AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Kennedy v. Bremerton School District, \_\_\_ U.S. \_\_** (2022)

*Joseph Kennedy was a high school football coach in the Bremerton School District. During his first years on the job, Kennedy regularly gave religious speeches to his team and invited players to join him in prayer on the fifty-yard line after the game was over. When reprimanded for doing this, Kennedy ceased the pep rallies and requested only that he be allowed to offer a silent person prayer at midfield after the games. When he did so, the District removed him from his position, claiming that he had no right to perform such a public prayer while acting as a school official. Kennedy sued, claiming that the Bremerton School District had violated his First Amendment free speech and free exercise rights, as incorporated by the due process clause of the Fourteenth Amendment. The local federal district court rejected his claim as did the Court of Appeals for the Ninth Circuit. Kennedy appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote reversed the Ninth Circuit. Justice Neil Gorsuch’s majority opinion ruled that Kennedy had engaged in private speech that was constitutionally protected. Gorsuch notes that the school permitted coaches to text friends after games. Is praying at the fifty yard-line an analogous form of speech? If not, what are the differences and do those differences matter? How does the majority describe the relevant facts? How does Justice Sonia Sotomayor in dissent describe the relevant facts? Does this factual dispute matter so that if each side agreed with the other sides facts they would reach the other side’s conclusion or is there a deep legal gulf between the majority and dissents? Gorsuch declares the* Lemon v. Kurtzmann *(1971) has been overruled. What was the* Lemon *test? What is the new test? What are the merits and demerits of this new test as compared with the* Lemon *test?*

JUSTICE GORSUCH delivered the opinion of the Court.

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. . . . The Free Exercise and Free Speech Clauses of the First Amendment work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers’ distrust of government attempts to regulate religion and suppress dissent. “[I]n Anglo–American history, . . . government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.”

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The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. . . . The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work 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.”

Under this Court’s precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not “neutral” or “generally applicable.” Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy “strict scrutiny” by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving “thanks through prayer” briefly and by himself “on the playing field” at the conclusion of each game he coaches. . . . Nor does anyone question that, in forbidding Mr. Kennedy’s brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. . . . . The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls.

. . . . [T]he First Amendment’s protections extend to “teachers and students,” neither of whom “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government’s behalf and convey its intended messages.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court’s decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* (1968); *Garcetti v. Ceballos* (2006) and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks “pursuant to [his or her] official duties,” this Court has said the Free Speech Clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes at least—the government’s own speech.

At the same time and at the other end of the spectrum, when an employee “speaks as a citizen addressing a matter of public concern,” our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in “a delicate balancing of the competing interests surrounding the speech and its consequences.”

. . . . At the first step of the *Pickering–Garcetti* inquiry, the parties’ disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District? . . . [I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech “ordinarily within the scope” of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. . . . During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. . . . That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy’s prayers took place “within the office” environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy’s speech and the circumstances surrounding it point to the conclusion that he did not.

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Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least “strict scrutiny,” showing that its restrictions on the plaintiff ’s protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. The District, however, asks us to apply to Mr. Kennedy’s claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. Ultimately, however, it does not matter which standard we apply. The District cannot sustain its burden under any of them.

. . . . [T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. . . . It is true that this Court and others often refer to the “Establishment Clause,” the “Free Exercise Clause,” and the “Free Speech Clause” as separate units. But the three Clauses appear in the same sentence of the same Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” A natural reading of that sentence would seem to suggest the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail. . . .

To defend its approach, the District relied on *Lemon v. Kurtzman* (1971) and its progeny.. . . . What the District and the Ninth Circuit overlooked, however, is that the “shortcomings” associated with this “ambitiou[s],” abstract, and ahistorical approach to the Establishment Clause became so “apparent” that this Court long ago abandoned Lemon and its endorsement test offshoot. The Court has explained that these tests “invited chaos” in lower courts, led to “differing results” in materially identical cases, and created a “minefield” for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a “modified heckler’s veto, in which . . . religious activity can be proscribed” based on “‘perceptions’” or “‘discomfort.’” An Establishment Clause violation does not automatically follow whenever a public school or other government entity “fail[s] to censor” private religious speech. Nor does the Clause “compel the government to purge from the public sphere” anything an objective observer could reasonably infer endorses or “partakes of the religious.” . . .

