GOD-TALK IN THE PUBLIC SCHOOLS

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INTRODUCTION

The Court has long struggled to determine the conditions under which God-talk is constitutionally permissible in the public schools. Cases ranged from challenges to prayers at the beginning of the day to religious sessions after school. Regrettably, the approach determining which school policies pass muster has been difficult to understand because the criteria seem to change without explanation – factors important in one case are unimportant in others. At this point, the underlying jurisprudence is so convoluted that lower courts must simply guess which school practices are prohibited.

Part II discusses the case law involving religious affirmations during the school day, focusing on the Pledge of Allegiance and prayer. The Court has made clear that students must be permitted to opt out of making affirmations contrary to conscience. However, the Court has had some difficulty in reaching a consensus about what constitutes impermissible state promotion of religion.

Part III discusses school activities involving religion once classes have finished. Here, the jurisprudence is even more unsettled, with the Court becoming increasingly willing to permit activities once thought constitutionally impermissible. The article concludes that the Court has laid the foundation for completely rewriting the law in this area, although time will tell whether the Court will really ignore past case law and construe Establishment guarantees in a way that is antithetical to long-recognized principles.

I. RELIGION DURING THE SCHOOL DAY

The Court has addressed various state practices during the school day that implicate religion. Two practices in particular have been the subjects of multiple decisions: starting the day with the Pledge of Allegiance and starting the day with prayers in the classroom.[1] While the Court's decisions clarified the issues to some extent, those decisions leave much room for interpretation.

A. Conscience and the Pledge

In 1940, the United States Supreme Court held that the First Amendment Religion Clauses were incorporated through the Fourteenth

[1] *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (pledge); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (pledge); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) (pledge); Engel v. Vitale, 370 U.S. 421 (1962) (prayer); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (prayer); Wallace v. Jaffree, 472 U.S. 38 (1985) (prayer).

Amendment to apply to the states.[2] Prior to that, Religion Clause challenges to school policy had been rejected because they did not involve a federal question.[3] But once the Court recognized that Religion Clause guarantees also apply to the states, the conflict between school policy and the dictates of conscience was addressed on the merits in *Minersville School District v. Gobitis*.[4]

The Minersville schools expelled the Gobitis children for their conscience-based[5] refusal to salute the flag as "the children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture."[6] School policy precluded any child unwilling to make the pledge from attending public school,[7] which meant that the children had to be enrolled in private school.[8] Their father, Walter Gobitis, challenged the constitutionality of their expulsion.[9]

The required performance involved the following:

> The right hand is placed on the breast and the following pledge recited in unison: 'I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all.' While the words are spoken, teachers and pupils extend their right hands in salute to the flag.[10]

The Court explained that the Religion Clauses "guard against . . . bitter religious struggles by prohibiting the establishment of a state religion

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[2] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[3] *See* Leoles v. Landers et al., 302 U.S. 656 (1937); Hering v. State Board of Educ., 303 U.S. 624 (1938); Gabrielli v. Knickerbocker, 306 U.S. 621 (1039); Johnson v. Deerfield, 306 U.S. 621 (1939).

[4] 310 U.S. 586 (1940).

[5] *Id.* at 591-92 ("The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture.").

[6] *Id.*

[7] *Id.* at 592 ("[T]heir father, on behalf of the children and in his own behalf, brought this suit. He sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school.").

[8] *Id.* ("The Gobitis children were of an age for which Pennsylvania makes school attendance compulsory. Thus they were denied a free education and their parents had to put them into private schools.").

[9] *Gobitis*, 310 U.S. at 592 ("To be relieved of the financial burden thereby entailed, their father, on behalf of the children and in his own behalf, brought this suit.").

[10] *Id.* at 591.

and by securing to every sect the free exercise of its faith."[11] The Clauses preclude the Government from "interfer[ing] with organized or individual expression of belief or disbelief."[12] However, when the dictates of conscience conflict with the common good,[13] some decisions must be made about the conditions under which sanctions will be imposed on those whose exercise of conscience endangers others.[14]

When determining whether a state policy burdening religion violates constitutional guarantees, the *Gobitis* Court first considered whether the policy at issue was adopted to target religious beliefs and practices or instead was adopted for other legitimate purposes. This policy at issue in *Gobitis* was adopted to promote "the desirable ends to be secured by having . . . public school children share a common experience . . . designed to evoke in them appreciation of the nation's hopes and dreams, its sufferings and sacrifices."[15] The state's purpose was secular, which was important because "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[16] Thus, the Court suggested, policies promoting legitimate ends that were not designed to benefit or burden religion were generally upheld when challenged as a violation of Religion Clauses guarantees.[17]

In the Court's view, the secular interest at issue was not merely legitimate but was of the utmost importance: "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."[18] At this time, Europe was already at war,[19] and countries placed a high premium on loyalty and unity.[20] When weighing the implicated interests, the Court placed on one side of the balance the

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[11] *Id.* at 593.

[12] *Id.*

[13] *Id.* ("But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men.").

[14] *Gobitis*, 310 U.S. at 594.

> Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.

[15] *Id.* at 597.

[16] *Id.* at 594.

[17] *Id*.

[18] *Id.* at 595.

[19] David Heymsfeld, *Those Angry Days: Roosevelt, Lindbergh, and America's Fight over World War II, 1939-1941*, FED. LAW. 88, 89 (2013) ("World War II began in 1939.") (reviewing LYNNE OLSON, THOSE ANGRY DAYS: ROOSEVELT, LINDBERGH, AND AMERICA'S FIGHT OVER WORLD WAR II, 1939-1941 (2013)).

[20] *Cf.* John Fabian Witt*, Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 745 (2004) (discussing "the importance of national loyalty in time of war" (citation omitted)).

very existence of the nation,[21] framing the issue as whether the Constitution precludes the State from adopting methods by which its very survival can be assured.[22] The Court was unwilling to second-guess the State's judgment with respect to whether loyalty could best be achieved by accommodating differing beliefs and practices or instead requiring impressionable students[23] to recite the Pledge of Allegiance in the morning.[24]

At issue was not merely whether the Court should defer to the State about what children should be required to do regarding the Pledge of Allegiance; rather, "[w]hat the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent."[25] Framing the issue this way was important because "the state is normally at a disadvantage in competing with the parent's authority."[26] Nonetheless, the Court was unwilling to hold that the Constitution mandated a religious exemption to

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[21] *See Gobitis*, 310 U.S. at 596 ("The ultimate foundation of a free society is the binding tie of cohesive sentiment.").

[22] *Id.* at 597

> The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.

[23] *Id.* (discussing the state's "belief in the desirable ends to be secured by having its public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation").

[24] *Id.* at 598

> The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the court-room is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances.

[25] *Id.* at 599.

[26] *Gobitis*, 310 U.S. at 599.

the flag-salute requirement, parents' beliefs about what was appropriate for their children notwithstanding.[27]

The *Gobitis* Court considered two different constitutional challenges to the state policy: (1) a free exercise challenge based on the unintended burdening of religious belief and practice, and (2) a Fourteenth Amendment challenge to the undermining of parental authority.[28] The first challenge did not pose much difficulty for the state because as a general matter, laws incidentally burdening religion had to be followed.[29] However, the latter challenge was more serious because parental authority is constitutionally protected.[30] Presumably, the *Gobitis* Court emphasized the compelling nature of the implicated state interest to justify overriding the parent's authority[31] rather than to justify the Court's rejection of the Religion Clauses challenge, since the latter could be justified as long as the State had a legitimate interest and did not have the purpose of promoting or undermining religion.[32]

After the *Gobitis* decision was issued, the West Virginia Board of Education imposed a policy requiring recitation of the Pledge.[33] Students and

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[27] *Id.* at 599-600

> But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

[28] *See id.* at 599 (citing to Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925), which cited to Meyer v. Nebraska, 262 U. S. 390 (1923), which struck down an education law limiting parents' rights to educate their children). *See Soc'y of the Sisters*, 268 U.S. at 534–35 ("Under the doctrine of *Meyer v. Nebraska*,… we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."). *See also Meyer*, 262 U.S. at 399 ("The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment.").

[29] *Id.* at 594 ("The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects.").

[30] *See id.* at 599-600 (citing *Soc'y of the Sisters*, 268 U.S. at 510).

[31] *See supra* text accompanying notes 25-27.

[32] *See supra* text accompanying note 26 (discussing the general tendency to uphold legislation that was not intended to support or undermine religion).

[33] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943)

> The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the

teachers were to make "the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.'"[34]

Students who refused to conform would be expelled and could not return until they were willing to make the Pledge.[35] Children who were not attending school might be declared "delinquent."[36] The parents of delinquent children might be prosecuted and, if convicted, subject to fine and imprisonment.[37]

When analyzing whether the religious rights asserted were constitutionally protected, the *Barnette* Court noted that the "freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual."[38] Collisions between the rights of different parties are the kinds of "conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin."[39] Here, instead, the "sole conflict is between [state] authority and rights of the individual."[40]

In overruling *Gobitis*,[41] the *Barnette* Court explained: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[42] Liberty comes at a price, and "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[43] Rather than suggest that the fate of the Nation depended upon forcing school children to make the Pledge, the *Barnette* Court suggested that when unusual attitudes "are so harmless to others or to the

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> salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.'

