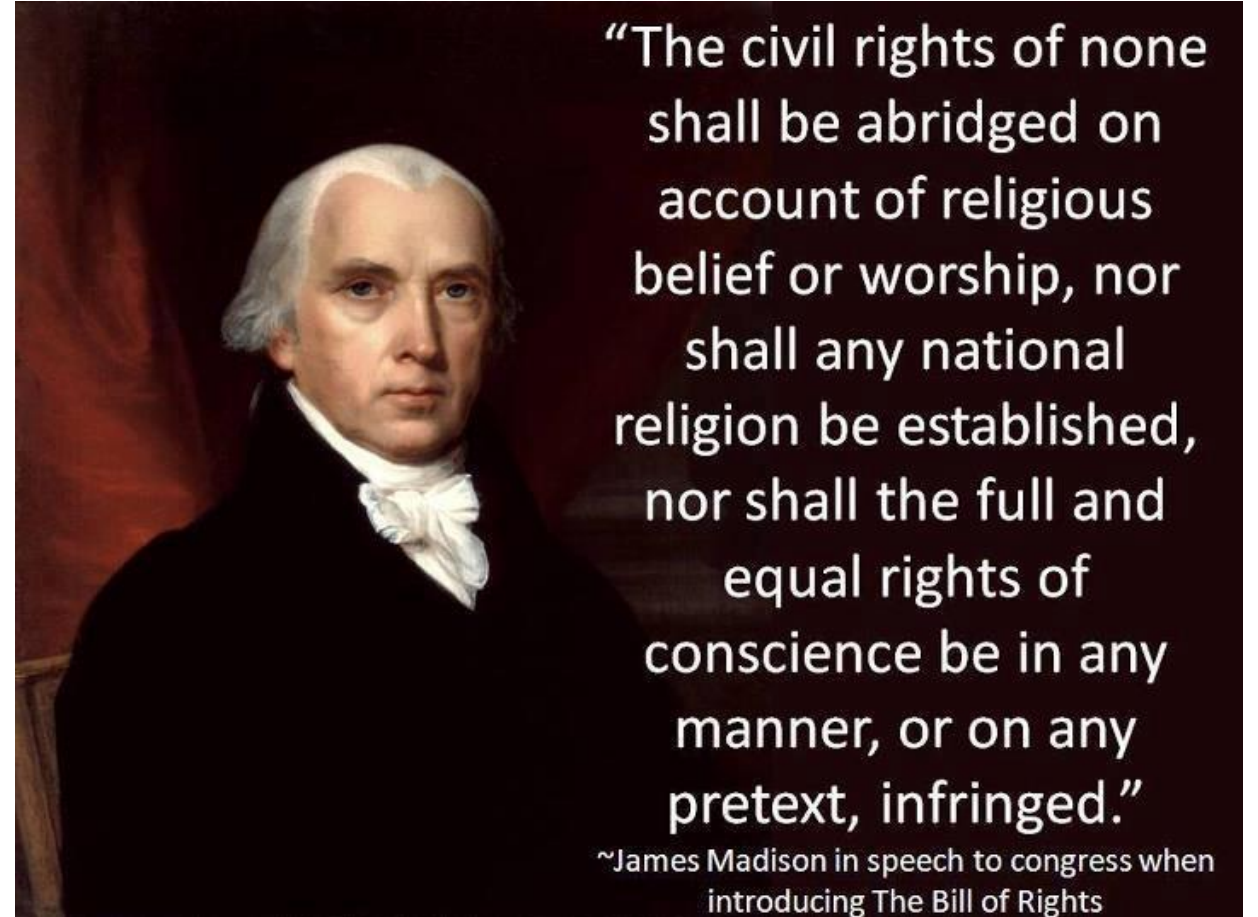

SPEECH, BELIEFS, AND OTHER STICKY ISSUES FOR SCHOOL ADMINISTRATORS 2024

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University of Louisiana at Lafayette



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WHO IS THE GOVERNMENT?

- Is your paycheck funded by tax dollars?
 - Is your job at a public entity/institution?
 - Do you buy your own supplies?
-



**YOU
CAN'T**

HANDLE

TRUTH the

LAYERS OF GOVERNMENT IN SCHOOLS

Employment
power?

Policy maker?

Political power?



Leadership?

Controls the finances?

