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The Emerging First Amendment Right to Mistreat Students

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THE EMERGING FIRST AMENDMENT RIGHT TO MISTREAT STUDENTS

Andrew Koppelman[†]

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INTRODUCTION

As America becomes more polarized, with the polarization tracking religious differences, it becomes more urgent to (as I have put it elsewhere) “tell a story of who Americans are in which each faction can recognize itself and see a home for itself.”¹ We need to make space for people who have radically different ideas of what counts as a good life.

The classic Lockean liberal answer is to draw clear boundaries, to create a private sphere where citizens are free to exercise their religion in ways that other citizens find repugnant. (The relation between Locke’s theory of property and his theory of religious liberty deserves greater exploration than it has gotten.) The question of how to handle wedding vendors who refuse to facilitate same-sex marriages, for example, is essentially one of adjusting—whether the adjustment is minor is the pertinent question—the boundary between the public and the private.²

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1. ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT* 145 (2020).
2. *See id.* at 60–64 & 173 n.100.

But there is a limit to religious accommodation in a regime with a constitutional prohibition of establishment of religion. What religious people may not demand is a right to invade and direct the public sphere, to alter the delivery of state functions in order to force their views upon nonadherents.

Unhappily, the federal judiciary as reshaped by the Trump Administration, notable for its solicitude for conservative religion, is crossing that line. Here I will focus on an extravagant expansion of the free speech rights of public employees who have religious objections to the directives of their employers. In two prominent cases, *Kennedy v. Bremerton School District*³ in the Supreme Court and *Meriwether v. Hartop*⁴ in the Sixth Circuit, one aspect of the extravagance is particularly notable: courts have held that publicly employed teachers may exercise their First Amendment rights of free speech and religion even when doing so mistreats students.

In both of these cases, despite a long-established rule of deference to public employers' need to control their own operations—and despite mighty efforts to accommodate difficult employees—public schools lost the capacity to protect students from misbehaving teachers. In each of these cases, the school tried to cobble together a solution that would give appropriate weight to each side's most urgent interests. Not good enough, the court decreed: the religious side must be granted an absolute and uncompromising victory. It was oblivious to the countervailing interest. The language of privacy and autonomy was deployed to enable the religious to wield state authority and harm their students.

These are only two cases. But they come from high federal courts and their similarity of approach, and resemblance to other recent treatments of religious liberty by the Court, is a reasonable basis for alarm.

I. THE MERIWETHER CASE

A. A Classroom Dispute

Professor Nicholas Meriwether teaches philosophy at Shawnee State University in Ohio. The school has had a policy since 2016 requiring faculty to respect students' pronouns.⁵ In his Political Philosophy class, he called on a student referred to in the proceedings as "Doe." Meriwether, who addresses students as "Mr." or "Ms.," responded to a question from Doe with "[y]es, sir."⁶ Doe approached Meriwether after class and explained that she uses feminine pronouns, showing him her driver's license that identifies her as female. Meriwether refused to use

3. 142 S. Ct. 2407 (2022).

4. 992 F.3d 492 (6th Cir. 2021).

5. *Id.* at 498 (citations omitted).

6. *Id.* at 499 (citations omitted).

her pronouns. Both of them reported the exchange to university officials.⁷

The dean initially told Meriwether that he could refer to Doe only by her last name, while using “Mr.” or “Ms.” for all other students. But after Doe complained again, the dean told him he had to respect her pronouns. Thereafter, Meriwether “accidentally” continued to address Doe as “Mr.”⁸ Eventually, he was given a written reprimand and warned that further corrective actions were possible. He sued Shawnee State, claiming infringement on freedom of speech and freedom of religion.

The district court referred the case to a magistrate judge, who recommended dismissal of the suit, a recommendation the district judge followed. The magistrate found that Doe

dreaded participating in plaintiff’s class but felt compelled to do so because plaintiff graded students on participation. She was concerned that classmates would notice the differential treatment, and on several occasions her classmates mistakenly used male honorifics and pronouns when referring to her. She suffered significant psychological strain and distress, including an exacerbation of her gender dysphoria.⁹

The school’s interest in avoiding these consequences should be clear. What were Meriwether’s countervailing claims?

He argued that because of his religious beliefs, he does not regard Doe as female. Teachers “should not be compelled to say and teach things they don’t believe or risk being fired or disciplined.”¹⁰ He elaborated upon this point in his complaint. The nondiscrimination policies “compel Dr. Meriwether to communicate messages about gender identity that he does not hold, that he does not wish to communicate, and that conflict with (and for him to violate) his religious beliefs.”¹¹ He was being punished “for refusing to communicate a University-mandated ideological message regarding gender identity.”¹² His Sixth Circuit brief declares that the school

7. *Id.*

8. *Id.* at 500.

9. Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2019 WL 2052110, at *6 (S.D. Ohio Sept. 5, 2019), *aff’d in part, rev’d in part sub nom.*, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

10. Nicholas Meriwether, *University Shouldn’t Punish Me for Not Addressing Male Student as “Ms.”*, DAILY SIGNAL (Aug. 28, 2020), <https://www.dailysignal.com/2020/08/28/university-shouldnt-punish-me-for-not-addressing-male-student-as-ms/> [https://perma.cc/96NN-YQT6].

11. Plaintiff’s Verified Complaint at ¶ 303, *Meriwether*, 2018 WL 5804211 (No. 1:18-cv-00753).

12. *Id.*

gave him no way to speak without endorsing philosophies that he believes are false and violating his religious beliefs.

....

... To call a man a woman, he must endorse metaphysical positions he believes are false. University officials are compelling him to communicate their ideas about sex and gender as his own.¹³

Meriwether does not discuss the harm to the student, and reveals no awareness of it.