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.’” “‘[T]he line’” that courts and governments “must draw between the permissible and the impermissible” has to “‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’” 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.” . . .

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. . . [T]his Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, “make a religious observance compulsory.” . . . . But 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. . . . In its correspondence with Mr. Kennedy, the District never raised coercion concerns. . . . This is consistent with Mr. Kennedy’s account too. He has repeatedly stated that he “never coerced, required, or asked any student to pray,” and that he never “told any student that it was important that they participate in any religious activity.” . . . The only prayer Mr. Kennedy sought to continue was the kind he had “started out doing” at the beginning of his tenure—the prayer he gave alone. He made clear that he could pray “while the kids were doing the fight song” and “take a knee by [him]self and give thanks and continue on.” . . .

Naturally, Mr. Kennedy’s proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is “part of learning how to live in a pluralistic society,” a trait of character essential to “a tolerant citizenry.” . . . Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But “[o]ffense . . . does not equate to coercion.”

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. . . . There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy’s quiet prayers following the three October 2015 games for which he was disciplined. . . .

. . . . [T]the District suggests that any visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law— impermissibly coercive on students. . . . . [H]ere is 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. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment’s double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District’s rule, a school would be required to do so. It is a rule that would defy this Court’s traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been “part of learning how to live in a pluralistic society.” . . .

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[T]this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. . . . The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy’s students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy’s discipline.

In the end, the District’s case hinges on the need to generate conflict between an individual’s rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should “‘trum[p]’” the other two. . . . In truth, there is no conflict between the constitutional commands before us. There is only the “mere shadow” of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. . . .

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)&analyticGuid=Ibdcbe522f5e311eca841d44555f1c91a), concurring.

First, the Court refrains from deciding whether or how public employees’ rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public. In “striking the appropriate balance” between public employees’ constitutional rights and “the realities of the employment context,” we have often “consider[ed] whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.”  In the free-speech context, for example, that inquiry has prompted us to distinguish between different kinds of speech; we have held that “the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern.” It remains an open question, however, if a similar analysis can or should apply to free-exercise claims in light of the “history” and “tradition” of the Free Exercise Clause.

. . . [T]the Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny. While we have many public-employee precedents addressing how the interest-balancing test set out in [*Pickering* v. *Board of Ed. of Township High School Dist. 205*, *Will Cty*. (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131204&pubNum=0000780&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)), applies under the Free Speech Clause, the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)&analyticGuid=Ibdcbe522f5e311eca841d44555f1c91a), concurring.

The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of public employees. Petitioner's expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities. When he engaged in this expression, he acted in a purely private capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)&analyticGuid=Ibdcbe522f5e311eca841d44555f1c91a), with whom Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)&analyticGuid=Ibdcbe522f5e311eca841d44555f1c91a) and Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)&analyticGuid=Ibdcbe522f5e311eca841d44555f1c91a) join, dissenting.

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Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

The Establishment Clause prohibits States from adopting laws “respecting an establishment of religion.” . . . . The Establishment Clause protects this freedom by “command[ing] a separation of church and state.”  At its core, this means forbidding “sponsorship, financial support, and active involvement of the sovereign in religious activity.”  In the context of public schools, it means that a State cannot use “its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.” Indeed, “[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. . . . . “Families “entrust public schools with the education of their children ... on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” Accordingly, the Establishment Clause “proscribes public schools from ‘conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred’ ” or otherwise endorsing religious beliefs. . . . Schools face a higher risk of unconstitutionally “coerc[ing] ... support or participat[ion] in religion or its exercise” than other government entities.  The State “exerts great authority and coercive power” in schools as a general matter “through mandatory attendance requirements.”  Moreover, the State exercises that great authority over children, who are uniquely susceptible to “subtle coercive pressure.” Accordingly, this Court has emphasized that “the State may not, consistent with the Establishment Clause, place primary and secondary school children” in the dilemma of choosing between “participating, with all that implies, or protesting” a religious exercise in a public school.