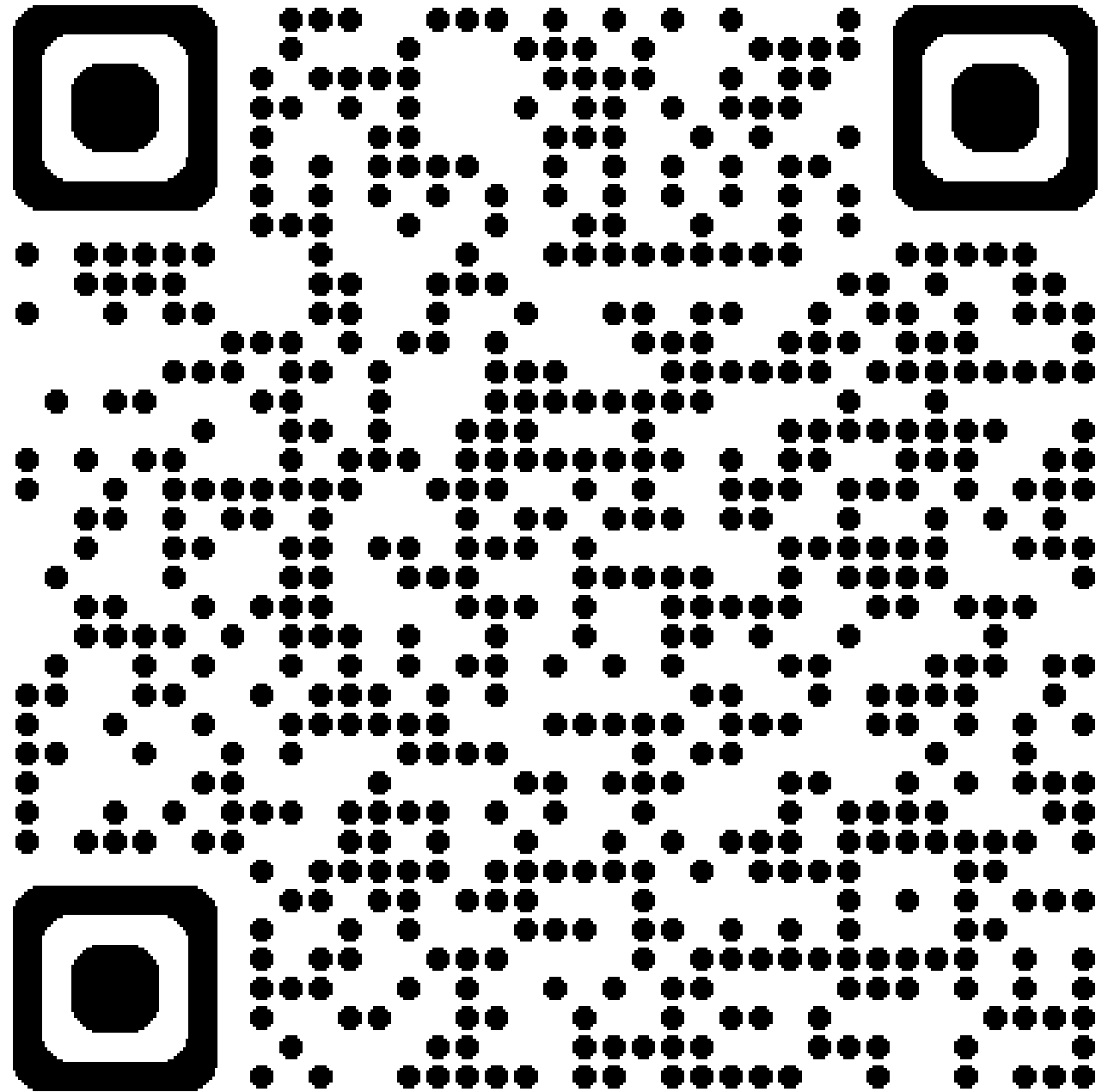
Evaluator?

IMPACT

TODAY'S TOPICS

- Freedom of Speech
 - Freedom of Religion
 - Upcoming sticky situations
-

HOW DID WE GET HERE?



FIRST AMENDMENT

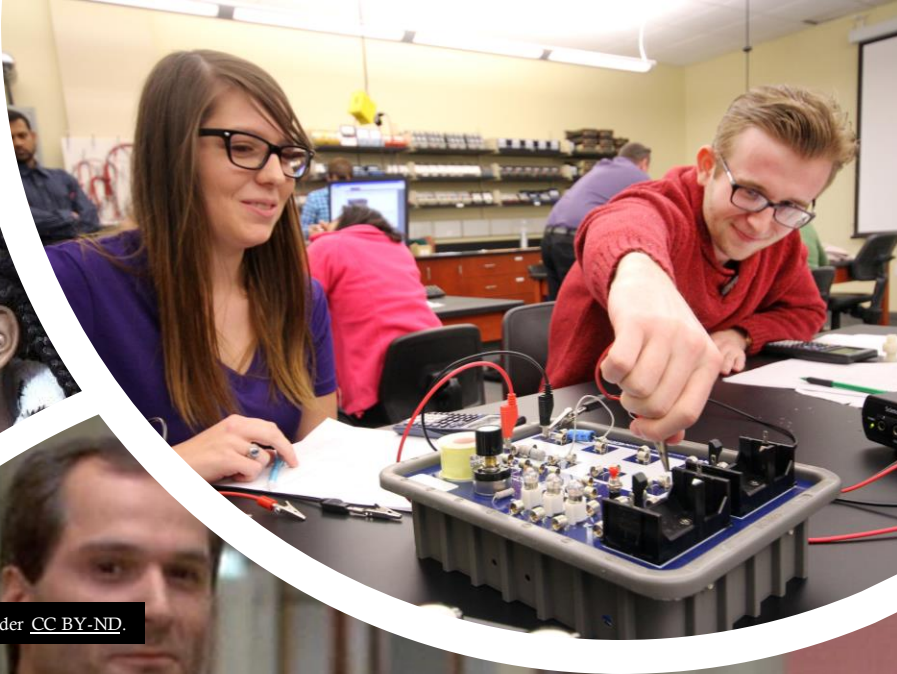
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of **religion** or prohibiting the free exercise thereof; or abridging the freedom of **speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to **petition** the Government for a redress of grievances.