Government employees do not get to say whatever they want while they are at work. The clerk at the Department of Motor Vehicles may not make political speeches to those who apply for licenses. The Supreme Court has said “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁴ Even when off the job, under the well-established *Pickering* test, public employees’ speech rights are normally balanced against the state’s interest in providing efficient public services.¹⁵ Rules against discrimination obviously promote the delivery of educational services. As I’ll shortly explain, the Sixth Circuit navigated around this well-established body of law by positing a grotesquely hypertrophied conception of academic freedom and by being utterly oblivious to the relevant state interests.

B. A Rejected Compromise

The appropriate response to these conflicts is not for each side to insist on its rights, but to aim for an accommodation that is responsive to each side’s deepest interests. In earlier work, focusing on the tension between LGBT rights and religious liberty, I have argued that it is possible to have a legal regime with safe space for everyone, but that working out the contours of that space is not a task that is suitable for adjudication. Ad hoc negotiation would be better. I wrote:

Lawyers are trained to think about conflict resolution by devising abstract principles that should cover all future cases, and which incidentally entail that their side wins. But this is not the only way to think about conflict. Sometimes, the right thing to

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13. Brief of Plaintiff-Appellant Nicholas K. Meriwether at 2, 9, *Meriwether*, 992 F.3d 492 (No. 20-3289).
 14. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
 15. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (stating that courts should strike a “balance between the interests of the [government employee], 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”).

do is not to follow a principle, but to accurately discern the interests at stake and cobble together an approach that gives some weight to each of those interests. Ethics is not only about principles. There is a tradition in moral philosophy, going back to Aristotle, that holds that a good person does not necessarily rely on any abstract ideal, but rather makes sound judgments about the right thing to do in particular situations. Sometimes principles are overbroad generalizations from experience, and distract us from the moral imperatives of the situation at hand.¹⁶

The Aristotelian approach has its attractions:

The principles at issue here—religious liberty and nondiscrimination—may seem irreconcilable. *But they are themselves parasitic on interests.* The way to think clearly about the conflict is to look past the principles to the underlying interests. Discrimination harms its victims' urgent interest in equal treatment in public spaces. Religious liberty protects what many people regard as their deepest concerns. The legal rights in question are tools for protecting those interests.

Arguments about the gay rights/religious liberty conflict often talk past each other, because they often focus on one of the interests in question and ignore the other. The principles are in unresolvable tension. The interests are not. There are ways to ensure that all the relevant interests are accommodated. This may require some modification of the principles. But what ultimately matters is not the principles but the people. We only care about the principles because we care about the people.¹⁷

That is precisely what the university tried to do.

In an email, the dean informed Meriwether of the school's counterproposal: "Every student needs to be treated the same in all of your classes. In other words, the policy seeks to ensure that what is done for one student is done for all to avoid issues of discrimination. This regards names, pronoun usage, and most any other matter."¹⁸ He could refer to *all* students by first or last names only, without using gendered titles for any of them. That would have treated all students equally, and it would not have required him to say anything he did not believe.¹⁹

16. KOPPELMAN, *supra* note 1, at 4–5 (footnotes omitted).

17. *Id.* at 12.

18. Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2019 WL 4222598, at *5 (S.D. Ohio Sept. 5, 2019) (citations omitted), *aff'd in part, rev'd in part sub nom.*, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

19. This is not a costless solution. In another case presenting a similar conflict, transgender students indicated that a teacher's policy of using only last

His district court complaint explains why he rejected this accommodation: “Dr. Meriwether refers to students in this fashion to foster an atmosphere of seriousness and mutual respect that is befitting the college classroom. Dr. Meriwether believes that this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor.”²⁰ Of course, the seriousness and weightiness of honorifics would not be available to Doe. Meriwether was insisting on his right to single out Doe and treat her worse than all other students.

The Sixth Circuit’s rejection of the dean’s proposal depended crucially on the purported difficulty of doing without pronouns in ordinary speech: “such a system would be impossible to comply with, especially in a class heavy on discussion and debate. No ‘Mr.’ or ‘Ms.’ No ‘yes sir’ or ‘no ma’am.’ No ‘he said’ or ‘she said.’”²¹

But that is not the only way to construe the dean’s instruction. It is indeed hard to remove all *pronouns* from one’s speech. It is, on the other hand, very easy to eliminate *titles*, and that is what the dean was asking for. One can easily avoid misgendering a single student. Just don’t use titles for anyone.

If the court wants to talk about practicalities, it should think about what actually happens in the classroom. Pronouns are used one at a time. It is mighty conspicuous if you refer to every student but one as “Mr.” or “Ms.” But pronouns are used sporadically and interchangeably with proper names. Avoiding gendered pronouns with respect to a single student, while continuing to use them for everyone else, is inconspicuous. The assertion that it is impossible to say “yes” rather than “yes sir” is unworthy of response. Referring to someone by their name, rather than by a pronoun, has no derogatory implications. It is actually a good way to communicate that the student’s contribution to the discussion is valued and recognized—or, at least, that the teacher remembers their name.

The court implies that Meriwether would never be permitted to use any gendered pronoun to refer to *any* student, but that misrepresents what he was told: “Every student needs to be treated the same in all of your classes.”²² That is a pretty good statement of the limits of faculty free speech. I’m a professor myself. There’s nothing impossible here. The court declares that “when Meriwether slipped up, which he

names made them “feel targeted and uncomfortable.” *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 844 (S.D. Ind. 2021). There is no evidence that Doe had that reaction. The burden on students will be different in different localities in ways that will be hard for courts to assess. That is another reason for them to defer to the judgment of school officials.