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Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a “[s]tate officia[l] direct[ing] the performance of a formal religious exercise” as a part of the “ceremon[y]” of a school event “conflicts with settled rules pertaining to prayer exercises for students.”  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.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were “clothed in the traditional indicia of school sporting events.”  Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. 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. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring “with the approval of the school administration.”

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. . . . The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face “immense social pressure” from their peers in the “extracurricular event that is American high school football.”

The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

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. . . . Kennedy's “changed” prayers at these last three games were a clear continuation of a “long-established tradition of sanctioning” school official involvement in student prayers.  Students at the three games following Kennedy's changed practice witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. They witnessed their peers from opposing teams joining Kennedy, just as they had when Kennedy was leading joint team prayers. They witnessed members of the public and state representatives going onto the field to support Kennedy's cause and pray with him. Kennedy did nothing to stop this unauthorized access to the field, a clear dereliction of his duties.. . . Kennedy himself apparently anticipated that his continued prayer practice would draw student participation, requesting that the District agree that it would not “interfere” with students joining him in the future.

Finally, Kennedy stresses that he never formally required students to join him in his prayers. 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.’ ” . . .

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. . . . Kennedy “accept[ed] certain limitations” on his freedom of speech when he accepted government employment. [*Garcetti* v. *Ceballos* (2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009252264&pubNum=0000780&originatingDoc=Ibdcbe522f5e311eca841d44555f1c91a&refType=RP&fi=co_pp_sp_780_418&originationContext=document&transitionType=DocumentItem&ppcid=61211af1914846749022a48250431140&contextData=(sc.Search)#co_pp_sp_780_418). . . . Case law instructs balancing “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” to determine whose interests should prevail. As the Court of Appeals below outlined, the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. . . .

. . . Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well. . . .

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First, the Court describes the Free Exercise and Free Speech Clauses as “work[ing] in tandem” to “provid[e] overlapping protection for expressive religious activities,” leaving religious speech “doubly protect[ed].”  This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause, but “the First Amendment protects speech and religion by quite different mechanisms.”  The First Amendment protects speech “by ensuring its full expression even when the government participates.” Its “method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse,” however, based on the understanding that “the government is not a prime participant” in “religious debate or expression,” whereas government is the “object of some of our most important speech.” . . .

Second, the Court contends that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses. The Court, however, has long recognized that these two Clauses, while “express[ing] complementary values,” “often exert conflicting pressures.” . . . The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of “whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.” . . .

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. . . . The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it describes as an “offshoot” of *Lemon*and paints as a “ ‘modified heckler's veto, in which ... religious activity can be proscribed’ ” based on “ ‘ “perceptions” ’ ” or “ ‘ “discomfort.” ’ ”  This is a strawman. . . . The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of “ ‘the reasonable observer’ ” who is “ ‘aware of the history and context of the community and forum in which the religious [speech takes place].’ ”  That is because “ ‘the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort’ ” but concern “ ‘with the political community writ large.’ ” . . . Paying heed to these precedents would not “ ‘purge from the public sphere’ anything an observer could reasonably infer endorses” religion.  To the contrary, the Court has recognized that “there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.”  These instances, the Court has said, are “often questions of accommodat[ing]” religious practices to the degree possible while respecting the Establishment Clause. . . .

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*Lemon* properly concluded that precedent generally directed consideration of whether the government action had a “secular legislative purpose,” whether its “principal or primary effect must be one that neither advances nor inhibits religion,” and whether in practice it “foster[s] ‘an excessive government entanglement with religion.’ ” . . . [T]the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. Neither the critiques of *Lemon*as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon*in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

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The problems with elevating history and tradition over purpose and precedent are well documented. For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? . . . .

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The Court's suggestion that coercion must be “direc[t]” to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”

Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter. . . . . [D]espite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because “Kennedy did not seek to direct any prayers to students or require anyone else to participate.”  But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. . . .This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does. . . .Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give “verbal” prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him “voluntarily” and pray. . . .

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Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty.