THE END OF THE ESTABLISHMENT CLAUSE?: CONSTITUTIONAL CHAOS CREATED BY THE COURT IN *KENNEDY*

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"It should not escape notice, however, that the effects of the majority's new rule [in *Kennedy v. Bremerton Sch. Dist.*] could be profound."- Justice Sotomayor, *dissenting*[1]

The Roberts Court ruling in *Kennedy v. Bremerton Sch. Dist.* sparked a transformation in First Amendment religious freedom jurisprudence.[2] *Kennedy* created unclear precedent that threatens to destroy the balance between the Free Exercise Clause and the Establishment Clause. The *Kennedy* majority ruled that a public school district violated a football coach's First Amendment rights by punishing him for publicly praying *with his players* on the fifty-yard line directly after a football game.[3] The Justices disagreed over the basic legal principle at issue in the case. The conservative majority found that the school's punishment of the coach violated his Free Exercise rights to individually pray.[4] However, the dissent defiantly contradicted the

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[1] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 574 (2022).

[2] *Id.* at 507.

[3] *Id.* at 562. The dissent states that some students felt coerced into prayer by Kennedy, as confirmed by the District Court evidentiary record. The majority erroneously deemed the allegation of student coercion irrelevant.

[4] *Id.* at 543 ("Respect for religious expressions is indispensable to life in a free and diverse Republic- whether those expressions take place in a

majority's classification of the coach's prayer as a question of Free Exercise, instead stating that the facts demonstrated an obvious violation of the Establishment Clause because a school official coaxed his players into praying with him.[5] Justice Gorsuch's majority opinion ignored facts, misrepresented legal history, and abandoned case precedent to allow a Christian coach to bombastically pray with students after a school-sanctioned football game at the center of the school's field.[6] Ultimately, the majority opinion of *Kennedy* diminishes religious freedom for all by creating a precedent that favors the Free Exercise Clause at the expense of the Establishment Clause. No signs indicate that the conservative majority plans to halt attacks on true religious freedom enshrined in First Amendment jurisprudence, despite growing public dissent and calls of illegitimacy.[7]

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sanctuary or on a field, and whether they manifest through the spoken word or a bowed head.").

[5] *Id.* at 546 ("The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion.").

[6] *Kennedy*, 597 U.S. at 543 (holding there is not conflict with the Establishment Clause when Coach Kennedy wished to pray after football games).

[7] *See* Tori Otten, *Poll: Two-Thirds of Americans Don't Have Confidence in Supreme Court*, THE NEW REPUBLIC (April 2023), https://newrepublic.com/post/172144/poll-two-thirds-americans-dont-confidence-supreme-court. In a poll conducted by NPR, PBS NewsHour, and the Marist Institute for Public Opinion, 62% of respondents have little to no confidence in the United States Supreme Court, which is the lowest percentage of confidence since the poll began asking that question in 2018. *Id.* Additionally, Justices on the court have called the Court's legitimacy into question themselves, especially within the dissent in *303*

The *Kennedy* case serves as an example of how far the current conservative bloc of Justices will go to undermine the Establishment Clause of the Constitution through the application of misconstrued facts and inaccurate legal interpretation.[8] To explore why the argument in *Kennedy* required an Establishment Clause analysis as opposed to a Free Exercise Clause analysis, Part I reviews a brief history of the First Amendment. After defining the historical interpretation of the religious clauses of the First Amendment, this comment explores the two separate ideologies that exist on the Court presently. *Kennedy* serves as a case study in Part II. In *Kennedy*, the majority opinion emphasizes Free Exercise of an individual's religious beliefs over the Establishment concerns of a public school, and the minority opinion emphasizes the Establishment of religion at public school as a reason to limit Free Exercise of an individual's religious beliefs. As the opinions in the *Kennedy*

Creative LLC v. Elenis, 600 U.S. 570, 604 *(2023)*, where Justice Sotomayor wrote, "a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong."; *see also* Hassan Kanu, *Even Some Justices are Rising Questions About the U.S. Supreme Court's Legitimacy*, REUTERS (July 10, 2023), https://www.reuters.com/legal/government/column-even-some-justices-are-raising-questions-about-us-supreme-courts-2023-07-10/.

[8] The conservative bloc of the Roberts Court consists of: Chief Justice John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Oriana González and Danielle Alberti, *The Political Leanings of the Supreme Court Justices,* AXIOS (July 3, 2023), https://www.axios.com/2019/06/01/supreme-court-justices-ideology.

case act as a battlefield for the Justices, a discussion of both ideologies will demonstrate that the conservative majority concocted facts and law to suit their desires while the minority attempted to cling to the rule of law and past precedents. Finally, Part III explores solutions to the erroneous transformation of the First Amendment's religious protections. In that section, recommendations are made for the Supreme Court to adopt a binding code of ethics with an effective enforcement mechanism and return to an even balance between the Free Exercise and Establishment Clause of the First Amendment's protection of religion in line with the Constitution.

I. Where We Were: The Conflict Between Free Exercise and Establishment

To truly appreciate how far the Roberts Court moved from typical judicial interpretations of the First Amendment in *Kennedy*, the origins of religious freedom must be examined, since the opinion holds that Establishment Clause issues must "accord with history and faithfully reflect the understanding of the Founding Fathers."[9] While drafting the Constitution, the founders understood that ensuring religious freedom for all meant keeping the government out of religion entirely.[10] Moreover, the United States was the

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[9] *Kennedy*, 597 U.S. at 535-36 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[10] *See* Mark Edwards, *Was America Founded As A Christian Nation?*, CNN (July 4, 2015), https://www.cnn.com/2015/07/02/living/america-christian-nation/index.html#:~:text=Those%20who%20signed%20the%20United,rejected%20a%20government%2Dsponsored%20church.

first nation to abolish religious disqualifications for public office or civil service.[11] Irrefutably, the 1797 Treaty of Tripoli, ratified by a Senate consisting of half of the original founding fathers, announced that the United States, "is not, in any sense, founded on the Christian religion."[12] Unlike the claims of the Roberts Court conservative majority, the Founding Fathers would not have wished for the Free Exercise Clause to overpower the Establishment Clause.[13]

Reviewing the work of James Madison demonstrates how the conservative *Kennedy* majority distorts history of the Founding Fathers to justify the erosion of religious freedom. Madison, the primary author of the Constitution and the Bill of Rights, wrote that citizens have the inalienable rights of religious freedom and liberty of conscious.[14] Before becoming the Father of the Constitution, Madison successfully called for an amendment to a draft of the Virginia Declaration of Rights in 1776, exchanging the phrase "toleration in the exercise of religion" to the

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[11] Edwards, *supra* note 10. Moreover, the founders worried "that religion would corrupt the state and, conversely, that the state would corrupt religion." *Id.*

[12] *Id.*

[13] *Kennedy*, 597 U.S. at 535-36. As demonstrated, Justice Gorsuch invokes the Founding Fathers to overturning precedent. *Id.*

[14] *See* James Hutson, *James Madison: Philosopher and Practitioner of Liberal Democracy,* Library of Congress, https://www.loc.gov/loc/madison/hutson-paper.html#:~:text=The%20first%20principle%20Madison%20enunciated,nature%20to%20enter%20civil%20society. Specifically, he stated that "any government embrace of religion violated the fundamental natural right to freedom of conscience which had been reserved by individual citizens when they left the state of nature to enter civil society." *Id.*

expansive phrase "free exercise of religion."[15] Madison also stated that mixing religion and politics would lead leaders to "vex and oppress each other."[16] In fact, Madison warned about the government favoring one religion over another because favoritism establishes a second-class citizenry of minority religions that do not practice the government-endorsed religion.[17] As a Founding Father, Madison expected an impenetrable wall of separation between church and state.[18] Ignoring this history, the *Kennedy* ruling damages that wall, creating constitutional chaos between the clauses, explored below.

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[15] James Madison's Montpelier, *James Madison and Religious Freedom*, National Trust for Historic Preservation, https://www.montpelier.org/learn/religious-freedom. This change in wording allowed for the right to follow one's conscious, an even broader freedom than allowing citizens to practice any religion. Additionally, the language in the free exercise clause of the First Amendment models the language Madison used in the Virginia General Assembly in 1776, demonstrating his dedication to the idea of religion freedom throughout his career in politics. *Id.* Additionally, Madison's "Memorial and Remonstrance" outlined fifteen arguments against the government support of churches. *Id.* Within that text, Madison emphasizes that individuals can choose to express their religious identities and that the government cannot direct religious expression in any way. *Id.*

[16] Edwards, *supra* note 10.

[17] Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 Wake Forest L. Rev. 617, 621-22 (2019).

[18] Madison is not the only founding father that held religious freedom in high regard. Thomas Jefferson, third President of the United States, stated in no uncertain terms in his 1777 bill for the Virginia legislature: "*the opinions of men are not the object of civil government, nor under its jurisdiction.*" Thomas Jefferson, *A Bill for Establishing Religious Freedom*, National Constitution Center (1779), https://constitutioncenter.org/the-constitution/historic-document-library/detail/thomas-jefferson-a-bill-for-establishing-religious-freedom.

A. The First Amendment: Free Exercise and Establishment Clauses

Broadly, the First Amendment sets out five rights inherently granted to any citizen of the United States: freedom of religion, freedom of the press, freedom of petition, freedom of assembly, and freedom of speech.[19] Under the First Amendment, citizens have the right to practice, or not practice, whatever religion they choose.[20] The Founding Fathers conceptualized the two separate aspects of the First Amendment as two parts of a whole that complement one another, yet the current conservative bloc on the Court creates holdings that have the Free Exercise Clause eating away at the Establishment Clause, seemingly making government religious neutrality a form of discrimination itself.[21] The concept of the separation of church and state

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[19] The full text of the First Amendment is: "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." Constitution Annotated, *First Amendment*, Congress.Gov, https://constitution.congress.gov/constitution/amendment-1/#:~:text=Congress%20shall%20make%20no%20law,for%20a%20redress%20of%20grievances.

[20] *See* Heather L. Weaver and Daniel Mach, *ACLU History: Maintaining the Wall: Freedom of- and From- Religion*, AMERICAN CIVIL LIBERTIES UNION (September 1, 2010), https://www.aclu.org/documents/aclu-history-maintaining-wall-freedom-and-religion?redirect=religion-belief%2Faclu-history-maintaining-wall-freedom-and-religion.

[21] Lawrence Hurley and Andrew Chung, *U.S. Supreme Court Takes Aim at Separation of Church and State,* REUTERS (June 29, 2022), https://www.reuters.com/legal/government/us-supreme-court-takes-aim-separation-church-state-2022-06-28/.

exists inherently implied within the text of the First Amendment.[22] The *Kennedy* ruling demonstrates the destruction of the delicate balance between the two existing clauses within the First Amendment's religious protection.

The clauses protecting religious freedom prohibit distinct forms of governmental coercion that work against each other in some instances: the Free Exercise Clause prohibits government compulsion on individual religious expression, while the Establishment Clause concerns the government endorsing a formal religion or indirectly endorsing a religion through policies or practices.[23] The Free Exercise Clause provides the right to worship or not without fear of penalties for religious beliefs.[24] Under the Free Exercise Clause, citizens have the right to practice the religious beliefs that relate to their own conscience, not the

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[22] Hana M Ryman and J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, Free Speech Center at Middle Tennessee State University (July, 2023), https://firstamendment.mtsu.edu/article/establishment-clause-separation-of-church-and-state/. Even though the phrase "separation of church and state does not appear in the First Amendment text, the idea is embodied in the Establishment Clause. The concept of separation of the church and state is present in the text of the Constitution, which prohibits the use of religious tests as a requirement for government jobs." *Id.* Moreover, Jefferson declared in an 1802 letter that adopting the First Amendment erected a "wall of separation between the church and state," like the position of James Madison. *Id.*

[23] Congress.gov, *Relationship Between the Establishment and Free Exercise Clauses*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/.

[24] ACLU, *Free Exercise of Religion*, AMERICAN CIVIL LIBERTIES UNION (2023), https://www.aclu.org/issues/religious-liberty/free-exercise-religion.

whims of the governing party in power.[25] Additionally, the Establishment Clause of the First Amendment prohibits the government from encouraging or establishing a religion in any way.[26] Based on the traditional principles of the Establishment Clause, the government cannot favor one religious practice over another through laws or regulations.[27] Because of this clause, the empowered few cannot exert their influence on the entirety of the country.[28] The Establishment Clause protects citizens from a national religion in the United States and acts as the reason why the government cannot directly fund religious institutions or religious schools.[29] Thus, legal interpretation of a First Amendment issue requires a balancing between Free Exercise protections

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[25] *See* Bradley Girard and Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, American Bar Association (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/.

[26] By 1833, every existing state disestablished religion, and in the 1940s, the Supreme Court held that the Fourteenth Amendment applies disestablishment to state governments as well as the federal government. Marci Hamilton and Michael McConnell, *The Establishment Clause,* National Constitution Center, https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264#:~:text=Congress%20shall%20make%20no%20law,for%20a%20redress%20of%20grievances.

[27] *See* Girard, *supra* note 25.

[28] *Id.*

[29] Weaver, *supra* note 20; the Establishment Clause is also the reason why many versions of school voucher programs for private religious schools fail since they require taxpayers to fund religious schools in violation of the Constitution. *Id.*

and Establishment protections.[30] This balance changes depending on the ideological composition of the Court, yet only the Roberts Court, with its ideologically conservative majority, allows for individual Free Exercise Clause claims to overtly erode government regulation through the Establishment Clause, as demonstrated in *Kennedy*.[31]

Justices on the Court act as final arbiters on conflicts between Free Exercise and Establishment issues, and there are no ways for parties to appeal once the Court made its ruling unless the Court decides to take the issue up again in

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[30] For example, the Supreme Court upheld the ban on polygamy, despite Free Exercise claims held by members of the Church of Jesus Christ of Latter-day Saints. *Reynolds v. United States*, 98 U.S. 145, 168 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[31] Most Supreme Court cases provide only minor exceptions for Free Exercise over Establishment violations while upholding government regulation of religious conduct, unlike *Kennedy*. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303-04 (1940) ("Thus the Amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (holding that government could only enforce religiously-neutral laws if the public interest is compelling, so Amish families cannot be punished for refusing to send children to school after the age of fourteen); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990) ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," contradicts both constitutional tradition and common sense.") (quoting *Reynolds v. United States*, 98 U.S., at 167).

another judicial session.[32] The Justices in the *Kennedy* majority held that government and church separation under Establishment, once held sacrosanct, pales in comparison to the Free Exercise of individual citizens to this Court, transforming the idea of religious freedom in this country. The majority likens the coach's actions as individualized expressions of prayer, which the dissent disputes, claiming the coach's role as a mentor and school leader acted as the school's endorsement and practice of religion. Since Justices have final say in American jurisprudence, the majority's *Kennedy* interpretation stands regardless of the condemnation and corrections made by the dissent. This uncertainty in Constitutional protections only harms religious freedom.

B. Jurisprudence of the Establishment Clause, Pre-*Kennedy*

The overall doctrine of the Establishment Clause employed various tests to determine if government action endorsed religion, including the *Lemon* test, the endorsement test, a coercion test, and an originalist history-

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[32] The perfect example of this juxtaposition between the Establishment Clause and the Free Expression Clause exists in the 1947 case of *Everson v. Board of Education*, where the Court rejected an Establishment Clause challenge to a New Jersey program that paid for bus fares for school children, even children attending private, religious schools; the Court in *Everson* reasoned that states cannot exclude citizens because of their faith or their lack of faith from receiving benefits from public welfare programs, even though the government would be, in effect, giving money to religious organizations through those programs. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

and-tradition test.[33] The focus of this *Kennedy* analysis centers only on the Establishment Clause jurisprudence relating to government-sponsored prayer. The *Lemon* test held that government action violated the constitution when the primary purpose of action was the promotion or favoring of religion, and it created the language of governments avoiding excessive entanglement with religion.[34] It fell out of favor quickly with Justices, though it persisted through Establishment Clause cases without being formally overturned until *Kennedy*.[35] Endorsement tests hold state action unconstitutional if a reasonable person, aware of the context of the practice at issue, would see it as government endorsement of religion, and coercion tests find a violation if the government compels participation in a religious exercise.[36] Justices that utilize originalist interpretations of the Establishment Clause rely on history and tradition as a framework for constitutionality.[37] Before the *Kennedy* ruling, the Court typically employed one or a combination of those tests to analyze Establishment Clause issues.

Precedent demonstrates favoring government regulation of religious conduct throughout Supreme Court

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[33] Corbin, *supra* note 17, at 622-23.

[34] *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that government statutes must: 1) have secular, legislative purpose; 2) principle or primary effect must be one that neither advances nor inhibits religion; and 3) statute must not foster excessive government entanglement with religion, which requires an examination of the character, purpose, nature of the aid that the state is providing *and* analysis of the resulting relationship between the religious authority and the government).

[35] *Kennedy*, 597 U.S. at 510 (2022) (overturning the *Lemon* test formally).

[36] *See* Corbin, *supra* note 17, at 623.

[37] Corbin, *supra* note 17, at 623.

rulings on the Establishment Clause. In the 1960s, the seminal Establishment Clause case of *Engel v. Vitale* held it unconstitutional for public schools to lead schoolchildren in prayer.[38] The prohibition of public prayer continued when the Court held it unconstitutional to have prayer at graduation ceremonies and football games put on by government entities.[39] Pre-*Kennedy*, the Court looked to the coercive intent of the government and religious entanglement, deeming certain instances of legislative prayer steeped in history as constitutional.[40] Most notably, the Court ruled that student-led, student-initiated public prayer at a high school football game violated the Establishment Clause in 2000, only to hold twenty years later in *Kennedy* that a school official could publicly pray with students, even after reports that they felt compelled to participate, for fear of violating the official's Free Exercise of religion.[41] Therefore, the most consistent aspect of the Roberts Court's treatment of the Establishment Clause is its continuous approval of practices amicable to Christianity, such as their acceptance of public prayer in *Kennedy*.[42] Since the *Kennedy* ruling ended the *Lemon* Test with no test to replace it, any Establishment Clause issues going forward will be met with constitutional chaos. The Roberts Court fundamentally changed interpretation of the Establishment Clause with the *Kennedy* ruling when the majority opinion

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[38] *Engel v. Vitale*, 370 U.S. 421 (1962).
[39] *See Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
[40] Corbin, *supra* note 17, at 618; the case being referenced is *Town of Greece v. Galloway* 572 U.S. at 565.
[41] *Doe*, 530 U.S. at 290; *Kennedy*, 597 U.S. at 562.
[42] Corbin, *supra* note 17, at 618.

deferred to an individual's Free Exercise at the expense of the Establishment's prohibition of government sanctioned religious activity.

C. Supreme Court 2022 Transformation: *Carson* and *Kennedy*

The Roberts Court, specifically in its 2022 term, overturned established precedent and transformed the First Amendment into a tool to create religious favoritism and not religious freedom for all.[43] When this Court hears cases involving religion, it continues to dismantle the rules codifying the clear line that separates church and state.[44] Most notably, the Roberts Court seemingly dismantled the protections of the Establishment Clause in *Kennedy* and significantly expanded individual protections to the Free Exercise Clause, undermining the precedent of *Employment*

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[43] *See* Girard, *supra* note 25.

[44] Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (Jul. 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative; this includes ruling: the constitution bars federal anti-discrimination laws from applying to teachers at religious schools; Catholic social services agency is allowed to refuse adopting children to same-sex couples in violation of their contract with the city of Philadelphia; for-profit corporations can refuse, based on religious principles, to provide contraception through health insurance plans; 40-foot cross honoring soldiers that died in World War I can remain on state property in Maryland due to its history and significance; and allowing city councils and local governments to open meetings with explicitly Christian prayer. *Id.*

Division v. Smith.[45] The Court produced more conservative decisions in the 2022 term that at any point in time since 1931, constituting 62% of the decisions made.[46] Moreover, the conservative bloc of this Court comprises the most pro-religion Justices in seventy years; a University of Chicago study found that the number of pro-religion outcomes of the Rehnquist Court averaged 58%, while the Roberts Court has a skyrocketed rate of 86% of pro-religion outcomes in cases.[47] The Court accomplished this task primarily by issuing their holdings in *Carson v. Makin* and *Kennedy v. Bremerton Sch. Dist.*[48] The *Kennedy* case will be discussed at length in the second section, below, so the Court's *Makin* holding acts as focus of this subsection. The majority opinions in both cases greatly expanded the concept of Free Exercise in schools, specifically for Christian ideology, and contained only limited mentions of the Establishment's separation of church

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[45] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 872 (1990) (holding that laws are constitutional, even if there are some burdens to religious practices, if those laws are neutral toward religion, or applies to both areligious and religious beliefs); furthermore, through use of the shadow docket the conservative majority on the Roberts Court ruled that COVID restrictions in California were not neutral or generally applicable, resulting in strict scrutiny analysis under the Free Exercise Clause whenever governments treat any form of secular activity more favorably than religious expression in the case of *Tandon v. Newsom*, 593 U.S. 61 (2021).

[46] Totenberg, *supra* note 44.

[47] Nearly every case before the Roberts Court with religious-issues present will end in a holding favorable to the party making the religious argument- a rate nearly 30% higher than other Courts composing of other Justices. *Id.*

[48] *Carson v. Makin,* 596 U.S. 767 (2022); *Kennedy*, 597 U.S. at 512.

and state.[49] The Roberts Court deference to the Free Exercise Clause over overt, sometimes blatant, Establishment Clause violations indicates that the Establishment Clause and Free Exercise Clauses no longer hold equal weight in Supreme Court analysis.

The *Carson* decision ended the centuries-old constitutional ban on federal and state government aid to teaching religion, ironically in the name of religious liberty.[50] The majority gave the Free Exercise Clause primacy over the Establishment Clause, making it clear to all lower courts how the Justices currently prioritize those distinct constitutional issues.[51] Instead of allowing states to choose to not pay for religious education, the Roberts Court held that Maine *must* pay for religious education of students.[52] The majority opinion characterized Maine's statute prohibiting funding of religious schools as discriminating

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[49] Totenberg, *supra* note 44; additionally, the Court issued more 6-3 decisions than any other time in its modern history; it must also be noted that every single Justice considered ideologically liberal signed on to more dissents in the 2022 term than in any year of their careers, including Justice Breyer's twenty-eight-year tenure on the Court. *Id.*

[50] Weaver, *supra* note 20.

[51] Weaver, *supra* note 20.

[52] Ian Millhiser, *The Supreme Court Tears a New Hole in the Wall Separating Church and State*, VOX (June 21, 2022), https://www.vox.com/2022/6/21/23176893/supreme-court-carson-makin-religion-schools-vouchers-chief-justice-roberts; *Carson* determined that states may refuse to fund specific religious actions but cannot exclude institutions from receiving government funds due to religious affiliations. *Carson* does not explicitly overturn *Locke v. Davey*, 540 U.S. 712 (2004), which holds that Washington state did not have to allow a student to use state scholarships to pay for religious training in religious institutions; *Carson* effectively overturns *Locke* without explicitly doing so. *Id.*

against certain schools due to their religious character, which the dissent rejected.[53] To Roberts and the other conservative Justices, this amounted to a Free Exercise Clause violation, despite the obvious Establishment Clause violation, and the Court required Maine to use state tuition aid to religious schools.[54]

The majority ignored that some of the religious schools at issue in *Carson* taught students to reject Islam or required teachers to agree that people that identify as LGBTQIA+ are "perverted."[55] Through the *Carson* decision, the conservative, activist majority on the Roberts Court forced Islamic taxpayers in Maine to fund schools that denigrate their religious beliefs, forced families with LGBT community members to fund schools that call their family members perverted, and ultimately forced all taxpayers in Maine, regardless of their religious beliefs, to fund religious schools with state funding- all in the name of the Free Exercise Clause.[56] The Roberts Court 6-3 majority in *Carson* endorses the idea that the Free Exercise Clause supersedes all other rights, even equal protection, due process, and constitutional or statutory anti-discrimination protections.[57] In the *Carson* dissent, Justice Sotomayor voiced concern for the majority's disregard of the Establishment clause by stating: "the Court leads us to a place where separation of

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[53] *Carson*, 596 U.S. at 795 ("We have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.").
[54] Millhiser, *supra* note 52.
[55] *Id.*
[56] Girard, *supra* note 25.
[57] Girard, *supra* note 25.

church and state becomes a constitutional violation."[58] According to the dissent, the Roberts Court conservative majority "continues to dismantle the wall of separation between church and state," by evoking a deference to history and tradition, directly against the wishes of the Founding Fathers.[59]

In summary, the Roberts Court refuted the logic of James Madison and the Founding Fathers by holding in *Carson* that state governments attempting to avoid an Establishment Clause violation by refusing to fund religious teaching counts as a violation of the Free Exercise Clause.[60] Like *Carson,* the *Kennedy* decision acts as the example of how the Roberts Court conservative majority stops at nothing to achieve its goal of eliminating the power of the Establishment Clause by ignoring facts to create Free Exercise arguments, as discussed below.

II. Where We Find Ourselves: *Kennedy* Ruling and Its Implications

The Roberts Court's conservative bloc again demonstrated their belief that the Free Exercise Clause should supersede valid and blatant Establishment Clause concerns when it held in favor of a high school football coach that engaged in ostentatious prayer directly after games on the 50-yard-line in *Kennedy v. Bremerton Sch. Dist.*[61] A basic misapplication of the Free Exercise Clause and the erosion

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[58] *Carson*, 596 U.S. at 810.
[59] *Id.* at 806 ("This Court continues to dismantle the wall of separation between church and state that the Framers fought to build.")
[60] Millhiser, *supra* note 52.
[61] Totenberg, *supra* note 44.

of the Establishment Clause exists in the *Kennedy* majority opinion, which Justice Sotomayor corrects in the dissent. The background information that led to *Kennedy* demonstrates the conservative majority's willingness to distort facts to achieve their preferred ruling that greatly expands individual Free Exercise rights, namely of Christian plaintiffs, at the expense of Establishment Clause violations, regardless of rule of law or First Amendment precedent.

A. The Who's Who: Background Information of *Kennedy*

The majority references only *some* of the facts found in the evidentiary record of this case when holding that Free Exercise issues should overpower Establishment protections against school prayer. Bremerton School District, located in Washington state, educates students that practice a multitude of religions, and it contains numerous students who consider themselves religiously unaffiliated.[62] Coach Kennedy joined the Bremerton School District in 2008 as an assistant football coach and began praying at the conclusion of games.[63] His prayers then turned into motivational

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[62] *Kennedy*, 597 U.S. at 547; the religions of the student populace include: Bahá'is, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christianity. *Id.*

[63] Dr. Brett Geier and Ann E. Blankenship-Knox, *When Speech is Your Stock in Trade: What Kennedy v. Bremerton School District Reveals about the Future of Employee Speech and Religion Jurisprudence*, 42 CAMPBELL L. REV. 31, 45 (2020), HTTPS://SCHOLARSHIP.LAW.CAMPBELL.EDU/CGI/VIEWCONTENT.CGI?ARTICLE=1680&CONTEXT=CLR. Coach Kennedy began this practice after he first saw it in a movie. *Id.*

speeches for his players.[64] These speeches employed overtly religious messages, given to Kennedy's players and sometimes opposing team players and coaches.[65] One opposing coach told the Bremerton principal that it was "cool that the [school] would allow its coaches to go ahead and invite other teams' coaches and players to pray after a game."[66] The football team had another tradition to pray in the locker room, which started before Kennedy coached at the school and continued under his support and leadership.[67] After the school became aware of the situation, it sent a letter to Coach Kennedy to stop his motivational speeches, ended locker-room prayers, and attempted to halt Kennedy's overt prayers on the field directly after the game near students.[68] The school indicated that the coach's actions violated the Establishment Clause of the Constitution and promptly advised Coach Kennedy to cease his actions.[69]

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[64] *Kennedy,* 597 U.S. at 514-15.

[65] *Kennedy,* 597 U.S. at 515.

[66] *Id.* at 549. This is a clear example of the endorsement test under the Establishment Clause, for a reasonable person identified that Kennedy praying amounted to government sanctioned prayer. For this author, the fact that another school official saw Coach Kennedy's prayer as actions of the Bremerton High School is evidence enough that the prayer is indicative of school endorsement. However, the majority references this inciting incident and chooses to not analyze the action further.

[67] *Id.* at 515.

[68] *Id.* As explained above, analysis of the Establishment Clause before the 2022 Roberts Court term would typically deem these facts as obviously constitutional. However, under the *Kennedy* majority's broad application Free Exercise Clause, the Establishment Clause becomes toothless.

[69] Geier, *supra* note 63, at 34.

Adding to the school's argument about an Establishment Clause violation, Coach Kennedy created a spectacle of his religious expression. Kennedy stopped giving the speeches for four weeks but then refused to cease, obtained counsel, and coached three more October games.[70] Additionally, Coach Kennedy bombastically prayed with students at three separate games: October 16, October 23, and October 26.[71] At these games, he made a point to advertise his actions to the media and overtly pray on the 50-yard line, in direct violation of the school's letter and against the school's wishes.[72] At the end of the season, the school did not rehire Kennedy, citing failure to comply with school policy and failure to supervise his student athletes when he interacted with the media and the community *he* invited to watch him pray instead of caring for his players, as per his job title.[73] The head coach himself decided not to rehire Kennedy, citing a laundry list of issues with Kennedy's employment, including: failure to follow school policy, lack of cooperation with the school administration, conduct that contributed to a negative relationship between the parents, students, community members, the coaching staff, and the school, and his failure to supervise student-athletes after games, opting to interact with the media and community members in attendance due to the public prayer routine.[74]

The Supreme Court majority opinion failed to mention that the head coach of the varsity football team that supervised Kennedy chose not to return to Bremerton

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[70] *Id.*
[71] Geier, *supra* note 63, at 34
[72] *Id.*
[73] *Id.* at 35.
[74] *Kennedy,* 597 U.S. at 555-56.

because of this ordeal.[75] The head coach resigned over fears that he or his staff would be shot or physically harmed by the crowds that began to flock to the school's football games solely from the turmoil created by Kennedy's various media appearances.[76] The school opened up all seven coaching positions to hire completely new staff for the next season.[77] Kennedy's conduct clearly disrupted the school's football season with his desire to continue to parade his prayers.[78] Most astoundingly, Coach Kennedy had such little interest in actually coaching his team that he immediately quit despite the Court forever altering constitutional precedent to give him his job back.[79] Kennedy sold his home in Washington and moved to Florida during the seven years of litigation to the Supreme Court, yet the Court ignored the obvious mootness of this issue to "expand a vision of religious liberty that abolishes the separation of church and state while granting Christians a freewheeling right to discriminate, often with public funding."[80] It must be noted that Kennedy's attorneys, who spent seven years getting this case to the Court's sympathetic conservative bloc, were awarded $1.775 million in attorneys' fees using taxpayer

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[75] *Id.*

[76] *Id.*

[77] *Id.* Coach Kennedy's actions caused the student-athletes to lose their entire coaching staff.

[78] *Kennedy*, 597 U.S. at 555-56.

[79] Ed Komenda, *A Football Coach Who Got Job Back After Supreme Court Ruled He Could Pray on Field Has Resigned*, Associated Press (Sep. 6, 2023), https://apnews.com/article/praying-high-school-football-coach-supreme-court-461b92b19ea3956776575189148255 73.

[80] Mark Joseph Stern, *The Supreme Court's Fake Prayed Coach Case Just Got Faker*, Slate (Sep. 7, 2023), https://slate.com/news-and-politics/2023/09/supreme-court-praying-coach-joe-kennedy-fake.html.

money from the Bremerton School District.[81] Those attorneys never mentioned Kennedy's permanent relocation out of the state to the Court.[82] After eight years of litigation and finally winning back his position, Kennedy coached one game before quitting and returning to his home in Florida, 3,000 miles away from Bremerton.[83] Therefore, instead of viewing the actions of Coach Kennedy holistically, the Court carved up the facts to be so narrow that it could interpret them strictly as a Free Exercise Clause issue.[84]

B. Coordinated Effort to Get *Kennedy* Before Supreme Court

The *Kennedy* majority ignores legally significant facts to disrupt and dismantle precedent when looking at the presentation of facts in the majority and dissenting opinions of the case. *Kennedy's* path to appearing before the Court

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[81] *Id.* A right-wing think tank called the First Liberty Institute funded Kennedy's representation. *Id.* The First Liberty Institute has coordinated and funded litigation of multiple cases to the Supreme Court to expand Christian ideology in this country by finding plaintiffs like Kennedy, willing to allege First Amendment violations.

[82] *Id.* In fact, Kennedy's counsel responded to the School District's assertion of mootness when Kennedy moved out of state with vitriol, claiming the relocation to Florida not permanent and Kennedy's eagerness and ability to move back to Bremerton as soon as his coaching duties were reinstated by the Court. *Id.* Kennedy had moved on from proselytizing to teens to the conservative media circuit, even meeting former Vice President Pence. *Id.*

[83] Komenda, *supra* note 79; Kennedy had no place to sleep when coaching his last game after selling his Washington home, so he slept on his friend's couch for the evening. Stern, *supra* note 80.

[84] *Kennedy,* 597 U.S. at 513-14.

occurred after overt judicial advocacy through speeches and opinions by conservative Justices.[85] Despite appearing before the Roberts Court in the 2022, the Ninth Circuit originally denied certiorari of the *Kennedy* case in December, 2019.[86] In a concurrence of the initial denial of certiorari, Justice Samuel Alito signaled that he wished for the Court to review the *Kennedy* case.[87] Moreover, Justice Alito literally invited the challenge and review of two cases, which he identified directly, issuing a call to action when he encouraged Coach Kennedy to appeal the verdict.[88] Justice Alito writes a call to action by stating, "while I thus concur in the denial of the present petition, the Ninth Circuit's understanding of the free speech rights of public-school teachers is troubling and may justify review in the future... review by this Court may be appropriate."[89] Tellingly, Justice Alito unabashedly critiqued the state of case law about the Establishment Clause.[90] Through his words in 2019, Justice Alito signaled his willingness to dismantle the existing application of the Establishment Clause.

The ideological makeup of the Court prevented Justice Alito from achieving this agenda when he made the remarks in his 2019 concurrence; however, the Court's ideology would

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[85] Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html.

[86] *Kennedy v. Bremerton School District*, 586 U.S. 1 (2019).

[87] Geier, *supra* note 60 at 45.

[88] *Id.* at 47.

[89] *Kennedy v. Bremerton School District*, 586 U.S. at 4-5.

[90] Geier, *supra* note 60, at 45. Justice Alito said this specifically regarding the Establishment Clause and the religious speech of public employees. *Id.*

shift after President Trump appointed Amy Coney Barrett to the Court.[91] The Supreme Court ideological makeup transformed with the addition of Justice Amy Coney Barrett in October of 2020, becoming a conservative majority by a 6-3 margin.[92] Emboldened by different ideological make-up of the Supreme Court, Justice Alito sent the world a message by making political remarks at a November, 2020 Federalist Society's annual convention.[93] He stated that liberals posed a threat to the First Amendment's protection of the freedom of speech and freedom of religion.[94] Justice Alito wanted the Supreme Court to move "further and faster" on religious right-wing issues, particularly with regard to COVID-regulations, LGBTQIA+ concerns, and the definition of marriage.[95] It signaled an incoming transformation in First Amendment protections for all.

In 2022, the conservative bloc on the Roberts Court debuted for its first full session, immediately making

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[91] Danielle Wallace, *Supreme Court Justice Amy Coney Barrett Faces Call to Recuse Herself from LGBTQ Case Over Christian Faith*, N.Y. POST (Nov. 27, 2022), https://nypost.com/2022/11/27/supreme-court-justice-amy-coney-barrett-faces-calls-to-recuse-herself-from-lgbtq-case-over-christian-faith/; Justice Barrett reportedly has ties to the controversial religious organization called the People of Praise. *Id.*

[92] Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES, (Jul. 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

[93] *Id.*

[94] *Id.*

[95] Joan Biskupic, *Samuel Alito' Viral speech Signals Where Conservative Supreme Court is Headed*, CNN (Nov. 13, 2020), https://www.cnn.com/2020/11/13/politics/samuel-alito-supreme-court-federalist-society-speech-analysis/index.html.

substantive legal changes to established rule of law.[96] The conservative bloc of Justices did not miss the opportunity to carve out exceptions to the Establishment clause, leaving it toothless while broadening constitutional protections for individual Free Exercise.[97] As discussed below, the majority in *Kennedy* ignored inconvenient facts, and in some instances *outright misconstrued facts*, to specifically weaken the separation of church and state consecrated by Court precedent and enshrined in the First Amendment.[98]

C. Majority's Misapplication of Free Exercise Clause in *Kennedy*

Justice Gorsuch classified Kennedy as a private citizen and reviewed Coach Kennedy's conduct of praying on the 50-yard line not as someone speaking for the government

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[96] Al Jazeera Staff, *Five Ways the US Supreme Court Reshaped Policy in 2022*, AL JAZEERA (Dec. 30, 2022), https://www.aljazeera.com/news/2022/12/30/five-ways-the-us-supreme-court-reshaped-policy-in-2022.

[97] *Kennedy*, 597 U.S. at 546-47; this is in reference to the coercion analysis that exists through the Establishment Clause under the First Amendment. Justice Sotomayor claims the majority does not analyze the coercion present in the *Kennedy* case at all, not recognizing the reality that teachers and coaches have a profound influence on their students. *Id.* at 547. For this author, pretending that teachers and coaches do not wield the power to influence students is damning in the majority's opinion- proving the majority is now unable to stop itself from bending the law into its own form of Constitutional interpretation that leaves a school powerless to one man's demands that he be allowed to overtly give demonstrative prayer in the middle of the football field after the game, in the same manner and tradition as his after-game prayers before he was disciplined by the District.

[98] *See id.* at 547.

but as an individual Free Exercise issue.[99] The *Kennedy* majority paints a picture of a solitary coach praying alone when describing the violation of Coach Kennedy's protection under the Free Exercise Clause.[100] Justice Gorsuch presented the issue in *Kennedy* as whether a government entity can punish an individual for engaging in a brief, quiet, personal religious practice under the First Amendment's Free Exercise Clause and Establishment Clause.[101]

To justify overturning precedent and creating constitutional chaos, the Court described Coach Kennedy's conduct in isolation, as praying quietly without his players, with the majority analyzing conduct at only three specific games and not the entire context and history of Coach Kennedy's praying.[102] However, his conduct at the three games at issue in the case *cannot* be viewed in isolation, for the history of Coach Kennedy's speeches at the school is directly relevant to the coercive effectives that his prayers had on his players. The majority draws "a bright line between Kennedy's year-long practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which [Bremerton's players] did not join, yet student peers from the other teams did."[103] The majority states that Coach Kennedy agreed to wait until the game ended and players left the field to pray.[104] Contrary to the majority's contestation, Kennedy made these remarks only

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[99] *Id.* at 543.
[100] *Id.* at 525.
[101] *Kennedy,* 597 U.S. at 543-44.
[102] *Id.* at 529 ("It seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech.").
[103] *Id.* at 576.
[104] *Id.* at 518.

in a deposition, stating in response to a question that waiting until after games to pray would be possible and might be acceptable to him, but he did not discuss it with the District at length in good faith.[105] Ultimately, the conservative majority manipulated facts and legal interpretation to break the balance of the Free Exercise Clause and Establishment Clause.

The majority requires the reader to overlook that Kennedy: 1) worked as a coach at the games; 2) could pray on the field directly after the game because of his access and proximity as a coach; 3) wore Bremerton High School apparel to be easily identified as a school employee; 4) prayed "alone" after the game within direct proximity to where he typically performed his prayer-speeches before the school intervened; and 5) surrounded himself with media and community members that Kennedy himself called and contacted.[106] The majority contended that other coaches could perform private activities, like checking a phone or making a call, so the demonstrative prayer that Kennedy chose to do after the games should permitted as well based on Free Exercise protections.[107] The majority dismissed Bremerton School District's Establishment Clause argument, instead prioritizing the importance of the alleged Free Exercise Clause violation despite the fact that Kennedy wore his school apparel for each of his 50-yard line prayers, in effect

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[105] *See id.,* at 551 n.1.

[106] *Kennedy,* 597 U.S. at 550-51; this includes national media outlets.

[107] *See id.*, at 527. Furthermore, Justice Gorsuch stated that Coach Kennedy, along with other coaches, could speak with speak with friends or family, check emails, or call a restaurant for a reservation on the sidelines, comparing those activities to Kennedy's displays of prayer. *Id.*

acting explicitly as a school official endorsing prayer.[108] Moreover, the majority only mentioned the fact that Coach Kennedy garnered media attention *himself* in passing, dismissing the lower courts characterizations of the Coach's invitations to the media as "pugilistic efforts to generate publicity" and to gain community approval for his religious conduct.[109] Regardless of the majority's false comparison, a reasonable person understands the distinction between a few seconds of silent prayer, akin to checking a text, and a man who uses bombastic prayer to motivate students at a public-school football game in the middle of the field.

Unfortunately, there are more examples in *Kennedy* of intentional misapplication of the Free Exercise Clause by the conservative majority to prioritize religious expression before valid Establishment Clause issues. The majority absurdly contends, "it did not matter that the school never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the school sought to ban Mr. Kennedy's prayer."[110] When referencing the parental complaints received by the school, the majority held that the complaints were hearsay and could not prove that students felt pressured to pray.[111] The

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[108] *Id.* at 562.

[109] *Id.* at 522.

[110] *Kennedy*, 597 U.S. at 533. However, the District Court discovered that players reported feeling compelled to pray with Kennedy to stay connected with their team or to ensure they did not lose playing time. *Id.* at 563. The District Court also concluded that the slow accumulation of players joining their coach over the course of Coach Kennedy's public prayer on the 50-yard line was evidence of the social pressure and vulnerability that the Establishment Clause intends to prevent. *Id.* at 574.

[111] *Id.* at 539.

majority stated that no evidence of coercion existed and made sweeping statements about the school's argument, effectively equating the school's treatment of Kennedy as an attempt to stop any government employee from any form of visible religious expression.[112] Despite Coach Kennedy's expression of faith and the appearance of school endorsement of religion with intent to coerce compliance, the majority stated that learning how to tolerate religious expression is how students learn to live in a pluralistic society, and that secondary-school students are old enough to understand that a school does not endorse the prayer and are not easily coerced.[113]

In his conclusion, Justice Gorsuch doubles down on his declarations of fact by announcing that the school incorrectly punished Coach Kennedy for acting as an individual when he engaged in "a brief, quiet, personal religious observance."[114] The majority concluded, erroneously, that the school disciplined Coach Kennedy for prayer that was private, not public or given to a captive audience, citing the fact that none of Kennedy's players participated in prayer on the October games in question.[115] The majority neglects to explain why none of Kennedy's players chose to pray during Kennedy's initial suspension,

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[112] *Id.* at 531. He does so by making the false equivalency of banning Kennedy's prayer and a school official not being able to pray over food at lunchtime, privately and silently.

[113] *Kennedy,* 597 U.S. at 538-39.

[114] *Id.* at 543.

[115] *Id.* at 542. Opposing team players joined Kennedy on these October games at issue, and members of the media and community, not related with the school, broke school policy by joining Kennedy on the field at Kennedy's behest.

which the dissent said that Kennedy's players only felt compelled to pray because the leadership of their coach.[116] By ignoring key facts and isolating the analysis to conduct at three specific football games, the conservative majority effectively smashes a hole in the separation of church and state by likening bombastic prayer filled with explicit showmanship to individualized, personal prayer to create a fictional Free Exercise issue.

D. Supreme Court Dissent's Correction of *Kennedy* Facts

Justice Sotomayor begins the dissent by stating that the issue of the case becomes "whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event."[117] The dissent describes Kennedy's role at these football games as a school employee initiating prayer, joining students or adults to create a group of worshippers on school property.[118] Justice Sotomayor asserts that allowing Kennedy to continue to pray at the 50-yard line would directly violate the Establishment Clause and appear only as a continuation of Kennedy's public practice, not silent or individual prayer.[119] Justice Sotomayor's dissent pushed back against the majority's contestation that Kennedy's prayer was short, private, and personal prayer by saying Justice Gorsuch misconstrued the

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[116] *Id.* at 557.
[117] *Id.* at 546.
[118] *Kennedy*, 597 U.S. at 546.
[119] *Id.* at 552.

facts.[120] Justice Sotomayor does so blatantly by adding photos of Coach Kennedy in the test of the dissent. Instead of being punished for three separate acts of public prayer like the majority claims, the school fired Coach Kennedy after repeated attempts to accommodate him and numerous instances of Kennedy blatantly violating school policies while neglecting his students in favor of gaining media attention.[121] Throughout her dissent, Justice Sotomayor argues that the majority cherry-picked facts to construct a Free Exercise Clause argument when, instead, the Establishment Clause permitted the school's regulation of Kennedy's religious expression.

According to Justice Sotomayor, the majority wanted people to fail to recognize the facts for what they were: Kennedy, who had a history of praying while wearing his school-issued attire, prayed during his duty as a coach, immediately following the completion of the football game when uniformed football players remained on the field in close proximity while an audience watched.[122] Justice Sotomayor's dissent departs from Court norms because she

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[120] Justice Sotomayor wrote: "To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it *misconstrues* the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50- yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history." (Emphasis added). *Kennedy,* 597 U.S. at 546; *see also* Steve Benen, *Sotomayor Says Gorsuch Flubbed Prayer Case Facts (And She's Right),* MSNBC (Jun. 28, 2022), https://www.msnbc.com/rachel-maddow-show/maddowblog/sotomayor-says-gorsuch-flubbed-prayer-case-facts-s-right-rcna35644.

[121] *See Kennedy,* 597 U.S. at 551.

[122] *Kennedy,* 597 U.S. at 551.

found the record so misapplied by the majority that she added three images to her opinion.[123] The images depict Kennedy at the center of a group of students, publicly worshipping with the very students that seek his approval and desire to please him for potential playing time, during a school sanctioned event.[124] The images bring home the dissent's point that the majority's facts misrepresent the true constitutional clause at issue. Coach Kennedy also admitted on the record to inviting others to join him in prayer on numerous occasions after his practice was initially discovered by the school.[125] Therefore, it is obvious that this case is not about individual liberty under a Free Exercise Clause violation, as claimed by the majority, but an Establishment Clause issue about whether a school must allow a man, in an official capacity, to publicly pray during his duties as a coach.

Also absent in the majority opinion is the evidence of the school's attempts to work with Kennedy to find a compromise that did not require school-sanctioned prayer and allowed him to pray privately.[126] The evidentiary record from the Court of Appeals found that Kennedy went so far as to refuse a proposed accommodation to pray after the

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[123] Benen, *supra* note 120. It is an almost unheard-of practice for the Supreme Court to include photos in opinions. Photos of the prayers that occurred on three nights in question can be viewed in the dissent of this opinion to demonstrate the visual that students saw when determining if they felt compelled to pray or not. In the photos, Coach Kennedy is surrounded by players and is the center of attention of a crowd he created, not in an act of peaceful, private prayer as the majority depicts.
[124] *Id.*
[125] *Kennedy*, 597 U.S. at 551-52.
[126] *Id.* 554.

stadium emptied when he indicated that his speech must be delivered in the presence of the students and spectators.[127] This statement from Kennedy directly contradicts the majority's contention that Kennedy's prayer was individual and silent, though the majority fails to address this fact at all. The school invited Kennedy to discuss religious accommodations and encouraged him to provide ideas as well; Mr. Kennedy never responded or offered alternatives.[128] Instead, his attorneys notified the media that Mr. Kennedy would only accept continuing his demonstrative prayer on the 50-yard line immediately after the games.[129] Coach Kennedy repeated his actions when he prayed on the 50-yard line after games on October 23 and October 26, while postgame activities occurred.[130] By holding the school's limit on Kennedy's religious expression constitutionally invalid, the conservative bloc of the Court allows the expression of religious freedom to supersede perceived or actual government entanglement with religion. Based on the *Kennedy* holding, individual employees can now invoke their religious beliefs to overrule the ability of others to be free of religion, in the name of the engorged purview of the Free Exercise Clause.[131] By this logic, due to the Roberts Court's extreme deference to religious Free Exercise, specifically for Christians, the conservative majority might now be inclined to side with a business owner claiming religious freedom and not the rule of law that

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[127] *Kennedy,* 597 U.S. at 555.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Girard, *supra* note 25.

protects citizens from discrimination.[132] All of this is at the expense of the Establishment Clause and breaks the delicate balance between the two clauses.

Adding credence to the dissent's claim that the majority ignored the history and context of Coach Kennedy's actions, before the October 16 Homecoming game, Kennedy brought more attention to his conduct by giving multiple media interviews.[133] In these interviews, he spoke about his plans to publicly pray at the 50-yard line, resulting in a Seattle News article, a local television broadcast, and a large number of threatening messages to the school.[134] Additionally, Coach Kennedy prayed while surrounded by members of the public, including state representatives that traveled to the game to support Kennedy after his press efforts, and his players, who joined Kennedy after he stood from prayer in the center of the field.[135] Kennedy did nothing to stop unauthorized community members from joining him on the field for his allegedly individual prayer in direct violation of his duties as a coach for the school.[136] The majority failed to address this failure, demonstrating its

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[132] For example, the Court in the case of *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968) provides an example of arguments that could be made under the guise of the Free Exercise Clause. This case determined that a restaurant owner that claimed his religious beliefs compelled him to oppose any integration of the races could not constitutionally refuse service to Black customers. *Newman,* 390 U.S. at 402 n.5; *See also 303 Creative LLC v. Elenis,* 600 U.S. 570 *(2023)* (holding that religious beliefs of a business owner can lead to legal forms of discrimination of people in the LBGT community).

[133] *Kennedy,* 597 U.S. at 554.

[134] *Id.* at 551.

[135] *Id.* at 554.

[136] *Id.* at 563.

attempts to misconstrue facts to establish a false Free Exercise Clause claim to further prioritize religious expression over Establishment Clause concerns. Ultimately, the only reasonable conclusion that a bystander with knowledge of Coach Kennedy's past conduct could draw from witnessing Kennedy's prayer, which occurred at the same time and location after games as past instances, is that it occurred with the explicit endorsement and approval of the school.[137] Court precedent established that a reasonable person with historical context of the community, who finds discomfort because of religious conduct, fails to classify as a 'heckler's veto,' despite the claims of the majority opinion.[138] Kennedy's behavior spoke louder than his prayers, and his actions were intentionally demonstrative to an audience that knew of his history at the school. Coach Kennedy's players were essentially his captive audience as they awaited their coach for a post-game debrief.

In contrast to the conservative majority's contention, the evidentiary record proves that after the incidents of Kennedy's prayer in October, multiple concerned parents contacted the school, claiming their students participated in the prayer only because they felt compelled and feared separated from the team.[139] This would make Kennedy's conduct clearly unconstitutional under the Establishment Clause. Directly contrasting the majority's contention that there was no evidence of coercion, the dissent holds that existing case law does not require evidence of coercion to be explicit, especially in cases involving children or

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[137] *See Kennedy,* 597 U.S. 563.
[138] *Id.* at 569.
[139] *Id.* at 555.

adolescents.[140] Justice Sotomayor eradicates the majority's argument that no coercion explicitly exists by pointing out that none of the multitude of school-prayer cases addressed by the Court focus on practices that required students to do anything more than silently listen to prayers.[141] Some of these cases did not make it a requirement to listen to the prayer and provided non-mandatory attendance, yet previous Justices on the Court still found those practices, with evidence much less egregious than evidenced in this case, as coercive and unconstitutional.[142] To the community, Coach Kennedy acted as a representative of the school, spoke from the playing field only accessible to teachers, coaches, and students, and Kennedy's coaching responsibilities. It should be noted that those responsibilities, still ongoing during his performative prayers, allowed Kennedy access to the field in the first place.[143] Unfortunately, this conservative bloc continues to shatter past precedent and make sweeping changes to constitutional interpretation, specifically regarding the relationship between the Free Exercise Clause and Establishment Clause.