20. Plaintiff’s Verified Complaint, *supra* note 11, at ¶¶ 129–30.

21. *Meriwether*, 992 F.3d at 517.

22. *Meriwether*, 2019 WL 4222598, at *5 (citations omitted).

inevitably would (especially after using these titles for twenty-five years), he could face discipline.”²³ This is unfair to Meriwether. There is no reason to think he lacks the competence to remember the gender identity of a single student. If, on the other hand, he “slips up” repeatedly and consistently, it would be reasonable for the university to infer that he is defying the policy.

C. Academic Freedom as Freedom to Mistreat

But now we must leave aside the possibilities of reasonable compromise and consider the legal argument on Meriwether’s behalf. As already noted, he was a state employee, and the state sought to regulate what he said on the job. Such speech has been deemed by the Court to be categorically unprotected: the state can control its own speech. How did the Sixth Circuit avoid that conclusion?

It noted that the leading case on government employees’ speech on the job, *Garcetti v. Ceballos*,²⁴ expressly declined to address whether its analysis would apply “to a case involving speech related to scholarship or teaching.”²⁵ Earlier cases, it concluded, “establish that the First Amendment protects the free-speech rights of professors when they are teaching.”²⁶ The Supreme Court has not clarified the bounds of any academic freedom exception to *Garcetti*, leaving the law somewhat muddled.²⁷ In *Meriwether*, the Sixth Circuit attempts a clarification.

The court declares that the academic freedom exception “covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not.”²⁸ That is a broader conception of academic freedom than, so far as I can tell, has ever before been proposed by any court. It swamps any account of the professor’s job description. It means that a chemistry professor has the right to repeatedly harangue his students about the next election.

Speech in the classroom, the court holds, is protected under the interest-balancing formulation of *Pickering*: courts must strike a “balance between the interests of the [government employee], 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.”²⁹ How does it strike that balance?

23. *Meriwether*, 992 F.3d at 517.

24. 547 U.S. 410 (2006).

25. *Id.* at 425.

26. *Meriwether*, 992 F.3d at 505.

27. See generally Inara Scott, Elizabeth Brown & Eric Yordy, *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1000–05 (2022).

28. *Meriwether*, 992 F.3d at 507.

29. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

It notes that “the use of gender-specific titles and pronouns has produced a passionate political and social debate.”³⁰ Meriwether was speaking on a matter of public concern, because “titles and pronouns carry a message.”³¹ His refusal to use the student’s preferred pronoun “reflected his conviction that one’s sex cannot be changed, a topic which has been in the news on many occasions.”³² In so doing, “he advanced a viewpoint on gender identity.”³³

That is certainly correct. On the other hand, political debate extends to many matters, including some about which schools have sound pedagogical reasons for having and enforcing policies that restrict certain political viewpoints.

Racism and sexism are ideas. Those who proclaim those ideas—and direct them at specific students—are engaged in speech about matters of public concern. The court says that “the First Amendment interests are especially strong here because Meriwether’s speech also relates to his core religious and philosophical beliefs.”³⁴ *Meriwether* is primarily a free speech case, but his religion evidently adds weight, perhaps decisively so, to his *Pickering* claim.

American racism has often reached for religious arguments. Biblical justifications were offered for slavery and segregation.³⁵ Racist religions are more marginal today, but “Christian identity” and “Creativity” have adherents in many states.³⁶

Suppose a professor believed what the Supreme Court once attributed to the Framers of the Constitution, that African Americans are “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they ha[ve] no rights which the white man was bound to respect.”³⁷ Such persons, he might infer, should be denied the honorific of “Mr.” or “Ms.”—demeaning treatment that was once common. Suppose he thought it appropriate to address only the Black students by their first names, to signify their appropriately subordinated status? Or to address them as “boy” and “girl”? Or suppose he were to say, to specific female

30. *Meriwether*, 992 F.3d at 508.

31. *Id.* at 507.

32. *Id.* at 508.

33. *Id.* at 509.

34. *Id.*

35. KOPPELMAN, *supra* note 1, at 114–15.

36. *Christian Identity*, ANTI-DEFAMATION LEAGUE (Feb. 5, 2017), <https://www.adl.org/resources/backgrounders/christian-identity> [<https://perma.cc/QU8F-MQJS>]; *Creativity Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/hate-symbol/creativity-movement> [<https://perma.cc/PLF7-BHAU>] (last visited Apr. 10, 2023).

37. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

students during office visits, that he believes that the pedagogical process is improved, and female students somehow tend to get better grades, if they make themselves sexually available to the professor? A professor who calls students racial slurs has advanced a viewpoint on a hotly contested issue—a matter of public concern that relates to core philosophical beliefs.³⁸ Titles and pronouns carry a message. The message of racial degradation must be permitted if, as the Sixth Circuit suggests, a university is categorically prohibited from constraining a faculty member in any way that would “alter the pedagogical environment in his classroom.”³⁹

If the professor were disciplined in such a case, must a court really conclude, as the Sixth Circuit does, that what the school actually proposed “silenced a viewpoint,”⁴⁰ “punished a professor for his speech on a hotly contested issue,”⁴¹ cast “a pall of orthodoxy over the classroom,”⁴² sought “to compel ideological conformity,”⁴³ or threatened to “transform institutions of higher learning into ‘enclaves of totalitarianism’”⁴⁴?

In a case where a student is thus specifically mistreated, one might respond that the *Pickering* test would not protect the speech. But the court misapplies the test by systematically minimizing the state interests at stake. That technique is available in any future case. As we shall see, it was shortly picked up by the Supreme Court.