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SPEECH



TALE OF TWO CASES OF STUDENT SPEECH

BELL V ITAWAMBA COUNTY SCH. BD. (5TH CIR.) (2015)

- Taylor Bell a student at Itawamba Agricultural High School in Itawamba County, Mississippi created and posted a rap recording on Facebook and YouTube accusing two of the coaches of having sexual misconduct with female students.
 - The song was laced with vulgarities and profanity and included the line “I’m going to hit you with my rueger (reference to a brand of firearm); “[I am] going to get a pistol down your mouth.”
 - The school suspended him. At the disciplinary hearing he stated he did not report the alleged sexual misconduct to the school because he thought he would be ignored. He admitted his recording was easily viewed.
 - He was transferred to the alternative school based on the recording being found to have "threatened, harassed, and intimidated school employees."
-

MAHANROY AREA SCHOOL DISTRICT V. B.L. (2021)

B.L., a student at Mahanoy Area High School (MAHS)

Unsuccessfully tried out for her high school's varsity cheerleading team but made the junior varsity team.

Outside of school over the weekend she posted on Snapchat picture of herself and the following caption:

“F*** school f*** softball f*** cheer f*** everything.”

About 250 people, many of those MAHS students and cheerleaders, saw it. Several students share screenshots with the coaches and others.

- **Coaches decide B.L. has violated team and school rules that she acknowledge before joining the team.**
 - **B.L. is suspended from the junior varsity for a year.**
-

THE SCOOP

- **B.L. sued the school under 42 U.S.C. § 1983 alleging**
 - **Her suspension from the team violated the First Amendment**
 - **The school and team rules were overbroad and viewpoint discriminatory**
 - **The rules were unconstitutionally vague.**

The district court granted summary judgment in B.L.'s favor, ruling that the school had violated her First Amendment rights.

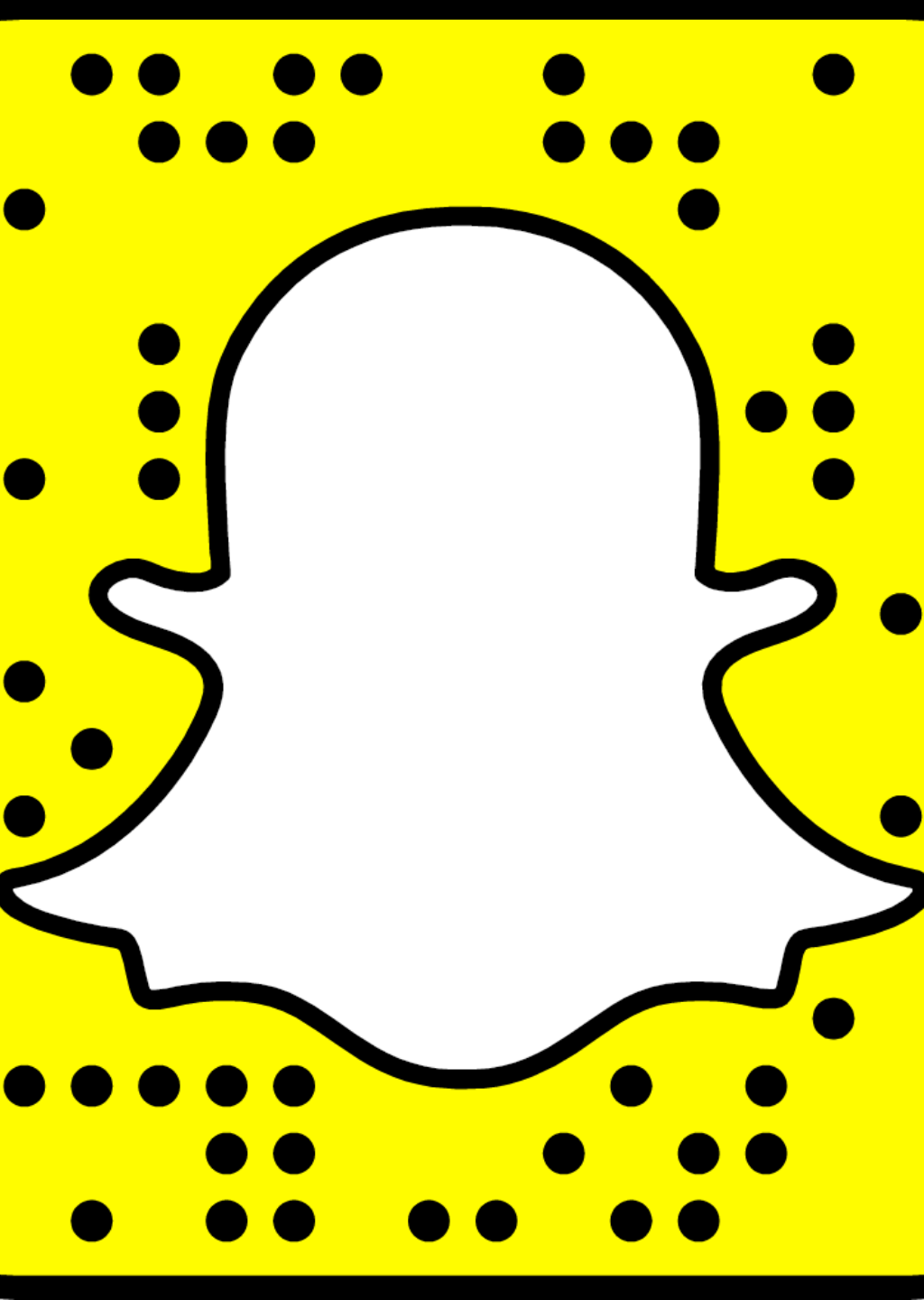
The U.S. Court of Appeals for the Third Circuit affirmed.

COMPARE AND CONTRAST

Questions	Itawamba	Mahanoy
What incident pushed the speech?		
What was the content of the speech?		
Where was it posted?		
What was the assumption of privacy?		
Outcome and who decided		

COMPARE AND CONTRAST

Questions	Itawamba	Mahanoy
What incident pushed the speech?	Protecting peers from believed harassment	Frustrated with loss of position
What was the content of the speech?	Threatening violence and attempted murder Vulgar language	Vulgar language
Where was it posted?	Facebook and YouTube	SnapChat to a few people
What was the assumption of privacy?	No assumption	Assumed privacy
Outcome and who decided	Suspension Disciplinary committee	Suspension from team for one year Coaches



BIG QUESTION

Does the First Amendment prohibit public school officials from regulating off-campus student speech?

BELL V ITAWAMBA COUNTY SCH. BD. (5TH CIR.) (2015)

- Bell argued per Tinker his out of school recording did not disrupt school to extent of the "substantial test" in Tinker.
 - The Court stated due to digital communications there is a “the paramount need for school officials to be able to react quickly and effectively to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.” [p. 20]
-

BELL V ITAWAMBA COUNTY SCH. BD. (5TH CIR.) (2015)

- Court ruled that restriction of off-campus speech is permitted “when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated and was disseminated, off-campus without the use of school resources.” [p. 25]
 - Court stated Bell intended his recording to reach the school community due to his own admission to the disciplinary board that his purpose was to “increase awareness of the [alleged misconduct].” [p. 26]
-

BELL V ITAWAMBA COUNTY SCH. BD. (5TH CIR.) (2015)

Tinker states:

- “a school board is permitted to discipline a student for speech that either causes a substantial disruption or reasonably is forecast to cause one.” [p. 28]
 - “[s]chool officials must be able to show that their actions were caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” [p. 28]
 - The Court concluded that “Bell’s conduct reasonably could have been forecast to cause a substantial disruption.” [p. 31] He names the two teachers directly and they held legitimate fear for their safety.
-

MAHANAY AREA SCHOOL DISTRICT V. B.L. (2021)



8-1 in favor of B.L.

The Ruling:

The First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials, and here, the school district's decision to suspend B.L. violated the First Amendment.

MAHANAY AREA SCHOOL DISTRICT V. B.L. (2021)



While the school's interest do not disappear when students are off campus, there are three features of off-campus speech that impact the First Amendment rights of students:

- (1) off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility**
- (2) off-campus speech regulations coupled with on-campus speech regulations would mean a student cannot engage in the regulated type of speech at all**
- (3) the school itself has an interest in protecting a student's unpopular off-campus expression because the free marketplace of ideas is a cornerstone of our representative democracy**

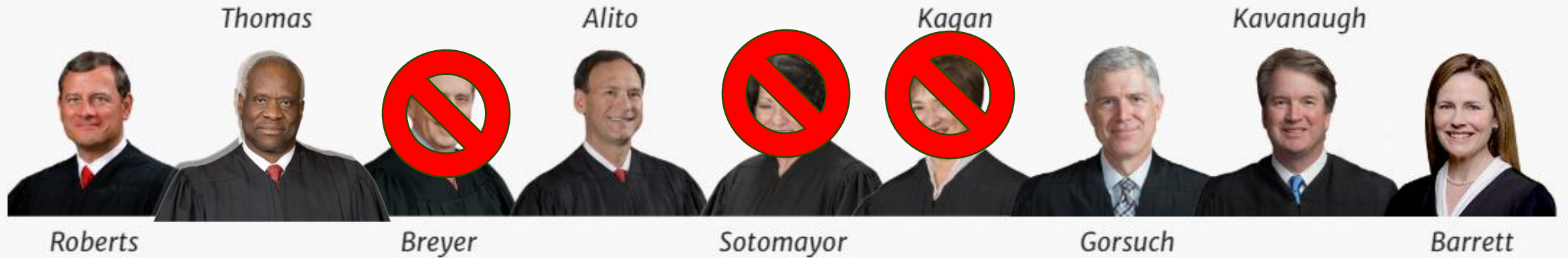
Breyer wrote: "her speech did not cause "substantial disruption" or threaten harm to the rights of others."

MAHANAY AREA SCHOOL DISTRICT V. B.L. (2021)



Justice Clarence Thomas argued that schools have historically had the authority to regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs.

MAHANAY AREA SCHOOL DISTRICT V. B.L. (2021)



Justice Neil Gorsuch authored the majority opinion of the Court.

The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.



IF THEN, SO
WHAT....

THINGS TO CONSIDER AT SCHOOL

- To what extent is the speech a substantial threat of disruption (Tinker; Saxe)
 - To what extent is the speech vulgar or obscene (Bethel)
 - To what extent is the speech contrary to the mission of the school if it occurs within a school activity (Hazelwood)
 - What are the procedures for discipline?
-

WHAT IS FREEDOM OF RELIGION?

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

As Americans, we have both
the freedom **FROM** and the
freedom **OF** religion.

FIRST AMENDMENT: RELIGION CLAUSES

Establishment Clause

Prevents the government from establishing a state religion

Free Exercise Clause

Protects religious exercise and religious expression from government interference or discrimination

EQUAL ACCESS ACT (1984)

- The Equal Access Act of 1984 forbids public schools from receiving federal funds if they deny students the First Amendment right to conduct meetings because of the “religious, political, philosophical, or other content of the speech at such meetings.”
 - *Board of Education of the Westside Community Schools v. Mergens* (1990)
-

What is the unconstitutional promotion of religion?

Lemon v. Kurtzman (1971)

The **Lemon test** says that in order to be constitutional, a policy must:

1. Have a non-religious purpose
 2. Not end up promoting or favoring any set of religious beliefs
 3. Not overly involve the government with religion
-

STUDENTS' RIGHTS TO RELIGIOUS EXPRESSION

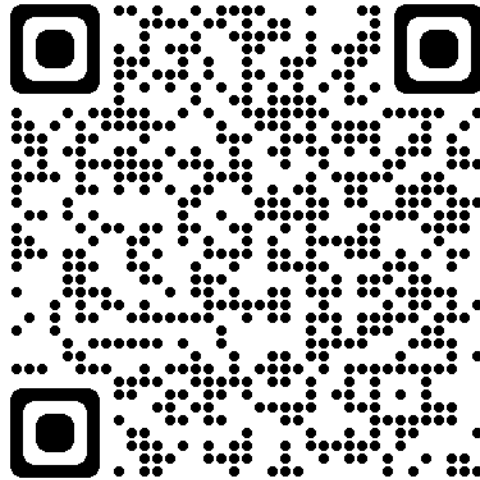
- Allowed to speak about religion or to refrain
 - Allowed to speak about religion and engage in religious activities to the same extent others are allowed to speak and gather for non-curriculum-related activities (*Westside Community Schools v. Mergers*, 1990; *Widmar v. Vincent*, 1981).
 - All activities must be student-initiated (*Lemon v. Kurtzman*, 1973).
 - Schools are not allowed to mandate any school activity that contradicts religious beliefs or practices.
-

WHAT ARE THE LIMITS?

Although the text is absolute, the courts place some limits on the exercise of religion. The Supreme Court has interpreted this clause so that the freedom to believe is absolute, but the ability to act on those beliefs is not.

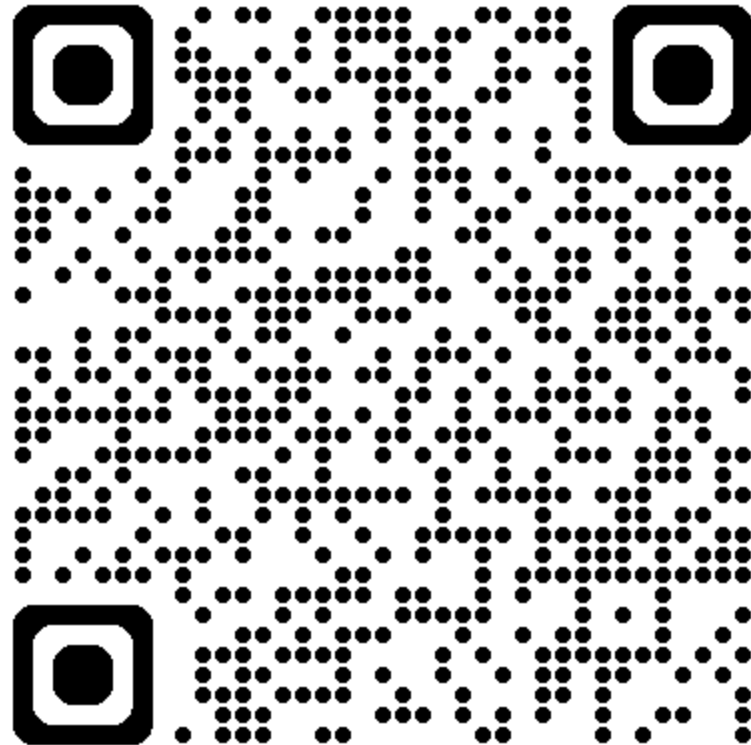
U.S. DEPARTMENT OF EDUCATION

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



Schools must also maintain neutrality among faiths rather than preferring one or more religions over others.[6]

CURRENT MOVEMENTS





THE FCA VALUES

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WAIT A MINUTE!

Lemon v. Kurtzman (1971)

The Lemon test is used to determine if a government policy is constitutional, a policy must:

1. Have a non-religious purpose
 2. Not end up promoting or inhibiting any religious beliefs
 3. Not overly involve the government in religion
-



KENNEDY VS BREMERTON SCHOOL DISTRICT (2022)

- **Joseph Kennedy, a high school football coach, engaged in voluntary prayer during and after school games. Some students joined. He had been doing this for over seven years.**
 - **Bremerton School District asked him to stop to protect the school from a lawsuit based on the Establishment Clause.**
 - **Kennedy refused.**
-

KENNEDY VS BREMERTON SCHOOL DISTRICT (2022)

- **He was suspended.**
 - **Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.**
 - **The district court held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified.**
 - **Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed**
-

KENNEDY VS. BREMERTON SCHOOL DISTRICT (2022)

- In forbidding Mr. Kennedy’s prayers, the District sought to restrict his actions because of their religious character, thereby burdening his right to free exercise.
- As to his free speech claim, the timing and circumstances of Kennedy’s prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirm that Kennedy did not offer his prayers while acting within the scope of his duties as a coach.
- The District cannot show that its prohibition of Kennedy’s prayer serves a compelling purpose and is narrowly tailored to achieving that purpose.
- The Court’s Lemon test, and the related endorsement test, are “abandoned,” replaced by a consideration of “historical practices and understandings.” Applying that test, there is no conflict between the constitutional commands of the First Amendment in this case.



JUSTICE GORSUCH DELIVERED THE OPINION OF THE COURT.

- 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. Mr. Kennedy is entitled to summary judgment on his **First Amendment** claims. The judgment of the Court of Appeals is



PRAYER AND RELIGIOUS EXERCISE DURING NON-INSTRUCTIONAL TIME

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities.

Students also may read from religious materials; say a prayer or blessing before meals; and engage in worship or study religious materials with fellow students during non-instructional time (such as recess or the lunch hour) to the same extent that they may engage in nonreligious activities.

Although school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious perspectives in applying such rules and restrictions.



ORGANIZED PRAYER GROUPS AND ACTIVITIES

Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other noncurricular student activity groups.

Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the groups' religious character or perspective. School officials should neither encourage nor discourage participation in student-run activities based upon the activities' religious character or perspective.

Schools may take reasonable steps to ensure that students are not pressured to participate (or not to participate) in such religious activities.



ORGANIZED PRAYER GROUPS AND ACTIVITIES

School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding noncurricular activities.

Student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets.

School authorities may not discriminate against groups that meet to engage in religious expression such as prayer.

School authorities may choose to issue appropriate, neutral disclaimers of the school's sponsorship or approval of noncurricular groups and events.



TEACHERS, ADMINISTRATORS, AND OTHER SCHOOL EMPLOYEES

- Teachers, school administrators, and other school employees may not encourage or discourage private prayer or other religious activity.
- School employees may participate in their personal capacities in privately sponsored baccalaureate ceremonies or similar events.

TEACHERS, ADMINISTRATORS, AND OTHER SCHOOL EMPLOYEES

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





MOMENTS OF SILENCE

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

ACCOMMODATION OF PRAYER AND RELIGIOUS EXERCISE DURING INSTRUCTIONAL TIME

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



STUDENT ASSEMBLIES AND NONCURRICULAR EVENTS

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

PRAYER AT GRADUATION

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



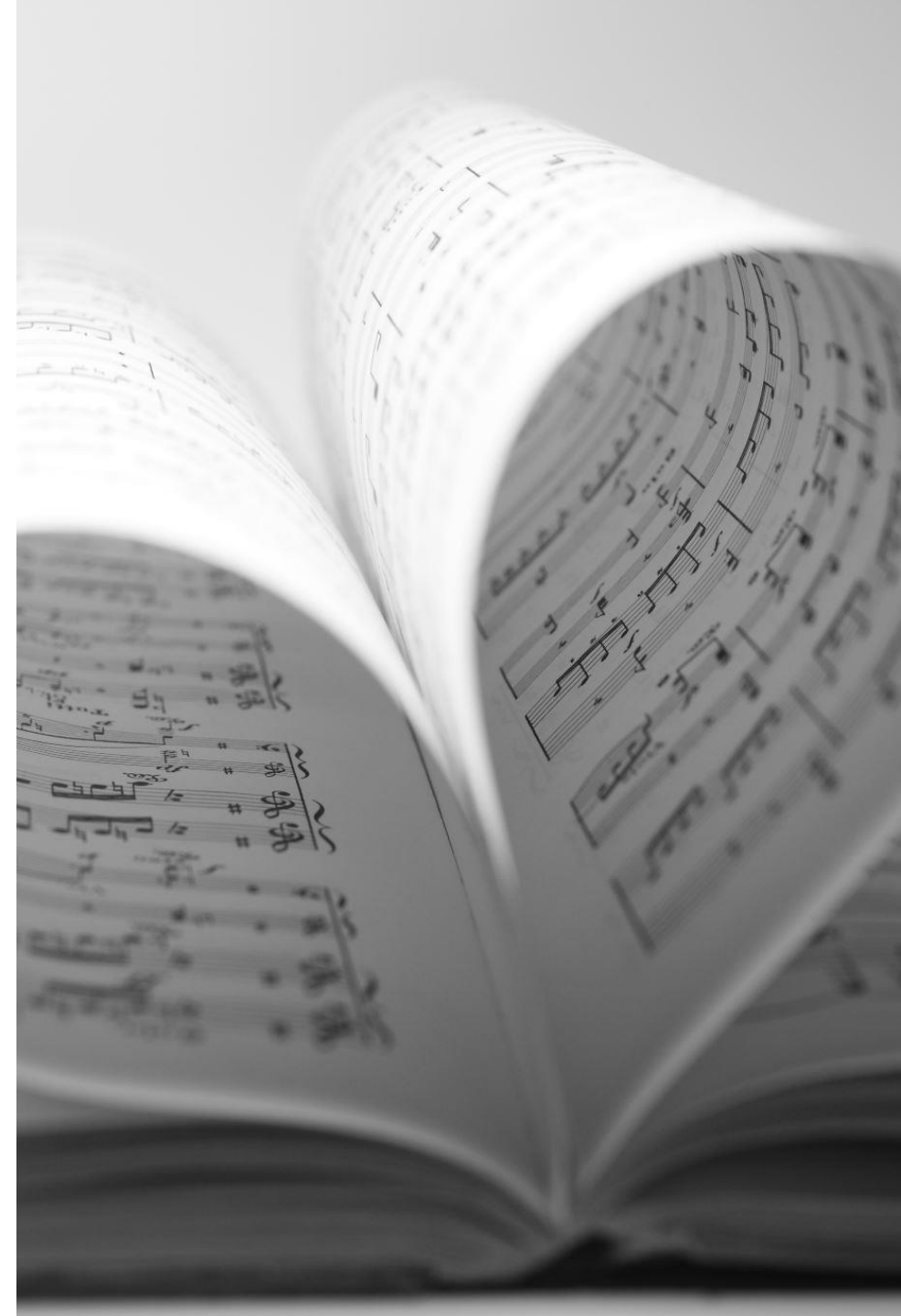
BACCALAUREATE CEREMONIES

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



PHILOSOPHICAL QUESTIONS

- Teachers may discuss philosophical questions concerning religion, the history of religion, comparative religion, religious texts as literature, and the role of religion in the history of the United States and other countries are all permissible public school subjects.
- Similarly, it is permissible to study religious influences on philosophy, art, music, literature, and social studies.
 - For example, public schools generally may allow student choirs to perform music inspired by or based on religious themes or texts as part of school-sponsored activities and events, provided that the music is not performed as a religious exercise and is not used to promote or favor religion generally, a particular religion, or a religious belief.