[34] *Id*. at 628-29.

[35] *Id*. at 629 ("Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance.").

[36] *Id*. ("[T]he expelled child is 'unlawfully absent' and may be proceeded against as a delinquent.").

[37] *Id*. ("His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.").

[38] *Barnette*, 319 U.S. at 630.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 642 ("The decision of this Court in Minersville School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled.").

[42] *Id*.

[43] *Barnette*, 319 U.S. at 641-42.

State as those we deal with here, the price is not too great"[44] for permitting students to refuse to make the pledge. While the *Gobitis* Court suggested that the fate of the Nation depended upon upholding the Pledge of Allegiance requirement,[45] the *Barnette* Court believed that there was little cost in striking down that requirement.[46]

One way to understand the *Barnette* Court's willingness to overrule *Gobitis* involves the respective Courts' differing assessments of how much danger was posed by refusing to defer to the State.[47] That change of perspective was likely partially attributable to changes in the composition of the Court.[48] But the *Barnette* Court was not resting its holding on the low cost associated with respecting religious rights: the "freedom to differ is not limited to things that do not matter much."[49] A position that religious rights would only be respected where there was no cost to according that respect "would be a mere shadow of freedom."[50] Instead, a system that takes the right to follow one's own path seriously will protect that right even where there is some potential cost to doing so: "The test of its substance is the right to differ as to things that touch the heart of the existing order."[51] Rights are not subject to political whim,[52] and the likelihood of significant harm must be established before such rights can justifiably be overridden.[53]

While understanding that the motivation behind refusing to salute the flag in the instant case was religious belief,[54] the Court recognized that some objecting to the flag salute requirement had other motivations.[55]

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[44] *Id*. at 642.

[45] *See supra* text accompanying notes 21-22.

[46] *See supra* text accompanying note 44.

[47] *Cf*. Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 372 (2008) ("Reflecting on the sudden reversal the day *Barnette* was decided, an editorialist mused that 'the war news is pretty good these days' and 'maybe the Supreme Court reads the war communiqués.'" (quoting Editorial, *Court Reverses Self*, BERKSHIRE EAGLE, June 15, 1943 (on file with Washington University Law Review)).

[48] *Id*. at 375 ("In the interim, Justice Stone, the lone dissenter in *Gobitis*, was elevated to Chief; Robert H. Jackson and Wiley Blount Rutledge, Jr., who both later voted to reverse the decision, also joined the Court.").

[49] *Barnette*, 319 U.S. at 642.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[53] *Id*. at 639 ("But freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.").

[54] *Barnette*, 319 U.S. at 634 ("[R]eligion supplies appellees' motive for enduring the discomforts of making the issue in this case.").

[55] *Id*. at 634-35 ("[M]any citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.").

Barnette does not focus on free exercise in particular[56] but also suggests that the State cannot require individuals[57] to make such an affirmation contrary to political belief.[58] The Court's choice to characterize the right at issue as the freedom to have one's own political and religious beliefs was important, at least in part, because a different test was triggered to determine the constitutionality of the state practice at issue. The *Gobitis* Court suggested that state laws and policies incidentally burdening religion would generally be upheld,[59] while the *Barnette* Court suggested that "freedoms of speech and . . . of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[60] The latter standard does not employ a presumption of constitutionality as long as the state did not intend to support or undermine religion[61]– on the contrary, state statutes implicating these guarantees will be struck down unless the state can meet its heavy burden of establishing that the statute is needed to forestall grave and immediate harm.[62]

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[56] Daniel Gordon, *Life's Complexities: Rethinking Barnette, the Flag, Totalitarianism, and the First Amendment*, 17 U. MASS. L. REV. 142, 150 (2022) ("Jackson reframed the compulsory flag salute in terms of free speech, although courts had previously approached it in terms of freedom of religion."). *See also* Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N. U. L. REV. 261, 269 (2015) ("The Court would soon overrule itself on the issue of mandatory flag salutes in *West Virginia State Board of Education v. Barnette*, emphasizing that free speech is a constitutional lodestar and that democracy cannot exist without it."); Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 820-21 (1986) ("Its plurality opinion, however, explicitly did not rely on the principle of religious liberty that had been extensively briefed by the lawyer representing the Jehovah's Witnesses. Instead, the four Justices appealed to a broader principle. Writing for the plurality, Justice Jackson condemned, in a much-quoted passage, government prescribed orthodoxy.").

[57] *Barnette*, 319 U.S. at 635 ("It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.").

[58] *Id*. at 634–35 ("[M]any citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual."). *See also id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[59] *See supra* text accompanying note 16.

[60] *Barnette*, 319 U.S. at 639.

[61] *See supra* text accompanying note 16.

[62] *See supra* text accompanying note 60.

Court members were not suggesting that conscience gives an individual the absolute right to do whatever she wants.[63] As Justice Black suggested in his concurrence, "[r]eligious faiths . . . do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."[64] Nonetheless, the grave and imminent danger standard is much more difficult to meet than the deferential standard employed by the *Gobitis* Court.

Yet, *Barnette* was not the final word on Pledge of Allegiance cases. In *Elk Grove Unified School District v. Newdow*,[65] a noncustodial parent, Michael Newdow, challenged a state requirement that schools begin the day with a patriotic exercise, where recitation of the Pledge of Allegiance would count as meeting the requirement.[66] However, the Pledge of Allegiance had been amended since *Barnette* and now involved the affirmation: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, *one Nation under God*, indivisible, with liberty and justice for all." [67]

Newdow, an avowed atheist,[68] did not wish to have his daughter participate in this daily exercise in her kindergarten class.[69] He filed suit to enjoin the daily recitation on his own behalf and on behalf of his daughter as her "next friend."[70] Sandra Banning, Newdow's ex-partner, opposed the motion, claiming that under California law she alone was entitled to represent their daughter's legal interests.[71] Banning suggested that by permitting Newdow to sue as their daughter's next friend, some might

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[63] *Barnette*, 319 U.S. at 643 (Black, J., concurring) ("No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do.").

[64] *Id*. at 643-44 (Black, J., concurring).

[65] 542 U.S. 1 (2004), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[66] *Id*. at 7 ("Under California law, 'every public elementary school' must begin each day with 'appropriate patriotic exercises.' The statute provides that '[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy' this requirement." (citing Cal. Educ.Code Ann. § 52720 (West 1989)).

[67] *Id*. (citing 4 U.S.C. § 4) (emphasis added).

[68] *Id*. at 8 ("Newdow is an atheist.").

[69] *Id*. ("Newdow's daughter was enrolled in kindergarten in the School District and participated in the daily recitation of the Pledge.").

[70] *Newdow*, 542 U.S. at 8 (noting that Newdow alleges that he "has standing to sue on his own behalf and on behalf of his daughter as 'next friend.'").

[71] *Id*. at 9.

mistakenly believe that Newdow and his daughter agreed that the Pledge of Allegiance should not be said each morning.[72]

Thereafter, Newdow sued only on his own behalf[73] and not on behalf of his daughter.[74] But the *Newdow* Court held that Newdow did not have standing to challenge the law, citing the "domestic relations exception."[75] Yet, the domestic relations exception "divests the federal courts of power to issue divorce, alimony, and child custody decrees,"[76] none of which were at issue in a challenge to the daily recitation of the Pledge. Even if the domestic relations exception were broadened to apply, for example, "if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties,"[77] the exception still would not be applicable in this case. Here, the couple had never married,[78] and neither spousal support nor custody was at issue.[79]

Not content to deny standing and refrain from addressing the merits,[80] the Court commented about the underlying issue. The Court characterized

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[72] *Id*. ("Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views.").

[73] Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1900 (2003) ("[A] parent has an interest independent of that of the child in challenging the state's unconstitutional behavior when that behavior interferes with the parent's relationship with his or her child.").

[74] *See Newdow*, 542 U.S. at 10 ("[T]he California Superior Court entered an order enjoining Newdow from including his daughter as an unnamed party or suing as her 'next friend.'").

[75] *Id*. at 12.

[76] *Id*. (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

[77] *Id*. at 13 (citing *Ankenbrandt*, 504 U.S. at 705-06).

[78] Gey, *supra* note 73, at 1898 ("The mother . . . was never married to Mr. Newdow.").

[79] *Cf*. *Newdow*, 542 U.S. at 21 (Rehnquist, C.J. concurring in the judgment) ("[R]espondent does not ask this Court to issue a divorce, alimony, or child custody decree.").

[80] *Cf*. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); *id*. at 342 ("The case-or-controversy requirement thus plays a critical role, and 'Article III standing ... enforces the Constitution's case-or-controversy requirement.'" (citing *Newdow*, 542 U.S. at 11)); Brendan T. Beery, *Free Exercise Standing: Extra-Centrality as Injury in Fact*, 93 ST. JOHN'S L. REV. 579, 619 (2019) ("[S]tanding is a justiciability issue that normally precedes any discussion of the merits of a case."); Richard A. Epstein, *Concepts Before Percepts: The Central Place of Doctrine in Legal Scholarship*, 84 U. CHI. L. REV. 99, 115 (2017) ("[T]the law of standing . . . is concerned with which claims will be allowed to go forward, and which will be stifled without reaching the merits."); Regina G. Thornton, *Notice, Compliance, and A Private Right of Action: A Tale of Two Statutes*, 19 QLR 371, 398 (2000)

the issue as Newdow "wish[ing] to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree."[81] But it is not as if this was simply a power play between parents about what some third party would be allowed to say to the child. Rather, this was a challenge to the *state's* teaching a child "religious ideas."[82] The Establishment concerns were simply not part of the majority's analysis. Even if Banning's interest was superior to Newdow's were the couple disagreeing about some purely domestic matter concerning how the child would be raised, like how early the child should be going to bed, that would not establish that Newdow lacked a sufficient implicated interest for purposes of challenging the State's alleged violation of Establishment Clause guarantees.[83]

The Court denied Newdow's standing at least in part because he was asserting his "claimed right to shield his daughter from influences to which she is exposed in school *despite the terms of the custody order*."[84] But the custody order did not give Banning the right to demand that her daughter be exposed to religious content while at school,[85] so it is not at all clear that the respective parent's rights were in conflict.

Other justices took issue with the *Newdow* Court's "novel" approach.[86] While they understood that the Pledge includes the words "under God," they nonetheless suggested that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."[87] Yet, the Establishment Clause is not only triggered when the promotion of a *particular* faith is at issue but also when religion

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(discussing "Article III standing [as] a prerequisite to the discussion of the merits question").

[81] *Newdow*, 542 U.S. at 17.

[82] *Id*.

[83] *See id*. at 24 (Rehnquist, C.J., concurring in the judgment) ("Banning's 'veto power' does not override respondent's right to challenge the Pledge ceremony.").

[84] *Id*. at 17 (emphasis added).

[85] *Cf*. Steven B. Thomas & Karen Megay, *Prayer in Public Schools: Policy Considerations for Educators*, 12 ED. LAW REP. 1, 2 (1983) ("Through the years, many practitioners, parents, and students have attempted a variety of methods to reinstate prayer in public education.").

[86] *Newdow*, 542 U.S. at 18 (Rehnquist, C.J., concurring in the judgment) ("The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling.").

[87] *Id*. at 31 (Rehnquist, C.J., concurring in the judgment). *But see* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) ("To recite that the nation is 'under God' is inherently a religious affirmation.").

is favored over non-religion[88] or when certain faiths are favored over others.[89] The Pledge certainly seems to favor certain faiths over others—for example, monotheistic faiths over polytheistic faiths or faiths not incorporating a belief in God.[90] Further, one objection to the required daily recitation of the Pledge is not that this is a religious exercise *rather than* a patriotic one but, instead, that the religion and patriotism are being linked.[91]

Justice O'Connor believed the Pledge an example of "ceremonial deism,"[92] where "government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution."[93] She argued that references to God may "serve to solemnize an occasion

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[88] Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) ("It is enough to note that it is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion[.]'" (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)). ("[A]nd even though it does not aid one religion more than another but merely benefits all religions alike." (citing Everson v. Board of Education, 330 U.S. 1, 15 (1947)).

[89] *See* Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens's Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 632 (2012) ("[D]isplays violate the Establishment Clause if they express a message of religious preferentialism that favors certain religions over others.").

[90] *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring in the judgment) ("[S]ome religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being. . . . But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation."). Some justices believed that preferring monotheistic religions was permissible. *See* McCreary Cnty., Ky. v. Am. C.L. Union of Ky., 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) ("Publicly honoring the Ten Commandments [and] . . . publicly honoring God . . . are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint."); *id*. at 879 ("[T]he dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view.").

[91] *See* Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 553-54 (2007) ("The Pledge can be both political and religious.") (suggesting that the view that "religious affirmations are permissible as long as they are in the context of a patriotic activity . . . implies that the government can endorse a variety of religious beliefs as long as it does so in the context of some patriotic exercise and potentially constitutionally immunizes a linking which can be especially worrisome").

[92] *Newdow*, 542 U.S. at 37 (O'Connor, J., concurring in the judgment) ("This case requires us to determine whether the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does.").

[93] *Id*. (O'Connor, J., concurring in the judgment).

instead of to invoke divine provenance"[94] and need not violate Establishment guarantees.[95]

According to Justice O'Connor, Establishment claims should be resolved by referring to the Endorsement Test, explaining that endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[96] However, she also believed that the reasonable person would not view solemnification as implicating endorsement concerns—a reasonable observer "would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion." [97] Yet, an atheist would not only *not* consider the references to God solemnifying but would also feel like an outsider when participating or witnessing the Pledge exercise,[98] and being told that her sincere reaction to the Pledge recitation was not reasonable would hardly make her feel like a respected, full member of the political community.[99]

While the *Gobitis* Court undermined the importance of the individual interests and exaggerated the importance of the State interests in mandating the Pledge, the *Barnette* Court corrected that assessment.[100] *Barnette* has subsequently been recognized as a seminal case.[101.] Regrettably, the

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[94] *Id*. at 36 (O'Connor, J., concurring in the judgment).

[95] *Newdow*, 542 U.S. at 37 (O'Connor, J., concurring in the judgment).

[96] *Id*. at 34 (O'Connor, J., concurring in the judgment) (citing Lynch v. Donnelly*,* 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). The *Bremerton* Court suggested that the Endorsement Test is no longer good law. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[97] *Newdow*, 542 U.S. at 34 (O'Connor, J., concurring in the judgment).

[98] John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 597 (2003) ("The religious language in the Pledge of Allegiance was important to those who supported its insertion in 1954, and it is important to those who continue to support its inclusion. But it is just as important to those Americans who feel alienated by its message of exclusion.").

[99] *Cf.* Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273, 1293 (2013) ("Justice O'Connor seems much more concerned about the feelings of the hypothetical observer and much less concerned that some members of the community might reasonably and actually feel like insiders and outsiders respectively because of a particular display.").

[100] *See supra* notes 60-62 and accompanying text.

[101] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2316 (2022) (Roberts, C.J., concurring in the judgment) (recognizing *Barnette* as a "seminal constitutional decision[]"). *See also* Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV**.** 1, 20 (2019) (recognizing *Barnette* as a seminal case); Peter J. Jenkins, Comment, *Morality and Public School Speech: Balancing*

Newdow Court seemed not to appreciate the lessons of *Barnette*, instead undercutting the significance of the implicated individual interests.

B. Prayer During the School Day

The State must exercise care before requiring students to affirm tenets contrary to their religious or political beliefs. At the very least, the State must afford students the option not to participate. But a separate question is whether affording such an option relieves the state of other obligations under the Establishment Clause. For example, the Court addressed whether the State can mandate prayer in school as long as objecting students are afforded the option not to participate.

At issue in *Engel v. Vitale*[102] was whether students could be required to recite a state-authorized prayer to start the school day. The New York Board of Regents created a prayer[103] to be recited daily:[104] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[105] The prayer was nonsectarian in that it did not distinguish among certain faiths,[106] although those believing in more than one God might feel that they were being asked to recite something contrary to faith as might those who did not believe in God at all.[107]

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the Rights of Students, Parents, and Communities, 2008 B.Y.U. L. REV. 593, 600 (2008) (same); *Constitutional Law-First Amendment-Washington Court of Appeals Upholds Apology Requirement of Juvenile's Sentence.-State v. Kh-H, 353 P.3d 661 (Wash. Ct. App. 2015)*, 129 HARV. L. REV. 590, 594 (2015) (same); Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 225 (2017) (same).

[102] 370 U.S. 421 (1962).

[103] *Id*. at 423.

[104] *Id*. at 422

> The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day.

[105] *Id*.

[106] Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2139 (1996) (discussing "the nondenominational prayer[] in Engel"). *See also* William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1507 (2006) ("[I]n *Engel v. Vitale* [the Court] struck down a voluntary, nondenominational, nonsectarian, monotheistic prayer.").

[107] *Cf.* Peter Brandon Bayer, *Is Including "Under God" in the Pledge of Allegiance Lawful? An Impeccably Correct Ruling*, 11 NEV. LAW. 8, 12 (2003) ("Even if understood to encourage belief in any faith, including creeds that either are

The New York Court of Appeals upheld the state's power to require this daily prayer as long as objectors could opt out.[108] The United States Supreme Court reversed,[109] reasoning that "by using its public school system to encourage recitation of the Regents' prayer, the State of New York … adopted a practice wholly inconsistent with the Establishment Clause."[110]

The practice at issue was a religious activity,[111] which violated constitutional guarantees because "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country 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."[112] Those guarantees ensure that "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[113]

Engel might be read in different ways. For example, it might be read to prohibit state *creation* of a prayer,[114] which would leave open whether

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polytheistic or eschew a supreme being, 'under God' would still be an unlawful endorsement favoring religion over atheism and agnosticism.").

[108] *Engel*, 370 U.S. at 423

> The New York Court of Appeals, over the dissents of Judges Dye and Fuld, sustained an order of the lower state courts which had upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection.

(citing Engel v. Vitale, 176 N.E.2d 579, 580 (N.Y. 1961), rev'd, 370 U.S. 421 (1962)).

[109] *Id*. at 436 ("The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.").

[110] *Id*. at 424.

[111] *Id*. at 424-25

> There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious.

[112] *Id*. at 425.

[113] *Engel*, 370 U.S. at 430.

[114] *See* Stephen M. Durden, *In the Wake of* Lee v. Weisman*: The Future of School Graduation Prayer Is Uncertain at Best*, 2001 B.Y.U. EDUC. & L.J. 111, 118 (2001) (noting that *Engel* "prohibit[ed] the creation of any official prayers to be said in schools as part of a state prayer program"); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79

prayers not created by the State could be required, as long as students could opt out of participating. That question was answered in *School District of Abington Township, Pennsylvania v. Schempp*.[115]

At issue in *Schempp* was the statutory requirement that sections of the Bible be read each morning.[116] The Pennsylvania statute specified:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.[117]

Students read the Bible verses over the intercom.[118] Then another student would recite the Lord's Prayer and students in the classrooms would be asked to join in that recitation.[119] The students themselves chose which verses to read and which Bible to use, although the school provided only the King James version of the Bible.[120] No statements were made prior to the reading and no comments, interpretations, or explanations were

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IOWA L. REV. 35, 43 (1993) (noting that the *Engel* "Court emphasized that the composition of official prayers lay outside the realm of governmental competence"); Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 320 (2017) (*"Engel* concerned New York state officials' composition of an official school prayer.").

[115] 374 U.S. 203 (1963).

[116] *Id.* at 205.

[117] *Id.*

[118] *Id.* at 207 ("Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building.").

[119] *Id.* ("This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison.").

[120] *Schempp*, 374 U.S. at 207

> The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures.

offered about the reading.[121] Students who did not wish to participate could leave the room or could remain in the room but refrain from taking part.[122]

The Schempps were Unitarians,[123] and some of the passages read to the children, Roger and Donna, were contrary to their faith tradition.[124] While the children could have been excused from the classroom so that they would not hear the prayers, their father Edward Schempp feared that the children leaving the classroom would impair their relationships with teachers and other students.[125]

Perhaps the Schempps' choice to remain in the classroom rather than go elsewhere could be used by the State as a defense to the claim that the children's Free Exercise rights had been violated, because coercion is an element of a free exercise claim.[126] However, the Court's focus was on Establishment guarantees. Because the State was "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison . . . as part of the curricular activities of students who are required by law to attend school"[127] and because the activities were "held in the school buildings under the supervision and with the participation of teachers employed in those schools,"[128] the Court found that "the exercises and the law requiring

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[121] *Id.* ("There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises.").

[122] *Id.* ("The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.").

[123] *Id.* at 206 ("The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church.").

[124] *Id.* at 208

> Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises.

(citing Schempp v. Sch. Dist. of Abington Twp., Pa., 177 F. Supp. 398, 400 (E.D. Pa. 1959), *vacated sub nom.* Sch. Dist. of Abington Twp., Pennsylvania v. Schempp, 364 U.S. 298 (1960)).

[125] *Schempp*, 374 U.S. at 208 ("Edward Schempp testified . . . that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.").

[126] *See id.* at 221 (suggesting that a free exercise violation depends upon "governmental compulsion" (quoting *Engel*, 370 U.S. at 430)).

[127] *Id.* at 223.

[128] *Id.*

them are in violation of the Establishment Clause."[129] Indeed, the Court expressly noted that "these required exercises [were not] mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."[130]

The *Schempp* Court did not hold that reading the Bible was always impermissible in the public classroom. For example, doing so would be permissible where the Bible was "used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects"[131] as long as it was not also being used "as an instrument of religion."[132]

Engel made clear that the State could not compose prayers to be read daily and *Schempp* made clear that the State could not require daily prayer. Both *Engel* and *Schempp* involved the *recitation* of prayers in school,[133] and a separate issue involved whether the First Amendment precluded the *posting* of religious text in schools.

Stone v. Graham involved whether the posting of the Ten Commandments in public schools violated constitutional guarantees.[134] The state of Kentucky argued that the posting served secular purposes,[135] but the Court was unwilling to accept "an 'avowed' secular purpose . . . [as] sufficient,"[136] noting that the school district in *Schempp* had claimed that the daily prayers served "secular purposes as 'the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.'"[137] The *Stone* Court explained, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed

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[129] *Id.*

[130] *Schempp*, 374 U.S. at 224-25 (citing *Engel*, 370 U.S. at 430).

[131] *Id.* at 224.

[132] *Id.*

[133] *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (noting that "the Bible verses . . . [were] read aloud . . . in *Schempp* and *Engel*").

[134] *See id.* at 39 ("A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.").

[135] *Id.* at 41

> The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

(citing 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978)).

[136] *Id.*

[137] *Id*. (citing *Schempp*, 374 U.S. at 223).

secular purpose can blind us to that fact."[138] The Court was not thereby banning the Ten Commandments from the classroom, noting that this was "not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[139] Rather, because the purpose behind posting the Ten Commandments was religious in nature,[140] the State was violating Establishment Clause guarantees.[141]

The United States Constitution does not permit the State to engage in practices where the State's sole purpose is to promote religion.[142] This limitation was also illustrated in *Wallace v. Jaffree*,[143] which involved whether or how the State could encourage prayer at the beginning of the school day.

In 1978, Alabama authorized a one-minute period of silence for meditation at the beginning of the school day.[144] Three years later, the state authorized a period of silence at the beginning of the school day to be used for meditation *or prayer*.[145] The *Wallace* Court reasoned that the State's adding the words "or prayer" was "entirely motivated by a purpose to advance religion,"[146] and hence the statute was unconstitutional.[147] The Court distinguished between the "legislative intent to return prayer to the public schools"[148] and "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the

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[138] *Stone*, 449 U.S. at 41.

[139] *Id.* at 42 (citing *Schempp*, 374 U.S. at 225).

[140] *Id.* at 41 ("The pre–eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.").

[141] *Id.* at 42 ("[T]he mere posting of the copies under the auspices of the legislature provides the 'official support of the State … Government' that the Establishment Clause prohibits.") (citing *Schempp*, 374 U.S. at 222; *Engel*, 370 U.S. at 431).

[142] *Id.* at 41 ("Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.").

[143] 472 U.S. 38 (1985).

[144] *Id.* at 40 ("§ 16–1–20, enacted in 1978, which authorized a 1-minute period of silence in all public schools 'for meditation.'" (quoting ALA. CODE § 16-1-20 (1978)).

[145] *Id.* ("§ 16–1–20.1, enacted in 1981, . . . authorized a period of silence 'for meditation or voluntary prayer.'" (quoting ALA. CODE § 16-1-20.1 (repealed 1998)).

[146] *Id.* at 56.

[147] *Id.* ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.").

[148] *Wallace*, 472 U.S. at 59.

school[-]day,"[149] believing the former[150] but not the latter[151] in violation of constitutional guarantees.

Taken together, the above cases suggest that the State can neither compose official prayers nor require that prayers be recited in school. State actions motivated solely by the desire to promote religion are also unconstitutional. But those limitations leave plenty of room for the State to promote or undermine religion in a host of ways, and the Court has been less than consistent when applying constitutional principles in the context of school-related activities before or after school.

II. FACILITATING RELIGIOUS TEACHING BEFORE OR AFTER SCHOOL

While *Gobitis* and *Barnette* involved school day policies requiring students to act in ways that conflicted with the students' religious beliefs, the Court in a different set of cases explored the respects in which the state was permitted to assist students to obtain pre- or post-school day religious education. These cases also manifested a disappointing inconsistency in approach.

A. Religious Teaching and the State Provision of Logistical Support

The Court has heard a few different cases addressing the logistical support for religious teaching that the state is permitted to provide. The cases ranged from whether the state may facilitate travel to religious schools to whether and how the state may rearrange the school day to facilitate religious instruction. In these cases, the Court emphasized certain principles when deciding one case, only to de-emphasize or ignore those principles in other cases – making the jurisprudence difficult if not impossible to understand.[152]

Everson v. Board of Education[153] was the first of the modern Establishment Clause cases asserting that federal guarantees were violated by a state policy assisting religious schools.[154] At issue was the constitutionality of parental reimbursement for their children's travel costs to parochial

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[149] *Id.*

[150] *Id.* at 61 ("§ 16–1–20.1 violates the First Amendment.").

[151] *See id.* at 59 ("The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16–1–20.") (footnote omitted).

[152] *E.g.*, Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 161 (2000) (discussing the Court's failure to give "clear guidance as to the line of demarcation between legitimate accommodations and unconstitutional establishments").

[153] 330 U.S. 1 (1947).

[154] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("The first case in our modern Establishment Clause jurisprudence was Everson v. Board of Ed. of Ewing . . . .") (italics removed) (citing *id.*).

schools.[155] When deciding whether Establishment guarantees were thereby violated, the Court noted that the Establishment Clause prohibited both the state and federal governments from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[156] In addition, such laws "[n]either can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."[157] The Court also made clear that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[158]

The focus was on whether this reimbursement should be construed as imposing a tax for the benefit of a religious institution.[159] The Court explained that the prohibition on using tax-raised funds to promote religious institutions did not preclude the provision of all state services to religious institutions.[160] For example, police, fire, and sewage services could be provided to religious institutions, because "cutting off church schools from these services, *so separate and so indisputably marked off* from the religious function, . . . is obviously not the purpose of the First Amendment."[161] Because transportation to the school was viewed as analogous to the provision of police and fire services, the reimbursement was upheld.[162]

Yet, a criterion focusing on whether services are separate and marked off from religious functions requires further elaboration before it can be a helpful guide. In subsequent cases, the Court implicitly set out some of the parameters to help determine whether practices were sufficiently separate and marked off so as not to violate constitutional guarantees.

McCollum v. Board of Education involved a practice in Illinois schools whereby "religious teachers, employed by private religious

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[155] *Everson*, 330 U.S. at 3

> The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools.

[156] *Id.* at 15.

[157] *Id.*

[158] *Id.* at 16.

[159] *Id.* at 3 ("The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students.").

[160] *See Everson*, 330 U.S. at 17-18.

[161] *Id.* at 18 (emphasis added).

[162] *Id.* ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and . . . for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law."[163] Interested community members had formed an association and had received permission from the Champaign County Board of Education "to offer classes in religious instruction to public school pupils in grades four to nine inclusive."[164] Classes were offered once weekly and were from thirty to forty-five minutes.[165] Parents had to give permission for their children to attend.[166] Children who did not attend the classes remained at school and performed secular studies.[167] Attendance was taken at the religious classes and the attendance reports were submitted to the secular teachers.[168]

When striking down the program,[169] the Court explained that "not only are the state's tax[-]supported public school buildings used for the dissemination of religious doctrines[, but t]he State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."[170] The Court did not make clear whether each of the two factors – (1) use of the public school for religious programming and (2) making use of the compulsory school machinery – alone sufficed as a basis for invalidating the program, and members of the Court noted that they were addressing this release-time program in particular and were not addressing all release-time programs.[171]

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[163] Ill. *ex rel.* McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203, 205 (1948).

[164] *Id.* at 207.

[165] *Id.* at 207-08 ("[T]hey were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher.").

[166] *Id.* at 207 ("Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend.").

[167] *Id.* at 209 ("Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies.").

[168] *McCollum*, 333 U.S. at 209 ("[S]tudents who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.").

[169] *Id.* at 212 ("This is not separation of Church and State.").

[170] *Id.*

[171] *Id.* at 231 (Frankfurter, J., concurring)

> We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found

A different program was at issue in *Zorach v. Clauson*, where children were released from school to receive religious education off-site.[172] Parents had to consent for the children to be able to attend these religious classes.[173] Students who were not released remained in their classrooms.[174] The religious institutions made weekly reports about who was attending these sessions.[175]

This program did not involve the use of public facilities for the instruction, and the costs of the program were borne by the religious institutions.[176] Those challenging the program nonetheless claimed that it was too similar to the *McCollum* program to be upheld, because "the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; [and] the classroom activities come to a halt while the students who are released for religious instruction are on leave."[177] When the school day is modified so that these off-site religious instruction classes can take place, for example, by making sure that content is not taught during the period that the students are attending religious classes,[178] there is an additional respect in which the state is playing a facilitative role in the teaching of religion.

> unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program.

[172] Zorach v. Clauson, 343 U.S. 306, 308 (1952) ("New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises.").

[173] *Id*. ("A student is released on written request of his parents.").

[174] *Id*. ("Those not released stay in the classrooms.").

[175] *Id*. ("The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.").

[176] *Id*. at 308-09 ("This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations.").

[177] *Zorach*, 343 U.S. at 309.

[178] *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring)

> If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices.

Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1630 n.277 (1995) ("By requiring non-participating students to sit idly in study halls during the release time period, it imposed costs on such students and may have encouraged them to attend the religious classes.").

The Court made clear that free exercise was not at issue here, because "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools."[179] Further, the program itself was not viewed as coercive. "[T]he school authorities . . . do no more than release students whose parents so request."[180] Had coercion been involved, a much different case would have been presented.[181]

The Court implied that refusing to permit this program would have broad implications, because teachers would allegedly be constitutionally prohibited from playing any role in helping students participate in religious events:

> A [C]atholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher . . . cooperates in a religious program to the extent of making it possible for her students to participate in it.[182]

Yet, it is difficult to understand why striking down this program would have had such implications. When students seek to be excused from school, the parent writes a note.[183] The Court reasoned that in addition to obtaining the note from the parent, the teacher would have to corroborate that the child had in fact attended the religious event with the clergy person.[184] Because the teacher was corroborating attendance, the teacher "cooperates in a religious program to the extent of making it possible for her students to participate in it."[185] But this seems incorrect. It is unlikely that the school would in fact require the clergyperson to sign off on having seen the student at religious services if only because it might be rather difficult to remember who had attended in a large congregation. It seems more likely that the school would only require the parent's permission.[186]

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[179] *Zorach*, 343 U.S. at 311.

[180] *Id.*

[181] *Id.* ("If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.").

[182] *Id.* at 313.

[183] *See id.* ("In each case the teacher requires parental consent in writing.").

[184] *Zorach*, 343 U.S. at 313 ("In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister.").

[185] *Id*.

[186] *See*, *e.g.*, COMMISSIONER'S REGULATIONS SECTION 109.2(A) (2010), https://www.p12.nysed.gov/sss/lawsregs/109-2.html ("Absence of a pupil from school during school hours for religious observance and education to be had

If that is so, then there is an important difference between the New York program and the case involving an individual student who wished not to attend school on a religious holiday. The New York program required the involvement of the clergyperson, while there was no such involvement for the child attending a religious service.

Suppose that the Court had been correct that the school required verification that the child had in fact attended the religious function, for example, by requiring in addition a note from the religious entity attesting to the child's attendance. Even so, that would seem analogous to requiring a note from the doctor that the child had had an appointment,[187] and it would seem odd to suggest that the school was thereby cooperating in a medical program.

The point is not to suggest that students should be prohibited from missing school to attend a religious function or to go to a doctor's appointment, but rather to suggest that permitting students to do so should not be thought to warrant a school setting up a program to facilitate religious instruction off-site. In his dissent, Justice Black suggested that the reason the religious instruction was being offered during school hours at another location was "to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery."[188] But if Justice Black's point is accurate, then the State would be changing its own education program to assure that the religious education was successful, which seems hard to square with a prohibition on state promotion of religion.

Rather than suggest that this coordinated effort to get children to receive religious instruction involved impermissible Church-State

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outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.").

[187] *See* Lynn M. Daggett, *The Myth of Student Medical Privacy*, 14 HARV. L. & POL'Y REV. 467, 520 (2020) (discussing "doctor's notes about student absences to keep records of excused and unexcused absences").

[188] *Zorach*, 343 U.S. at 318 (Black, J., dissenting). *Cf*. *McCollum* 333 U.S. at 222 (Frankfurter, J., concurring)

> But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his 'business hours.'

A separate question was what substance would be covered in the nonreligious class during this period when some of the students received religious instruction. *See id*. at 223 (Frankfurter, J., concurring) ("Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.").

cooperation,[189] the *Zorach* Court suggested that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[190] Indeed, the Court went further, suggesting that to hold that the State could not do this "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups."[191] Yet, it is hard to understand how callous indifference would be demonstrated by a public school's refusal to modify its own program just so that religious schools would be sufficiently attractive to students to be well-attended.[192]

The *Zorach* Court emphasized that there was an important difference between *McCollum* and the case before the Court. "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here . . . the public schools do no more than accommodate their schedules to a program of outside religious instruction."[193] But this accommodation meant that no substance was taught in the public school during the time that students were receiving religious instruction elsewhere,[194] which was similar to the policy at issue in *McCollum*.[195] As Justice Black noted in his dissent, "Except for the use of the school buildings in Illinois, there is no difference between the systems."[196]

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[189] *Cf*. Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 704 (1968) ("[T]he Court has sustained programs whose sole purpose is to aid religion . . . [t]he released time program in *Zorach* had no other purpose.").

[190] *Zorach*, 343 U.S. at 313–14.

[191] *Id*. at 314.

[192] *Cf*. Steven A. Seidman, *County of Allegheny v. American Civil Liberties Union: Embracing the Endorsement Test*, 9 J.L. & RELIGION 211, 215 (1991) ("The Court in *Zorach v. Clauson* believed that accommodation of religion is a necessity since anything less would be 'callously indifferent' to religion.").

[193] *Zorach*, 343 U.S. at 315.

[194] *Id*. at 309 ("[T]he classroom activities come to a halt while the students who are released for religious instruction are on leave.").

[195] In *McCollum*, the child not attending religious class would either go to study hall or go to a class teaching some substance. *See McCollum*, 333 U.S. at 227 (1948) (Frankfurter, J., concurring)

> If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices.

[196] *Zorach*, 343 U.S. at 316 (Black, J., dissenting). *See also* David L. Tubbs, *Conflicting Images of Children in First Amendment Jurisprudence,* 30 PEPP. L. REV. 1, 58 (2002) ("The most conspicuous difference between the New York City program upheld in Zorach and the Champaign program concerned the location of

Perhaps *McCollum* and *Zorach* together suggest that location is key and that use of public buildings to conduct sectarian teaching is constitutionally prohibited. However, it would be unsurprising for those advocating religious education to claim that prohibiting their using public schools for that purpose would involve animus or a callous indifference to religion.[197]

In *Board of Education of Westside Community Schools v. Mergens By & Through Mergens*, the Court examined whether a federal law, "the Equal Access Act,"[198] applied to a school refusal to permit a club to meet on campus where the students would "read and discuss the Bible, . . . have fellowship, and . . . pray together. Membership would . . . [be] voluntary and open to all students regardless of religious affiliation."[199] While the club would have been open to students of any faith, this was a "Christian club,"[200] which meant that the students of other faiths would have been learning about and engaging in prayer in the Christian tradition.[201]

The Act provided:

> "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[202]

The Court's Establishment analysis was rather limited, suggesting that "such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion."[203] The secular purpose might be to provide a forum to exchange ideas,[204] the primary effect would not be to promote religion in particular because there would be many

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the religion classes: in the New York program, students left the grounds of the public school.").

[197] *Cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 401 (1993) (Scalia J., concurring) (suggesting that a failure to accommodate all religions in the schools would involve a callous indifference to religion).

[198] 496 U.S. 226, 231 (1990) (citing 98 Stat. 1302, 20 U.S.C. §§ 4071–4074).

[199] *Id*. at 232.

[200] *Id*.

[201] *See id*. at 287 (Stevens, J., dissenting) ("Testimony in this case indicated that one purpose of the proposed Bible Club was to convert students to Christianity."); *id*. at 263 (Marshall, J., concurring in the judgment) ("I write separately to emphasize the steps Westside must take to avoid appearing to endorse the Christian club's goals.").

[202] *Id*. at 235 (citing § 4071(a)).

[203] *Id*. (citing Widmar v. Vincent, 454 U.S. 263, 271-74 (1981)).

[204] *See Widmar*, 454 U.S. at 271 n.10.

nonreligious clubs as well,[205] and there would not be excessive entanglement because the state allegedly would be avoiding discrimination against religious speech.[206]

The Act was passed because Congress disagreed with federal decisions suggesting that permitting student religious groups to meet after school would violate Establishment guarantees.[207] But this suggests that the purpose was to promote religious groups meeting on campus and, if the group at issue in *Mergens* was representative of what Congress wanted to protect, to promote religious proselytizing.[208] Rather than follow the lead that the Court provided for itself in *Wallace*,[209] the *Mergens* Court instead interpreted the "legislative purpose [as] . . . intended to address perceived widespread discrimination against religious speech."[210] The Court was no longer worried about the issues important to the *McCollum* and *Zorach* Courts, namely, where the religious instruction and prayer were taking place. Nor was the Court worried about the difference between prayer and discussing religion in a secular context.[211] The Court instead was willing to group together prayer and discussions about

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[205] *See id*. at 274 ("[T]the forum is available to a broad class of nonreligious as well as religious speakers.").

[206] *See id*. at 271-72 ("[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion.").

[207] *See Mergens*, 496 U.S. at 239 ("[T]he Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time.").

[208] *See supra* text accompanying note 201. *See also Mergens*, 496 U.S. at 247–48

> [P]etitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

[209] *See supra* text accompanying notes 144-52 (discussing the Court's striking down a law because of an impermissible purpose to promote religion).

[210] *Mergens*, 496 U.S. at 239.

[211] *See id*. (discussing members of Congress "who sought to end discrimination by allowing students to meet and discuss religion before and after classes."). But discussing religion is not the same as prayer. *See supra* notes 131-32 (discussing the *Schempp* Court's distinguishing between discussing religion for secular rather than religious purposes). *But see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001) ("We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.").

religion as "religious content,"[212] and find that the Act did not offend Establishment guarantees.[213] In addition, the Court was suggesting that refusing to permit prayer and proselytizing would involve discrimination against religion, thereby providing cover for the Alice-in-Wonderland view[214] that the Religion Clauses are meant to protect religious prayer or indoctrination in the public schools.[215]

By passing the Equal Access Act, Congress in effect suggested that if a school permits student clubs that are not curriculum-based,[216] then the school creates a limited public forum,[217] and the school is prohibited from defining that forum to exclude student groups based on the religious, political, or philosophical content of their speech.[218] But suppose that school policy addresses something other than student campus groups and so does not fall under the Equal Access Act. A separate question was whether schools could create a limited public forum excluding religious groups, for example, because the schools wanted to avoid religious divisiveness.[219]

At issue in *Lamb's Chapel v. Center Moriches Union Free School District* was a New York law that authorized local school boards to permit school buildings and property to be used after school for approved purposes,[220] where those specified purposes did not include using the building

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[212] *Mergens*, 496 U.S. at 247.

[213] *See id*. at 235.

[214] *Cf*. Welsh v. United States, 398 U.S. 333, 354 (1970) (Harlan, J., concurring) (discussing "an Alice-in-Wonderland world where words have no meaning").

[215] *See infra* text accompanying note 305 (suggesting that the Court might find that the Religion Clauses require teacher prayer in schools to be permitted).

[216] *See Mergens*, 496 U.S. at 235 ("A 'limited open forum' exists whenever a public secondary school 'grants an offering to or opportunity for one or more *noncurriculum related* student groups to meet on school premises during noninstructional time.'" (citing § 4071(b)) (emphasis added)).

[217] *See id*.

[218] *See supra* text accompanying note 202. *But see Mergens*, 496 U.S. at 276–77 (Stevens, J., dissenting) (discussing whether "the existence of a French club, for example, would create [the] . . . obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities").

[219] *Cf*. McCollum, 333 U.S. at 237 (Jackson, J., concurring)

> Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities.

[220] 508 U.S. 384, 386 (1993) ("New York Educ. Law § 414 (McKinney 1988 and Supp.1993) authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes.").

for religious purposes.[221] The Court framed the issue as whether "it violates the Free Speech Clause of the First Amendment . . . to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today."[222] The film series promoted a particular religious view, namely, that "the undermining influences of the media . . . could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage."[223]

The Court swiftly dismissed the Establishment worry, noting that the "showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[224] Because the "property had repeatedly been used by a wide variety of private organizations,"[225] the Court concluded that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[226]

The Court accepted that the school was "not a designated public forum open for indiscriminate public use for communicative purposes"[227] and that the relevant test was whether "excluding this category of speech was reasonable and viewpoint neutral."[228] However, the Court concluded that the ban was not viewpoint neutral even though it applied to all religions,[229] because similar views from a non-religious perspective would have been permitted.[230]

But in that case, there is no viewpoint discrimination in the sense that the school was trying to keep a particular traditional or progressive view

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[221] *Id*. ("The list of permitted uses does not include meetings for religious purposes.").

[222] *Id*. at 387.

[223] *Id*. at 388.

[224] *Id*. at 395.

[225] *Lamb's Chapel*, 508 U.S. at 395.

[226] *Id*.

[227] *Id*. at 392.

[228] *Id*. at 393.

[229] *Id*.

> That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

[230] *Lamb's Chapel*, 508 U.S. at 393-94 ("Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective.").

from being articulated.[231] Rather, a whole category of speech—religious speech—was being excluded. But excluding certain categories from a limited public forum is permissible,[232] assuming that the limitation itself is reasonable.[233]

Excluding religious groups might be reasonable to avoid conflict. For example, perhaps there had been or there likely would be complaints about including certain religious groups,[234] and the school decided to adopt a

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[231] *Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting) ("[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate.").

[232] *Id*. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[233] *Rosenberger*, 515 U.S. at 829 ("The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'") (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804-06 (1985)).

[234] *Cf*. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 834 (9th Cir. 2017) (Smith, J., concurring) ("An objective observer would know that Kennedy had access to the field only by virtue of his position as a coach, [and] that a Satanist group had been denied such access."); Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368, 372 (S.D.N.Y. 1999), *aff'd in part, vacated in part, rev'd in part*, 245 F.3d 49 (2d Cir. 2001)

> Plaintiffs allege that a totality of "methodologies, exercises, materials and presentations" have been used, implemented and promoted by the School District, which violate the Free Exercise Clause of the First Amendment, or alternatively violate The Establishment Clause thereof. Particularly, Defendants are accused of having developed the so-called "Bedford Program" which allegedly involves, "the promotion of Satanism and occultism, pagan religions and a New Age Spirituality." (footnote omitted).

Birch P. Burdick, *What Do the Chess Club and the Skinheads Have in Common Under the Equal Access Act? Bd. of Educ. of Westside Community Schools v. Mergens*, 12 HAMLINE J. PUB. L. & POL'Y 175, 186–87 (1991)

> The school could take a wide-open approach and allow equal access to every club. This certainly has a socially appealing feel to it and removes the legal complications of defining "noncurriculum related." However, this would also open the way for a range of groups that may seem to many to be inappropriate for a public high school. Westside's principal noted that students have said "they'll start a Satanist club or a skinheads group." Pro-life/pro-choice groups might be among the first to appear at schools. (footnotes omitted).

Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 620 (2011) ("[A]n 'all groups, all views' RSO policy . . . surely must embrace a supremacist student group--as well as a Wiccan group,

blanket rule precluding all religious group participation to avoid the difficulties that would arise were certain religious groups permitted. By excluding all groups, the school would not be open to charges of preferring some religions over others.[235] Nonetheless, the Court held that the state could not prohibit the category of religious speech from after-school uses, even if the school were trying to avoid some of the conflict that had occurred in past based on religious differences.[236]

The Court's jurisprudence regarding after-school religious education has not only been inconsistent, but it has turned a blind eye toward considerations implicating Establishment Clause concerns. Further, the Court has modified free speech jurisprudence *sub silentio* to provide specious justifications for the Court's holdings.

B. School Ceremonies and Religion

Where the Court addressed the constitutionality of hosting after-school religious clubs on school property, the Court emphasized that there were many types of clubs so it would be discriminatory to exclude religious clubs, ignoring that the Establishment Clause itself suggests that religious groups should be treated differently.[237] However, other cases do not involve a variety of clubs but instead involve the conditions under which after-school ceremonies can include religious content. Here, too, the Court offers principles in certain cases, only to downplay or ignore them later.

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a socialist group, a Summum group, and any others who applied for RSO status.").

[235] *Cf. Cornelius*, 473 U.S. at 813

> We conclude that the Government does not violate the First Amendment when it limits participation in the CFC in order to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups.

[236] *Cf. Everson*, 330 U.S. at 9

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.

[237] *See* Steven G. Gey, *When Is Religious Speech Not "Free Speech"?,* 2000 U. ILL. L. REV. 379, 381 (2000) ("[T]he presence of the Establishment Clause in the First Amendment requires courts to treat religious speech differently than other types of controversial speech when that speech occurs on government property or in some other context that associates the religious speech with the government.").

In *Lee v. Weisman*, the Court examined formal graduation ceremonies which included "invocation and benediction prayers."[238] Clergy were invited to offer prayers that reflected "inclusiveness and sensitivity."[239] While many of the students attending such ceremonies might welcome inclusive, sensitive prayers, some students might nonetheless find such religious exercise offensive.[240]

Certainly, those students who thought that such exercises would ruin their graduation might simply stay away, and there was no formal requirement that students attend their graduation ceremony.[241] The Court nonetheless believed that the students' "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory,"[242] which meant that students who would be religiously offended were in effect compelled to attend.

The Court noted some of the constitutional difficulties implicated in the case. "A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."[243] In addition, the state selected the clergyperson to deliver the prayer, which might itself be divisive.[244] Students who did not agree with the message of the prayer might nonetheless feel pressured to (appear to) participate.[245] Finally, by recommending that the prayers be inclusive, the state was playing a role in influencing the content of the prayer, which itself was a violation of Establishment guarantees.[246]

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[238] Lee v. Weisman, 505 U.S. 577, 580 (1992).

[239] *Id*. at 581.

[240] *Id*. at 586 (discussing "those students who object to the religious exercise").

[241] *Id*. ("[T]he school district does not require attendance as a condition for receipt of the diploma.").

[242] *Id*.

[243] *Lee*, 505 U.S. at 587.

[244] *Id*. ("[T]he potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.").

[245] *Id*. at 588 ("[S]ubtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.").

[246] *Id*.

> It is a cornerstone principle of our 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,' and that is what the school officials attempted to do.

(citing *Engel*, 370 U.S. at 425).

The Court believed that many of the students would view standing during the delivery of the invocation and benediction as participation[247] and that a dissenting student would find little comfort in being told that "standing or remaining in silence signifies mere respect rather than participation."[248] Instead, such a student would likely feel coerced, and "given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it."[249]

The *Lee* Court provided numerous reasons that the practice at issue was unconstitutional. In doing so, the Court left open whether in future cases all of these factors would have to be present in order for a state-sponsored religious exercise to be held unconstitutional or, if not, which factors(s) would be decisive. While *Lee* has been interpreted to involve a coercion test,[250] there is some controversy with respect to what counts as coercive[251] and what counts as participation.[252]

The Court had the opportunity to provide further clarification of the jurisprudence in *Santa Fe Independent School District v. Doe*.[253] At issue was a policy authorizing the inclusion of invocations at high school football games.[254] The student body would vote on whether to have such invocations and would also vote on who should deliver the invocations.[255]

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[247] *Id.* at 593 ("There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer.").

[248] *Lee*, 505 U.S. at 593

> It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

[249] *Id*.

[250] Samuel Taxy, *Pressure to Pray? Thinking Beyond the Coercion Test for Legislator-Led Prayer*, 86 U. CHI. L. REV. 143, 154 (2019) ("In *Lee v Weisman*, the Court held that nonsectarian religious prayers offered at a nonrequired school function still violate the Establishment Clause because they are coercive.").

[251] *See Lee*, 505 U.S. at 640 (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.*"). *See also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) ("Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause.").

[252] *See Lee*, 505 U.S. at 637 (Scalia, J., dissenting) ("The Court's notion that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.").

[253] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[254] *Id*. at 296–97.

[255] *Id*.

The Court rejected that the authorized invocations should be considered private speech, instead noting that the invocations would be "authorized by a government policy and take place on government property at government-sponsored school-related events."[256] Further, "the school allows only one student, the same student for the entire season, to give the invocation."[257] Such a process raised additional concerns because "the majoritarian process implemented by the District guarantees . . . that minority candidates will never prevail and that their views will be effectively silenced."[258] While such a process might make it likely that fewer individuals would be offended and "while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."[259]

In *Santa Fe*, the Court did not accept that solemnification immunized the message from Establishment concerns. On the contrary, "the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is 'to solemnize the event.' A religious message is the most obvious method of solemnizing an event."[260]

The Court emphasized the context in which the invocation would be given, for example, that "the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot."[261] Given "this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[262]

Perceived endorsement was not the only worry. In addition, some students had to attend the games,[263] and they might be unwilling participants in or observers of these activities.[264] Those students would likely feel like

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[256] *Id*. at 302.

[257] *Id*. at 303.

[258] *Santa Fe*, 530 U.S. at 304.

[259] *Id*. at 305.

[260] *Id.* at 306.

[261] *Id.* at 307–08.

[262] *Id.* at 308.

[263] *Santa Fe*, 530 U.S. at 311 ("There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit.").

[264] *Id.* at 305 ("[W]hile Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.").

outsiders at their own school's football games,[265] and might nonetheless feel pressured to attend the games.[266]

Lee and *Santa Fe* seemed to clarify the jurisprudence. While the State cannot compose the message,[267] public prayers might be attributed to the State even if the State does not have a hand in the prayer's composition.[268]

Yet, even the view that the Constitution precludes state actors from coercing students into witnessing or participating in religious activities may now be under revision. In *Kennedy v. Bremerton School District*,[269] the Court examined the constitutionality of a school district's decision not to rehire a football coach[270] in response to his decision to pray on bended knee at the conclusion of football games.[271]

The coach had a practice of offering prayers at the end of games and many of the players on the team eventually joined him.[272] Indeed, there had been a "school tradition" offering pre-game or post-game prayers.[273] The coach was warned about offering prayers midfield at the end of games and about offering pre-game prayers in the locker room[274] – the District feared that reasonable observers might infer that the state was endorsing religion.[275] The District's fear was justified: when Kennedy invited other coaches to pray with him, another coach contacted the principal suggesting that it was "cool" that the District permitted Kennedy to invite the other coaches and players to pray with him.[276]

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[265] *Id.* at 309-10 ("School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" (citing *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring)).

[266] *Id.* at 312 ("For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one.").

[267] *See supra* text accompanying note 246.

[268] *See supra* text accompanying note 256.

[269] 142 S. Ct. 2407 (2022).

[270] *Id.* at 2419 ("The evaluation advised against rehiring Mr. Kennedy on the grounds that he 'failed to follow district policy' regarding religious expression and 'failed to supervise student-athletes after games.'").

[271] *Id.* at 2415 ("Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks.").

[272] *See id.* at 2416 ("The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games.").

[273] *Id.*

[274] *Bremerton*, 142 S. Ct. at 2416.

[275] *Id.* at 2417.

[276] *See id.* at 2435 (Sotomayor, J., dissenting).

Kennedy tried offering a prayer midfield after everyone had left,[277] which had been acceptable to the District.[278] But having done so did not feel right to Kennedy, who informed the school that he felt a religious obligation to offer prayers midfield immediately after the football game ended.[279] He did so and was joined by others in his prayers,[280] although the particular occasions upon which the Court focused did not involve his own team members joining him.[281] Nonetheless, the District was fearful that Establishment guarantees were being violated because a known public employee was engaging in prayer mid-field immediately after the game.[282]

The *Bremerton* Court noted that the District "possessed 'no evidence that students have been *directly coerced to pray* with Kennedy.'"[283] While public employees cannot coerce students to pray without violating constitutional guarantees,[284] the Court was confident that "in 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."[285]

Yet, the previous jurisprudence suggests that Kennedy might well have crossed the line. Some students felt that unless they joined the coach in prayer they would either lose playing time or might not even be permitted to play.[286] Such a policy may not have been expressly stated by the coach but the students nonetheless felt pressured. Were the *Bremerton*

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[277] *Id.* at 2417.

[278] *See id.* at 2438 (Sotomayor, J., dissenting) ("The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line.").

[279] *Id*. at 2417 ("Mr. Kennedy sent a letter to school officials informing them that, because of his 'sincerely-held religious beliefs,' he felt 'compelled' to offer a 'post-game personal prayer' of thanks at midfield."). *See also id.* at 2439 (Sotomayor, J., dissenting) ("[H]e would accept only demonstrative prayer on the 50-yard line immediately after games.").

[280] *Id.* at 2418.

[281] *See id.* at 2432 ("[N]one of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline.").

[282] *Id.* at 2419.

[283] *Id.* (emphasis added).

[284] *Id.* at 2429.

[285] *Id.*

[286] *Id.* at 2440–41 (Sotomayor, J., dissenting)

> The District Court further found that players had reported "feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time," and that the "slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context."

(citing Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1239 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022)).

analysis accurately capturing the jurisprudence, one might have expected both *Lee* and *Santa Fe* to have come out the other way, because there was no direct coercion to pray in either of those cases.[287]

The Court rejected that Kennedy was acting as a public employee when giving the prayer, even though he had school duties at the time, was dressed in District-logoed attire,[288] and was on the 50-yard line precisely because he was a coach.[289] Further, this was a school event on school property, considerations that played an important role in *Santa Fe*.[290] In short, given his role and where and when the prayer took place, Kennedy cannot plausibly be thought merely to have been engaging in a private religious exercise.[291]

The Court characterized the activity as the coach's engaging in private prayer.[292] But it was not as if the coach was spontaneously moved to engage in prayer – he had made multiple public appearances publicizing beforehand his plans to pray at mid-field.[293] Indeed, after one of the coach's public prayers in the past, the District had received calls from Satanists who wanted to engage in post-game religious expression.[294] The District then had to make clear that the playing field was not open to the public.[295]

One of the purposes of the Establishment Clause is to reduce divisiveness along religious lines.[296] Indeed, the practice at issue in *Santa Fe* was

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[287] *Cf. id.* at 2444 (Sotomayor, J., dissenting) ("But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" (citing *Santa Fe*, 530 U.S. at 312)).

[288] *Id.* at 2437 (Sotomayor, J., dissenting).

[289] *Id.* at 2443 (Sotomayor, J., dissenting) ("Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game.").

[290] *See supra* text accompanying note 256.

[291] *Bremerton*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting) ("Kennedy was on the job as a school official 'on government property' when he incorporated a public, demonstrative prayer into 'government-sponsored school-related events' as a regularly scheduled feature of those events." (citing *Santa Fe*, 530 U.S. at 302)).

[292] *See id.* at 2418.

[293] *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.").

[294] *Id.* at 2438 (Sotomayor, J., dissenting) ("After the game, the District received calls from Satanists who 'intended to conduct ceremonies on the field after football games if others were allowed to.'").

[295] *Id.* at 2438 (Sotomayor, J., dissenting) ("[T]he District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.").

[296] *See* McDaniel v. Paty, 435 U.S. 618, 622 (1978) (discussing the "state interests in preventing the establishment of religion and in avoiding the

struck down, at least in part, because it would "encourage[] divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause."[297] The Bremerton community was religiously diverse,[298] and Kennedy's public prayers and the accompanying media attention had resulted in the school's receiving threatening letters.[299] The fears that there might be violence may well have caused other members of the coaching staff to sever their ties with the school.[300]

The *Bremerton* Court chastised the District for treating religious speech differently from other speech.[301] But the whole point here was that a coach, who was a public employee, was praying at midfield immediately after the football game, and the District was worried about Establishment guarantees because onlookers might reasonably infer state endorsement of the school employee's practice. Had he instead been on the 50-yard line yelling "Great game," there would have been no Establishment worries. The *Bremerton* Court's Establishment analysis turns the previous jurisprudence on its head,[302] suggesting that school employees must be permitted to engage in public prayer at school events while acting as school employees. If the Court is not saying that state employees with the power to coerce students are not constitutionally protected in their attempts to proselytize, then the Court at the very least has presented a test that "offers essentially no guidance."[303]

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divisiveness and tendency to channel political activity along religious lines"); Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Political divisiveness is admittedly an evil addressed by the Establishment Clause."); Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (discussing "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid" (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting))).

[297] *Santa Fe*, 530 U.S. at 311.

[298] *Bremerton*, 142 S. Ct. at 2435 (Sotomayor, J., dissenting) ("The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated.").

[299] *Id.* at 2437 (Sotomayor, J., dissenting) ("In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.").

[300] *Id.* at 2440 (Sotomayor, J., dissenting) ("The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.").

[301] *Id.* at 2423 ("Prohibiting a religious practice was thus the District's unquestioned 'object.' The District candidly acknowledged as much below, conceding that its policies were 'not neutral' toward religion.").

[302] *Id*. at 2443 (Sotomayor, J., dissenting) ("Under these precedents, the Establishment Clause violation at hand is clear.").

[303] *Id.* at 2450 (Sotomayor, J., dissenting).

CONCLUSION

Establishment guarantees have been evolving for a long time, especially in the school context. However, the Court has not been consistent in applying the principles that it had already recognized, creating confusion about which factors or principles played an important role in determining whether Establishment guarantees were violated.

In a society as religiously diverse as the United States is today,[304] there is great potential for religious strife.[305] Regrettably, the current Court does not seem up to the task to provide a reasonable and nuanced understanding of Establishment guarantees, instead ignoring both facts[306] and the law[307] to reach results that are impossible to reach in light of past case law.[308]

Bremerton sets the stage for a variety of practices that will have to be analyzed. For example, it would be unsurprising for a schoolteacher to assert that she has sincerely held religious beliefs that require her to offer a private (but not silent) prayer in her classroom. After *Bremerton*, it simply is not clear whether the Court would find such a practice in violation of Establishment guarantees.[309] Depending upon which historical practices one wishes to consult,[310] the Court might well suggest that such a practice is protected.[311] Such a holding would turn Establishment

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[304] Carson as next friend of O. C. v. Makin, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting) ("We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist." (citing PEW RESEARCH CENTER, AMERICA'S CHANGING RELIGIOUS LANDSCAPE 21 (2015))).

[305] *Id.* (Breyer, J., dissenting) ("People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division.").

[306] *Bremerton*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) ("To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts.").

[307] *Id.* (Sotomayor, J., dissenting) ("Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.").

[308] *Id.* at 2443 (Sotomayor, J., dissenting) ("Under these precedents, the Establishment Clause violation at hand is clear.").

[309] *See id.* at 2431 (discussing "the District's suggestion not only that it may prohibit teachers from engaging in any demonstrative religious activity, but that it *must* do so in order to conform to the Constitution. Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails").

[310] *See id.* at 2411 ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'" (citing *Town of Greece*, 572 U.S. at 575 (2014))).

[311] *Cf. Bremerton*, 142 S. Ct. at 2421

> The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work

jurisprudence on its head. While the Court has not been consistent with respect to the principles or rationales that should be used in Establishment Clause jurisprudence, one of the points on which there had been agreement in the modern Establishment era is that teachers praying aloud in the public school classroom is prohibited.[312] *Bremerton* casts doubt on whether there is even a consensus about that.

The current Court has set the stage to undermine much of the modern Establishment jurisprudence, returning to a time when schools are accorded much more discretion with respect to the kinds of religious activities that are permissible. But because the country is more religiously diverse now than it was over half a century ago, there is more rather than less reason to fear what might ensue from the promotion of religion in the public schools. When one adds to the equation that the Court does not seem to approach all religions with the same degree of consideration,[313]

> by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts."

(citing Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990)).

[312] Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of A Standard*, 110 W. VA. L. REV. 315, 325 (2007) (noting that "the Supreme Court invalidated teacher-led group prayer and other devotional exercises in public school classrooms"); Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students As Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 132 (2013) ("Daily prayers recited by teachers . . . in public schools were held to be a violation of the Establishment Clause even when students were allowed to leave the room."); Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26, 36 (2021) (noting that "the Supreme Court has deemed teacher-led prayer in public schools as falling within the definition of 'an establishment'").

[313] *Cf*. Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting)

> Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.

David Bogen & Leslie F. Goldstein, *Culture, Religion, and Indigenous People*, 69 MD. L. REV. 48 (2009) ("For several decades, the Supreme Court of the United States interpreted the First Amendment as offering religion greater protection against interference than was offered to culture, but the Supreme Court

the current approach cannot help but lead to religious strife. One can only hope that the Court will modify its approach before it is too late.

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largely dissolved these constitutional differences when confronted with issues posed by the religious practices of Native Americans.").