The state interest, the court holds, “is comparatively weak,”⁴⁵ because there was a better approach available. “Meriwether proposed a compromise: He would call on Doe using Doe’s last name alone. That

38. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190–91 (6th Cir. 1995) (holding that a coach could be terminated for calling students “niggers” in an attempt to motivate them).

39. *Meriwether*, 992 F.3d at 500. Eugene Volokh reads the decision more narrowly than I do: “[W]hether a university may forbid faculty members from referring to students using the pronoun that the student rejects remains an open question. This case only deals with faculty members declining to use the pronoun the student prefers, and using the student’s name instead.” Eugene Volokh, *Pronouns in the University Classroom & the First Amendment*, VOLOKH CONSPIRACY, <https://reason.com/volokh/2021/03/26/pronouns-in-the-university-classroom-the-first-amendment/> [<https://perma.cc/FKW8-9RLZ>] (Oct. 12, 2021). As explained above, the university did offer Meriwether the option of declining to use any pronoun to refer to Doe.

40. *Meriwether*, 992 F.3d at 506.

41. *Id.* at 498.

42. *Id.* at 503.

43. *Id.* at 506.

44. *Id.* at 510 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

45. *Id.*

seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive.⁴⁶ The university at first agreed, then changed its position. It is easy to see why. Title IX prohibits “discrimination under any education program or activity” based on sex.⁴⁷ In his complaint, recall, Meriwether explains that he “refers to students in this fashion to foster an atmosphere of seriousness and mutual respect that is befitting the college classroom.”⁴⁸ By his own reasoning, that seriousness and respect (which, incidentally, had nothing to do with his religious beliefs) would not be available to the transgender student. She would be treated worse than any other student. The Sixth Circuit regards that as a “win-win.”⁴⁹

During the litigation, in a public exchange with me, Meriwether made clear that this was precisely what he had in mind. In a newspaper column, I observed that his administration “suggested that he could refer to all students by first or last names only, without using gendered pronouns for any of them. That would have treated all students equally, and it would not have required him to say anything he did not believe. Why would he not do that?”⁵⁰

He responded, “I should have a certain amount of freedom, within my own classroom, to determine the exact language I do and do not use when teaching my class.”⁵¹ He elaborates: “[T]he school’s problem with me—and, for that matter, the student’s problem with me—is not really that I treated him [sic] differently, but that I did not. I treated this student exactly like I treat others, when in fact he [sic] wanted to be treated differently.”⁵² But impact and need matter, and schools can take impact and need into account when they regulate how students are treated. So does the law. Meriwether’s notion of equality would be satisfied by a classroom that happens to have a doorway too narrow for a wheelchair. For that matter, it would be satisfied if the school had ignored his religious compunctions, made no effort to accommodate him, and simply demanded that he follow the same rules as all other faculty.

The court says that Title IX does not apply, because in order for a violation to occur, “the behavior [must] be serious enough to have the

46. *Id.* at 510–11.

47. 20 U.S.C. § 1681(a).

48. Plaintiff’s Verified Complaint, *supra* note 11, at ¶ 129.

49. *Meriwether*, 992 F.3d at 510–11.

50. Andrew Koppelman, *Free Speech Gone Wild: The Meriwether Case*, THE HILL (Aug. 17, 2020), <https://thehill.com/opinion/judiciary/512306-free-speech-gone-wild-the-meriwether-case> [<https://perma.cc/3DV8-JGQH>].

51. *Meriwether*, *supra* note 10.

52. *Id.*

systemic effect of denying the victim equal access to an educational program or activity.⁵³ The court concluded that there was no such effect here, because Doe received a good grade in the class. (This is already more demanding than the test Meriwether proposed, which would immunize him even if the effect on student learning was devastating.) The implication is that schools may not protect students in advance from the denial of equal opportunity, but may only act after the harm has occurred and is clear enough to be provable in court.⁵⁴

The court also presumes that schools have no legitimate interest in protecting their students from mistreatment unless that mistreatment violates federal law. The court seizes on statements by some administrators that Meriwether's conduct did not create a hostile environment⁵⁵ (here disagreeing with their own Title IX office).⁵⁶ One hopes that the opinions of nonlawyers are not a conclusive source of law.⁵⁷ If administrators get to decide what is not a hostile environment, then no university will ever be guilty of a violation. And whatever the law requires, schools must have the capacity to prevent students from being put in this position, even if some members of the faculty have strong desires to the contrary. You will search the opinion in vain for any acknowledgment of the discriminatory burden, *or any burden at all*, on the student. The court appears to think that schools have no legitimate interest in promoting an environment conducive to learning.

I can't resolve the boundaries of the academic freedom question here,⁵⁸ but will say that the state's interest is at its maximum when a teacher's offensive speech targets an unwilling student.⁵⁹

The one plausible academic freedom claim that Meriwether put forth was this one:

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53. *Meriwether*, 992 F.3d at 511 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999)).
54. This point is well developed in Scott et al., *supra* note 27, at 1026–27. The court leaves open the possibility of evidence emerging at trial: “[T]here is no indication at this stage of the litigation that Meriwether’s speech inhibited Doe’s education or ability to succeed in the classroom.” *Meriwether*, 992 F.3d at 511. But the court makes clear that actual harm must be shown, not the “mere” anticipation of it. *Id.* No wonder the university settled.
55. *Meriwether*, 992 F.3d at 502, 511.
56. *Id.* at 500–01.
57. And one emphatically hopes that they are not now binding law throughout the Sixth Circuit.
58. For a thorough and persuasive analysis, see generally Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615 (2022).
59. Eugene Volokh has suggested this, in the context of the workplace, in *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1871 (1992).