RELIGIOUS LITERATURE

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





TEACHING ABOUT RELIGION

Public schools may not provide religious instruction, but they may teach *about* religion and promote religious liberty and respect for the religious views (or lack thereof) of all.

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

STUDENT DRESS CODES AND POLICIES

Public schools generally may adopt policies relating to student dress and school uniforms to the extent consistent with constitutional and statutory civil rights protections.

Schools may not, however, target religious attire in general, or the attire of a particular religion, for prohibition or regulation.

If a school makes exceptions to a dress code to accommodate **nonreligious student needs**, it ordinarily must also make comparable **exceptions for religious needs**.

Students may display religious messages on items of clothing to the same extent and pursuant to the same conditions that they are permitted to display nonreligious messages.

In addition, in some circumstances Federal or State law may require schools to make accommodations that relieve substantial burdens on students' religious exercise. School officials may wish to consult with their attorneys regarding such obligations.



RELIGIOUS EXPRESSION IN CLASS ASSIGNMENTS AND HOMEWORK

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions.

Such home and classroom work should be judged by ordinary academic standards of substance, relevance, and other legitimate pedagogical objectives.

EXCUSALS FOR RELIGIOUS ACTIVITIES

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





NOW WHAT?

- Watch for the offshoot cases that arise.
-

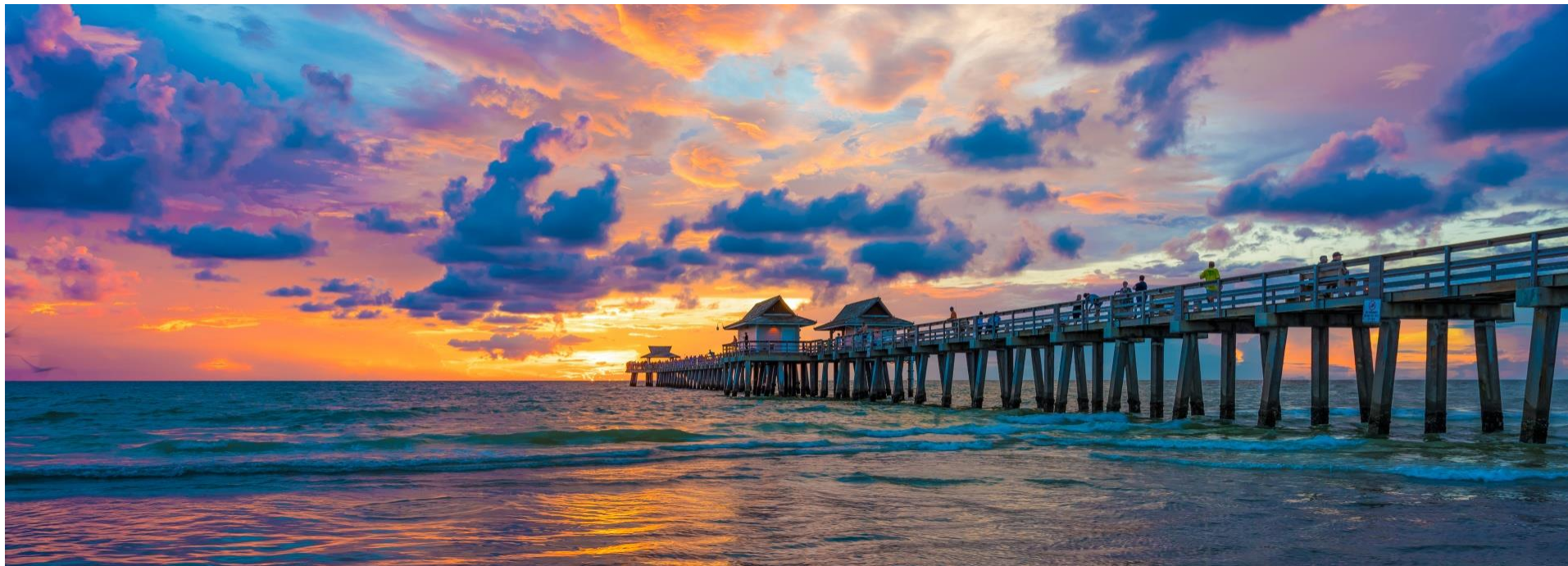
PREPARATION

What is your district/school doing to consistently develop your teachers' and administrators' understanding of the First Amendment?



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AND COACH KENNEDY?



THANK YOU

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