead his players in the Lord's Prayer at every practice.[95] In addition to noting the significant pressure on the plaintiff to participate in the team prayers, the court focused on how the activities created an impression of school endorsement of religion, a concern that was

> particularly true in the instant context of basketball practices and games. The challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend. During these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies.[96]

As Justice Sotomayor noted in her dissenting opinion in *Kennedy*, Coach Kennedy did not cease to be either a representative of the school or a role model for his players when he chose to pray demonstratively on the fifty-yard line at the conclusion of the football games.[97]

However, Justice Gorsuch refused to consider "whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion."[98] Rather, he simply found the

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92 *Id.* at 967–68 (citations omitted).

93 *Id.* at 970.

94 *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010); Borden v. Sch. Dist., 523 F.3d 153, 171 (3d Cir. 2008) (holding under *Pickering*-based analysis that school could prohibit faculty participation in student-initiated prayer); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 700 (4th Cir. 2007) (holding under a *Pickering*-based analysis that a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479–80 (7th Cir. 2007).

95 70 F.3d 402 (5th Cir. 1995).

96 *Id.* at 406.

97 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2443 (2022) (Sotomayor, J., dissenting).

98 *Id.* at 2427 (majority opinion).

no-endorsement-of-religion approach to be unworkable.[99] In discussing the "shortcomings" of the endorsement standard, however, Justice Gorsuch disingenuously relied chiefly on nonschool cases, cases involving prayers at legislative sessions, religious displays on public property, and religious flags flying in front of a government building.[100] The reasonable observers in those cases would have been adults confronting the religious expression in situations drastically different from a public-school environment with an audience of impressionable school children.

## III. "HISTORICAL PRACTICES AND UNDERSTANDINGS"

Justice Gorsuch's opinion was a marvel of efficiency, as it single-handedly eliminated two legal standards the Court had applied in school prayer cases—the three-part *Lemon* test and the endorsement test—while it all but eviscerated the coercion test from *Lee v. Weisman*. Reading Justice Gorsuch's opinion closely, the coercion test is not completely dead, only its "subtle coercion" and "indirect coercion" variants. Still, this means that future courts will need to rely on Justice Scalia's dissenting opinion in *Lee* (joined by Justice Thomas) where Justice Scalia, in the process of chastising any form of "ersatz, 'peer-pressure' psycho-coercion," insisted that only coercion "backed by threat of penalty," similar to expulsion from school as in the flag-salute case, would suffice.[101] And because the legal standards upon which the earlier holdings rest are no longer valid, Justice Gorsuch wrote, Establishment Clause controversies arising in the public schools are now to be decided by "reference to historical practices and understandings."[102]

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99 *Id.*

100 *Id.* at 2427–28 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion); then citing Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014); and then citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1604–05 (2022) (Gorsuch, J., concurring)). In the one school case discussed, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), involving a religious group's request to use a public-school classroom following the school day for conducting a religious club, Justice Thomas had summarily dismissed the endorsement argument by noting that because parents had to approve their children's participation in the club, endorsement concerns did not exist. *Id.* at 117–19.

101 Lee v. Weisman, 505 U.S. 577, 641, 641–42 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 640). Justice Scalia also noted how the Barnette children were also subject to "being sent to a reformatory for criminally inclined juveniles, and [their] parents to prosecution (and incarceration) for causing delinquency." *Id.* at 642.

102 *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 576).

The "historical practices and understandings" approach to adjudicating Establishment Clause controversies has been the hobbyhorse for the Court's conservatives for some time.[103] Proponents insist that it aligns decisions with the true purpose and meaning of the constitutional text while it respects our traditions. It also reputedly frees judges from designing artificial and arbitrary standards; in Justice Kennedy's words, "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[104]

This approach suffers from innumerable problems.[105] Simply stated, a historical test is unworkable because there were a variety of perspectives about church-state intermixing during the Founding period. The extensive and conflicting scholarship on this subject demonstrates there was no consensus "original understanding" that can be discovered and applied.[106] This is because, in part, the historical record of the Founding period is incomplete and marked with inconsistencies and ambiguities. What motivated a particular speaker, the idioms they employed, and the context behind a statement, can easily be misunderstood and misconstrued. Also, a "historical practices" approach—assuming an accurate meaning of relevant facts can be divined—cannot address many current controversies that the Founders never anticipated. And finally, a "historical practices" approach invites a selective use of historical documents to arrive at a particular legal conclusion.[107]

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103 *Town of Greece*, 572 U.S. at 576; *Am. Legion*, 139 S. Ct. at 2086. *See also* Cutter v. Wilkinson, 544 U.S. 709, 728–29 (2005) (Thomas, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 673–78 (1984); Marsh v. Chambers, 463 U.S. 783, 786–91 (1983).

104 *Town of Greece*, 572 U.S. at 577.

105 *See* Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505, 507 (2021) [hereinafter Green, *Ahistorical Historicism*]; Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN ST. L. REV. 683, 686, 712 (2008); Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1718 (2006) [hereinafter Green, *Bad History*].

106 *See, e.g.*, DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 45–54 (1995).

107 Green, *Ahistorical Historicism*, *supra* note 105, at 538–57; Green, *Bad History*, *supra* note 105, at 1730–34; Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1622 (1997); Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1591 (1997); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995); Erwin

An attempt to apply a "historical practices and understandings" approach within the public-education context also demonstrates a woeful ignorance of our nation's historical practices in this area. First, what counts as the beginning and ending time period for considering those relevant "practices and understandings?" Problems immediately arise when applying this inquiry to public education. Public schools, as we think of them today, were nonexistent during the Founding period.[108] Although several Founding Fathers like Thomas Jefferson and Benjamin Rush advocated creating a system of public education, one did not arise until approximately a half century after the American Revolution beginning with the Massachusetts Education Act of 1827.[109] Then, do we consider the prevalence of religious practices during its first decade, during the second and third decades, or during the first fifty years? And what schools or jurisdictions are relevant: those that promoted evangelical Protestant religious instruction, catechisms, devotional religious exercises, and used religious-based textbooks; those that followed the Horace Mann model of nonsectarian Bible reading unaccompanied by religious instruction; or those that acknowledged Catholic and Jewish complaints by abolishing any form of religious exercises?[110] Are the practices of punishing and expelling children for refusing to engage in the religious activity relevant or actions we would want to emulate today?[111] And how should courts evaluate the evolution of school religious practices in the years leading up to the school prayer cases in which they became increasingly uncommon?[112]

For Court conservatives to advocate a "historical practices and understandings" approach in this area would also be ironic considering the eagerness with which they *condemned* the historical practice of states refusing to fund Catholic religious schooling during the nineteenth century, referring to it as a "shameful pedigree" that

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Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 908 (1993).

108 *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, at 13–29 (1983); STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 13–15 (2012).

109 Green, *supra* note 108, at 15–16, 20–21.

110 *See id.* at 13–36.

111 *See id.* at 36–42; *see also* Donahoe v. Richards, 38 Me. 379, 391 (1854); Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859).

112 *See* RICHARD B. DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS 49–51 (1962) (indicating that prior to the *Engel* decision, prayer and Bible reading took place in only approximately 42% of the nation's public schools, primarily in the South and Midwest); STEVEN K. GREEN, THE THIRD DISESTABLISHMENT: CHURCH, STATE, & AMERICAN CULTURE, 1940–1975, at 276 (2019).

was "born of bigotry."[113] As I have examined extensively, the origins and applications of the no-funding rule are nuanced and do not lend themselves to any simple conclusions.[114] But the Court's willingness to rely on "historical practices and understandings" selectively only highlights the difficulty, if not hypocrisy, in applying that approach.[115]

## CONCLUSION

Because the First Amendment involves multiple expressive rights it is rare for any single decision to have as wide an impact as *Kennedy* had on overall First Amendment jurisprudence. To be sure, school expression cases have frequently involved multiple and competing First Amendment claims, but usually the Court has sought to balance those competing interests consistent with existing jurisprudence.[116] In *Kennedy*, however, the majority all but eradicated seventy-five years of Establishment Clause jurisprudence related to public school religious activity while it enhanced notions of what constitutes a protected Free Exercise interest.[117] At the same time, the majority sowed confusion into the government-employee speech doctrine. As Justice Sotomayor asserted in her dissent:

> This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.[118]

The full impact of the *Kennedy* holding will become clear only after the Court majority utilizes a "historical practices and

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113 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020) (quoting Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion)).

114 *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295; STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA 251–325 (2010); STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE (2012); STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY 124–36 (2022).

115 In his blistering concurring opinion in *Espinoza*, Justice Alito acknowledged that he relied heavily on historical accounts supplied by amici long opposed to the no-funding rule. *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring).

116 *See, e.g.*, Board of Education v. Mergens, 496 U.S. 226 (1990) (upholding the Equal Access Act by balancing free expression, public forum, and Establishment Clause interests); Good News Club v. Milford Central School, 533 U.S. 98 (2001) (balancing same interests).

117 *See* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (striking down on-campus "released time" religious instruction).

118 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2446 (Sotomayor, J., dissenting).

understandings" approach to resolve future school prayer controversies.[119] But one thing that the *Kennedy* holding tells us now is that with the Establishment Clause guardrails all but gone, a school employee's "right" to engage in "private" religious expression while engaged in their duties will likely prevail over the school district's interests. An imbalance among First Amendment values will only continue.[120]

119 Professor Barclay argues that Justice Gorsuch offered a "nuanced historical test" that "a variety of historical hallmarks relevant to what was viewed as an established religion at the founding." Barclay, *supra* note 8, at 2104. As noted above, those hallmarks have questionable application within the context of public-school environments.

120 *See* Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023); Steven K. Green, *Disrupted Symmetry*, LIBERTY, Nov.–Dec. 2023, at 4–9.