Meriwether asked whether the university's policy would allow him to use students' preferred pronouns but place a disclaimer in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." Dean Milliken rejected this option out of hand. She insisted that putting a disclaimer in the syllabus would itself violate the university's gender-identity policy.⁶⁰

This was a philosophy class, and his general beliefs about gender identity were within the scope of that scholarly enterprise. On the other hand, such a disclaimer would, in context, be understood by everyone to concern Doe and only Doe. It presents a harder case. The problem could, however, be avoided if he adopted the solution of using only last names for all students, a solution that had not yet been suggested by anyone at that point in the proceedings. Then there would be nothing for him to disclaim.

But now that solution will not be pursued, because the court gave Meriwether a total victory. After its decision, the university settled the case and paid him \$400,000.⁶¹ The settlement agreement declares that he "has the right not to use pronouns or titles when addressing or referring to any person, including students, who request pronouns or titles that conflict with the person's biological sex, even if he uses pronouns or titles for other persons, including students."⁶² Whether the settlement requires the university to violate Title IX has not been resolved, because no transgender student participated in the settlement, which cannot bind nonparties.

II. THE *KENNEDY* CASE

A. *A Dispute Over a Prayer*

For years, football coach Joseph Kennedy led his players in prayers. When the Bremerton School District learned of this, it began an investigation into whether he had violated its policy

that "[s]chool staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity" and that "[r]eligious services,

60. *Meriwether*, 992 F.3d at 500 (internal citations omitted).

61. Madison Hall, *A University in Ohio Agreed to Pay a \$400,000 Settlement to a Professor It Disciplined for Not Using a Trans Student's Pronouns*, INSIDER (Apr. 19, 2022, 3:14 PM), <https://www.insider.com/shawnee-state-settlement-professor-who-refused-using-trans-persons-pronouns-2022-4> [<https://perma.cc/7U2Z-J9EJ>].

62. Settlement Agreement and Release, *Meriwether v. Hartop*, available at https://ohiocapitaljournal.com/wp-content/uploads/2022/04/Meriwether-Final-Settlement-w_Meriwether-signature.pdf [<https://perma.cc/5GWK-P564>].

programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity.”⁶³

While that inquiry was pending, the athletic director told Kennedy that he should not conduct prayer with players.

What happened next is revealing: “After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player’s helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.”⁶⁴ In other words, Kennedy’s first response, when told (or reminded) of the school’s policy, was to deliberately and openly defy it, and then anticipate conflict.

The school district did not fire him. (In fact, it never fired him.)⁶⁵ It did send him a letter instructing him that although he had a right to pray, he must do so separately from students.⁶⁶ He hired an attorney, who sent the district a letter claiming that the district required him to “flee from students if they voluntarily choose to come to a place where he is privately praying during personal time,” referring to the 50-yard line of the football field after the game.⁶⁷ He requested that the district provide a “clarif[ication] that the prayer is [Kennedy’s] private speech,” and that if students joined him in his prayer, the district would not “interfere.”⁶⁸

The district wanted to figure out a way to accommodate him, but he refused to so much as talk to them. Kennedy, the district court

63. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2435 (2022) (Sotomayor, J., dissenting).

64. *Id.* at 2436.

65. In an extraordinary series of misrepresentations, both counsel and the Court claimed the opposite. Andrew Koppelman, *Elena Kagan and the Supreme Not-a-Court*, THE HILL (Sept. 25, 2022), <https://thehill.com/opinion/judiciary/3659769-elena-kagan-and-the-supreme-not-a-court/> [<https://perma.cc/87RZ-Q8YQ>].

66. *Kennedy*, 142 S. Ct. at 2436–37 (Sotomayor, J., dissenting). The letter declared: “Student religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff.” *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020).

67. *Kennedy*, 142 S. Ct. at 2437 (Sotomayor, J., dissenting).

68. *Id.* The letter said he wished to “wai[t] until the game is over and the players have left the field’ to ‘wal[k] to mid-field to say [his] short, private, personal prayer.” *Id.* at 2422 (majority opinion). But the letter demanded that students be permitted to join him, stating, “To the extent that students voluntarily choose to join Coach Kennedy, the District must not discriminate against, prohibit or interfere with student-initiated religious activities. A simple disclaimer that Coach Kennedy’s prayers are his private speech will suffice to avoid any constitutional concerns.” Joint Appendix at 71, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

found, “never came in after numerous requests and contacts.”⁶⁹ Instead, he began a media tour claiming that he was a victim of religious persecution. He gave newspaper and television interviews. He appeared on *Good Morning America* and Fox News. After he began his public relations campaign, spectators at one game swarmed the field to join his prayer, knocking students down. In the days that followed, school officials started receiving hate mail and were confronted by belligerent spectators at games. Several of them quit because they feared for their safety.⁷⁰ Kennedy surely had a right to protest what he regarded as his unfair treatment, but the district was not obligated to overlook his unwillingness to make any effort to deescalate what had become a genuinely dangerous situation.

The district then suspended Kennedy with pay. He was never fired, but

the head coach of the varsity team recommended Kennedy not be rehired because he “failed to follow district policy,” “demonstrated a lack of cooperation with administration,” “contributed to negative relations between parents, students, community members, coaches, and the school district,” and “failed to supervise student-athletes after games due to his interactions with media and community” members.⁷¹

He sued, claiming his rights of free speech and religion had been violated.

Eventually, the Supreme Court ruled in his favor. In doing so, it made several of the same moves that the Sixth Circuit did in the earlier *Meriwether* case, distorting the record and minimizing the harm to students in order to vindicate the religious claim.

69. *Kennedy*, 443 F. Supp. 3d at 1231 (quoting Kennedy’s 2015 season evaluation completed by Athletic Director Barton); *see also Kennedy*, 142 S. Ct. at 2446 (Sotomayor, J., dissenting) (“[T]he District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District’s suggestions and declined to communicate with the District, except through media appearances.”).

70. The head coach “fear[ed] that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy’s media appearances.” *Kennedy*, 142 S. Ct. at 2440.

71. *Id.* (quoting Kennedy’s annual review). The majority’s description of the reason for the suspension omits Kennedy’s lack of cooperation and contribution to negative relations. *Id.* at 2419 (majority opinion); *cf. Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that a supervisor was not required to “tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships”); *id.* at 151–52 (“When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”).

B. What Kennedy Wanted

There is some dispute about how important it was to Kennedy that students participate in his prayers. The Supreme Court misdescribed the facts when it declared that his case was about the right to engage in a “short, private, personal prayer.”⁷² The policies he violated, quoted above, said nothing about such prayers and certainly did not prohibit them. Kennedy, however, was not satisfied with a private, personal prayer. As the school district told the Supreme Court, “[H]e never asked to pray silently and alone.”⁷³ He insisted “that the District could not prohibit him from praying with students if they voluntarily joined.”⁷⁴ He later made clear that the reason he was litigating was for the sake of “helping these kids be better people.”⁷⁵

In his final communication to school officials before he was suspended, Kennedy declared that he would continue to pray and would not “flee the scene if students voluntarily [came] to the same area” where he was praying.⁷⁶ He would not “discourage[]”⁷⁷ students from joining him. No students joined him the three times he prayed on the field after his letter, but the school reasonably did not want to wait for the slow accumulation of players to begin again.

The “option” of “voluntarily” praying brings coercive pressure on students. That was why the school was unwilling to permit it. One parent complained to the school that his son “felt compelled to participate,” even though he was an atheist, because he felt he would not get to play as much if he did not participate.⁷⁸ Others said their children “participated in the team prayers only because they did not

72. *Kennedy*, 142 S. Ct. at 2417, 2422. The Court also claims that Kennedy was “willing to say his ‘prayer while the players were walking to the locker room’ or ‘bus,’ and then catch up with his team.” *Id.* at 2417. But the Court’s narrative creates the misimpression that this was a proposal that the school rejected, when in fact he said that for the first time during a deposition—a concession that could not bind him in the future. *See id.* at 2437 n.1 (Sotomayor, J., dissenting); *Kennedy*, 443 F. Supp. 3d at 1244 n.8 (“Kennedy never reached out to the District to discuss such an accommodation.”).

73. Brief for Respondent at 11, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

74. *Kennedy*, 443 F. Supp. 3d at 1230.

75. Mike Carter, *Bremerton Football Coach Vows to Pray After Game Despite District Order*, SEATTLE TIMES (Feb. 4, 2016), <https://www.seattletimes.com/seattle-news/education/bremerton-football-coach-vows-to-pray-after-game-despite-district-order/> [<https://perma.cc/KC6B-WNR3>].

76. *Kennedy*, 142 S. Ct. at 2417.

77. *Id.*

78. Brief for Respondent, *supra* note 73, at 4–5; *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1011 (9th Cir. 2021).

wish to separate themselves from the team.”⁷⁹ After Kennedy was told to stop the prayers, several students and parents thanked the district for correcting the “awkward situations where they did not feel comfortable declining to join with the other players in Mr. Kennedy’s prayers.”⁸⁰ Revealingly, the students stopped praying once Kennedy was no longer initiating and leading the prayers.⁸¹

The coach has unlimited discretion to decide who plays. Students who don’t play won’t get football scholarships.⁸² The trial judge, whose findings of fact the Supreme Court was obligated to accept unless it deemed them clearly erroneous (which it did not), wrote:

Players (sometimes via parents) reported feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time, and there is no evidence of athletes praying in Kennedy’s absence. Kennedy himself testified that, “[o]ver time, the number of players who gathered near [him] after the game grew to include the majority of the team.” This 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.⁸³

Nice starting position you have. Too bad if anything should happen to it.

This Article is about an emerging right to mistreat students, but as we have seen, Kennedy did not think he was mistreating students. He thought that by inducing them to pray, he was making them into better people. Such treatment is, however, the core harm that the religion clauses of the First Amendment aim to prevent.

C. A Corrupted Religion

Many people (including some judges) mistakenly think that disestablishment is somehow hostile to religion. The Framers, however, thought religion was uniquely *sacred*. The Court instructs: “[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]

79. Brief for Respondent, *supra* note 73, at 5.

80. *Id.* at 11.

81. *Id.*; Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1239 (W.D. Wash. 2020) (“[T]here is no evidence of athletes praying in Kennedy’s absence.”).

82. “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.” *Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).

83. *Kennedy*, 443 F. Supp. 3d at 1237 (citations omitted).

the understanding of the Founding Fathers.”⁸⁴ That understanding condemned any pressure to outwardly conform to the religion preferred by state officials.

John Locke, the philosopher who most influenced the Founding generation, argued that officially induced worship was “hypocrisy, and contempt of his Divine Majesty.”⁸⁵ Thomas Jefferson wrote that all attempts to influence religion “by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness.”⁸⁶ James Madison, the primary author of the First Amendment, despised the notion that religion should be promoted because it conduces to good citizenship. Any attempt to “employ Religion as an engine of Civil policy” was “an unhallowed perversion of the means of salvation.”⁸⁷ Moreover, he wrote, “[E]xperience witnesseth that ecclesiastical establishments . . . [produce] pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.”⁸⁸ Pertinent to the *Kennedy* case, he argued that only worship “freed from all coercive edicts . . . can be acceptable to Him whom no hypocrisy can deceive.”⁸⁹ The Supreme Court’s first avowed originalist, Hugo Black (the architect of the Establishment Clause doctrine that today’s Justices are trashing), thought that the First Amendment barred favoritism for “persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.”⁹⁰ Freedom from compelled worship was at the core of the establishment of religion the Framers meant to prohibit, and

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84. *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).
85. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 127 (J.W. Gough ed., Basil Blackwell 1948).
86. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> [https://perma.cc/FC9H-8PC7] (last visited Mar. 15, 2023).
87. James Madison, *Memorial and Remonstrance Against Religious Assessments*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [https://perma.cc/KP6F-WJ87] (last visited Mar. 15, 2023).
88. *Id.*
89. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 79–80 (2022) (quoting James Madison, *Presidential Proclamation of July 23, 1813*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/03-06-02-0434> [https://perma.cc/VZ3T-MN7S] (last visited Apr. 6, 2023)).
90. *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961). For elaboration on the corruption argument, see generally Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

such compulsion was specifically prohibited by most state constitutions at the time of the Founding.⁹¹

The Framers were right to worry. As I pointed out after the *Kennedy* decision, if you asked a thoughtful Bremerton football player what he learned from his coach, he might, if he were honest, tell you this:

My public school taught me that religion is a sham. We go through the motions to keep the coach happy. But everyone knows that it is an empty ritual, and everyone knows that everyone else knows. The coach's notion that this charade makes us "better people" just shows that religious people like him are amazingly gullible.

One might reply: "That's an exaggeration, isn't it? Surely some of the students in the prayer circle are sincere. And the coach says he won't retaliate against anyone who doesn't join."

But the student could reasonably respond:

Maybe, but how can anyone tell? In this situation, neither coach nor players can even be sure about their own motives. There is only one way to know that religious people really mean what they say: take away all secular inducements. Those inducements will henceforth be a permanent part of "voluntary" prayers, here and at lots of other schools. There are thousands of football scholarships, plenty of coaches who want to do what Kennedy did, and plenty of students who will fear offending those coaches. Tawdry, bogus religion will henceforth be a permanent part of the landscape of American public education.⁹²

It is not only non-Christians who will be offended by this way of carrying on. Some Christian students will be unwilling to join the coach's prayer because they regard it as a grotesque distortion of Christianity. Jesus of Nazareth said: "[D]o not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by men But when you pray, go into your room, close the door and pray to your Father, who is unseen."⁹³ Kennedy is of course entitled to think that Jesus was confused about what would make students better people. The school is no longer permitted to hold that its authority may not be placed on either side of that question. Kennedy and other coaches are empowered to punish students for disagreeing with their religious views.

91. MUÑOZ, *supra* note 89, at 56–58.

92. Andrew Koppelman, *Originalism and the Football Coach's Prayer*, THE HILL (May 7, 2022, 8:00 AM), <https://thehill.com/opinion/judiciary/3478324-originalism-and-the-football-coachs-prayer/> [<https://perma.cc/2ASZ-8ZV2>].

93. *Matthew* 6:5–6 (New International).

D. The Law from Now On

The Court places great weight on the school's concession that there was "no evidence that students [were] directly coerced to pray with Kennedy."⁹⁴ There was no "record evidence that students felt pressured to participate in these prayers."⁹⁵

Here we can see again the technique for concealing harm that the Sixth Circuit deployed in *Meriwether*: disable the state from protecting students from the risk of harm by declaring that it has acted arbitrarily unless the harm has already happened and the state can prove it in court. This of course misapprehends the whole notion of risk. The decision hamstring schools that seek to prevent this kind of intimidation.⁹⁶ The Court dismisses as "hearsay" evidence that parents complained to district employees about pressure from the coach.⁹⁷ But managing a school is not a trial. Do schools violate teachers' free exercise rights if they make administrative decisions that protect students before harm happens, rather than first allowing the harm to happen and then collecting sworn proof of it? The proof of coercion might ultimately require testimony in open court from students courageous enough to face retaliation in their communities.⁹⁸ Families who complain about Establishment Clause violations already face stigma, loss of jobs, and even violence.⁹⁹

94. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2419 (2022).

95. *Id.* at 2430.

96. Justice Sotomayor observes:

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. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

Id. at 2453 (Sotomayor, J., dissenting) (citations omitted). Although the Court does not embrace the demand, in practice it will be very difficult for schools to resist such demands in the future, since any effort to separate praying teachers from students will be subject to attack under this precedent.

97. *Id.* at 2430 (majority opinion).

98. Ira C. Lupu & Robert W. Tuttle, *Kennedy v. Bremerton School District—A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y (June 28, 2022), <https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/> [<https://perma.cc/NSY3-LP3Y>].

99. In the earlier case *Santa Fe Independent School District v. Doe*, the district court determinedly protected the identities of the plaintiffs in order to prevent such retaliation. That would have been impossible, and the result would likely have been different, if the plaintiffs' testimony were required in order for their claim to prevail. Paul Horwitz, *Of Football*,

If only direct coercion counts, then indeed the 1960s school prayer cases have been overruled.¹⁰⁰ The Court declares that “the possibility that students might choose, unprompted, to participate in Mr. Kennedy’s prayers [does not] necessarily prove them coercive.”¹⁰¹ But for many years, notably in the cases involving official school prayers, the Court recognized that the pressure to conform, as it put it in 1992, “though subtle and indirect, can be as real as any overt compulsion.”¹⁰² The notion that students will “choose, unprompted,” in the face of these pressures makes as much sense as the notion that I might choose, unprompted, to hand my money to the thug whose gun coincidentally happens to be pointed at me.

The Court also notes that Kennedy “has repeatedly explained that he is willing to conduct his prayer without students—as he did after each of the games that formed the basis of his suspension—and after students head to the locker room or bus.”¹⁰³ This sentence might be taken to authorize other school districts in the future to insist on that condition for teacher prayer.¹⁰⁴ But the Court also notes that voluntary prayer may not be discouraged. If the next coach demands to pray while students are in the vicinity and able to “choose, unprompted,” to join him, it is uncertain whether the school can stop him absent sworn evidence of past direct coercion.

Suppose that a teacher decides to pray before the bell rings, telling students they may join him if they like. Part of the pre-1955 Good Friday Mass, which some Catholics still think appropriate (here disagreeing with the Vatican),¹⁰⁵ reads: “Let us pray also for the

“Footnote One,” and the Counter-Jurisdictional Establishment Clause: *The Story of Santa Fe Independent School District v. Doe*, in *FIRST AMENDMENT STORIES* 481 (Richard W. Garnett & Andrew Koppelman eds. 2012); Lisa Graybill, Stephanie Bauman & Alissa Parsley, *At the Mercy of the Majority: Attacks on Religious Freedom in Texas Public Schools in the Decade After Santa Fe v. Doe*, *ACLU OF TEX.* (Sept. 12, 2012), <https://www.aclutx.org/en/report/attacks-on-religious-freedom-in-public-schools> [<https://perma.cc/KUE7-7BGL>].

100. Lupu and Tuttle observe that the school prayer cases “did not depend upon coercion, and they both presumed the likelihood of coercion without the necessity of proof by the claims of individuals.” Lupu & Tuttle, *supra* note 98. The inconsistency with those cases is elaborated in *Kennedy v. Bremerton School District*. *Kennedy*, 142 S. Ct. at 2450–51 (Sotomayor, J., dissenting).
101. *Kennedy*, 142 S. Ct. at 2432 n.7 (majority opinion).
102. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).
103. *Kennedy*, 142 S. Ct. at 2432 n.7.
104. Thanks to Stephanie Barclay for calling my attention to this possible reading of the Court’s opinion.
105. *See, e.g.*, Peter Kwasniewski, *The Truthfulness of the Pre-1955 Good Friday Prayer for the Jews*, *NEW LITURGICAL MOVEMENT* (Dec. 7, 2020),

faithless Jews . . . hear our prayers, which we offer for the blindness of that people; that acknowledging the light of thy Truth, which is Christ, they may be delivered from their darkness.”¹⁰⁶ Suppose, in a community with a history of anti-Semitic vandalism and violence, a teacher recites that, and growing numbers of students join him. Does the school district have the power to stop him? After this decision, dare it risk trying?

III. LEARNING TO LIVE WITH MISTREATMENT

In both of these cases, what teachers do to students in public educational institutions, while they are on the public payroll and exercising power that they have only because they are state employees, is judicially deemed to be private and beyond state control. Both courts demand proof that students have actually been injured, thereby categorically disabling schools from preventing harm before it happens.

In both cases, the state sought to devise a reasonable accommodation with its employee, which the court finds inadequate. In both cases, the employee is entitled to reject any compromise that gives any weight to the pertinent students’ interests. Evidently, conservative Christians may haughtily dismiss any rule that fails to give them everything they want.

In the new dispensation, even slight burdens on the religious are intolerable, while substantial injuries to the nonreligious are to be minimized or ignored.¹⁰⁷ It happens that the judges who decided these

<https://www.newliturgicalmovement.org/2020/12/the-truthfulness-of-pre-1955-good.html> [<https://perma.cc/YTD9-QFTW>].

106. *Id.*

107. That is a recurrent theme in much of the Supreme Court’s recent religious liberty jurisprudence. See Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023); Andrew Koppelman, *Justice Alito, Originalism, and the Aztecs*, 54 LOYOLA U. CHI. L.J. 455 (2023). *Meriwether* is a free speech case, but as noted above, the fact that the plaintiff is religious gives possibly decisive weight to his claim. See *supra* note 34 and accompanying text.

The calculus is especially clear in Justice Alito’s objection to same-sex marriage. The only effect of marriage equality he notices is its deployment in popular rhetoric against those who share his beliefs. Dissenting from the Court’s decision to recognize a right to marry, he claimed that that right “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.” They will “risk being labeled as bigots and treated as such by governments, employers, and schools.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting). More recently, he and Justice Thomas complained that recognition of same-sex couples’ right to marry “enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots.” *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas & Alito, JJ., dissenting from denial of certiorari). (The branding certainly happens, but

cases are themselves conservative Christians. As members of that group win case after case, often on the basis of strikingly weak reasoning, it is hard to avoid the suspicion that tribalism is at work. In the context of adjudication, tribalism is a form of corruption, as much as if the judge were married to one of the parties.

These decisions offer a distinctive vision of the appropriate response to religious diversity. The *Kennedy* Court cites “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.’”¹⁰⁸ Evidently part of learning how to live in a pluralistic society is discovering that you have been bullied by a conservative Christian and that there is nothing that you or anyone else can do about it.

They also offer a distinctive vision of religious identity. A long-standing part of American disestablishment is that the state is supposed to be neutral with respect to theology.¹⁰⁹ But in these episodes, courts embrace a religious vision, one that is and should be contested: the Christian as unapologetic sociopath.

it is delusional to think it is caused by *Obergefell* or would stop if that decision were overturned.) The fact that there are millions of gay people who need the law’s protection is an overlooked detail. The conservative Christians doubtless had an easier time of it when gay people were closeted. But the pertinent moral point was made long ago by Joel Feinberg: “When two persons each have interests in how one of them lives his life, the interests of the one whose life it is are the more important.” 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 61 (1990).

108. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

109. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 105 (2013).