Unlike Justice Sotomayor's dissent, the majority describes Kennedy's conduct as non-obstructive and incidental to the game.[144] However, Kennedy's constant contact with the media created real safety concerns for the school, as evidenced by the fact that community members

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[140] *Id.* at 563.
[141] *Kennedy,* 597 U.S. at 563
[142] *Id.* at 574.
[143] *Id.* at 563.
[144] *See id.*

rushed the field to join Kennedy in prayer on October 16.[145] Kennedy's need for publicity directly led to students being harmed. Television cameras made Kennedy's public prayer even more of a performance when they surrounded the group praying on the 50-yard line.[146] After this game, Kennedy's conduct forced the school to make additional security arrangements with local law enforcement to ensure the safety of its students.[147] Moreover, due to the public nature of Kennedy's prayer on the school's football field, the school received calls from other religious organizations, including a group of satanists that wished to use the field "to conduct ceremonies on the field after the football games if others were allowed to."[148] The District refused the satanists, without fanfare. Consequently, Coach Kennedy's blatantly religious actions displayed such government entanglement with religion that *other* religious groups felt emboldened ask for permission to also use the school's field for ceremonies, just like Coach Kennedy.

As reviewed, the conversative majority of the Roberts Court misconstrued facts and incorrectly classified the issue in *Kennedy* as one of a Free Exercise Clause violation instead of an obvious violation of the Establishment Clause. The ramifications of the majority's overturning of First

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[145] *Id.* at 553. These community members, called to the game by Kennedy's media appearances, ran over students in the band on their way to the Coach publicly praying. *Id.*

[146] *Id.*

[147] *Kennedy,* 597 U.S. at 553.

[148] *Id.* at 553. Kennedy's conduct presented religious affiliation with the school so clearly that even Satanists wanted to use the field for ceremonies, just like the school official they witnessed during football games.

Amendment precedent creates constitutional chaos, especially since the empowered conservative majority does not show signs of ending their expansion of Free Exercise protections at the expense of government regulation under the Establishment Clause. Without a return to the traditional balancing of Free Exercise and Establishment, people of any faith across the nation lose religious freedom.

III. Implications of an Overbroad Free Exercise Clause

Justices in the Conservative majority used improper constitutional interpretations and implied incorrect assertions without evidence to achieve their goal of more expansive Free Exercise of religion at the expense of the government's prohibition of religious Establishment. Moreover, the dissent correctly points out that the majority's opinion in the case study of *Kennedy* relies on a hodgepodge of pluralities, concurrences, and dissents by the Conservative Justices to "effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all."[149] Worse is how successfully the Conservative majority, emboldened by their numbers, overturned precedent without care for factual accuracy. The performance that the majority conducts in the *Kennedy* opinion creates facts and ignores decades of precedent to achieve its desire objective. That objective is to forcibly expand the rights of the individual, specifically the Christian coach in this case, to exert his religion on an entire school and its players. Instead of applying the Establishment

[149] *Kennedy*, 597 U.S. at 567.

Clause to find the school's punishment constitutional, the Roberts Court expanded the Free Exercise Clause and found Kennedy's prayer to be individual and protected.

Alleged Justice misconduct and rulings like *Kennedy,* which misconstrued facts and historical interpretation, caused the Supreme Court to enact a code of ethics for the first time in November of 2023.[150] Although contending that the Court had a common set of principles that Justices adhered to, the "absence of a Code, however, has led in recent years to the misunderstanding that the Justices... unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[151] One of the canons outlined in the code of ethics addresses respecting the rule of law, encouraging Justices to comply with law and precedent so as to instill confidence in the Court's legitimacy and integrity.[152] If this canon existed while the Court decided *Kennedy*, Justice Gorsuch's misconstruing of facts and case law to embolden the Free Exercises Clause over the

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[150] Annie Gersh and Nina Totenberg, *The Supreme Court Adopts First Code of Ethics*, NPR (November 13, 2023), https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code. These scandals include, but are not limited to, Justice Thomas' wife's alleged involvement in the January 6th insurrection attempting to overturn the 2020 election, Justice Thomas taking trips and receiving gifts from Republican donor Harlan Crow, and Justice Alito taking a trip with Republican donor Paul Singer. *Id.*

[151] *Statement of the Court Regarding the Code of Conduct*, Supreme Court of the United States (November 13, 2024), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[152] *Id.* ("A Justice should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

Establishment Clause would have violated it. Unfortunately, the code of ethics adopted by the Court lacks any enforcement mechanism to hold Justices accountable.

The Court must adopt a binding code of ethics with an actual enforcement mechanism to restore public confidence in its rulings. Organizers pushing for more accountability for the Court expressed concern with the current code of ethics for the Court, stating, "with 53 uses of the word 'should' and only 6 of the word 'must,' the court's new 'code of ethics' reads a lot more like a friendly suggestion than a binding, enforceable guideline."[153] Other observers of the Court described the newly adopted code of ethics as "woefully inadequate."[154] The Brennan Center for Justice describes the Supreme Court code of ethics "are more loophole than law."[155] As of now, the Court's code of ethics lacks any enforcement mechanism, meaning that there will be no actors to enforce or interpret any rules or regulations that the Justices self-impose.[156] To truly fix the air of illegitimacy plaguing the Court's reputation, caused the Justices' own actions, there must be a more binding code of ethics imposed. This more stringent code of ethics must include an enforcement mechanism to ensure that there are methods of review if the actions of a Justice are legitimately called into question.

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[153] Gersh, *supra* note 150.
[154] *Id.*
[155] Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, Brennen Center for Justice (November 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail.
[156] *Id.*

The Court must return to the balancing of the First Amendment Free Exercise Clause and Establishment Clause originally intended by the Founding Fathers and soundly rejected by the Roberts majority in *Kennedy*. When analyzing the Establishment Clause, inquires must be fact-specific and require the Justices to carefully consider the origins and specific practices at issue.[157] Additionally, Supreme Court precedents do not support or permit choosing only certain isolated incidents or government actions from relevant context when determining if a violation of the Establishment Clause exists.[158] The Conservative Justices, as evidenced in *Kennedy*, displayed a readiness and willingness to ignore relevant facts to achieve their intended goals of ensuring that the Free Exercise Clause dominates and diminishes the Establishment Clause.

The manipulation of facts displayed in the Kennedy majority opinion, demonstrates how the Conservative majority will construct rulings in line with a specific agenda.[159] Based on the Court's protection of Christian prayer at the expense of others, it would be interesting to see how this Court would have ruled if Coach Kennedy practiced Judaism or Islam. Americans should fear the unmitigated power of the Conservative religious majority on the Court, for the 2023 judicial term delivered even more devastating

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[157] *Id.*

[158] *Kennedy*, 597 U.S. at 562.

[159] Corbin, *supra* note 17, at 618. This agenda appears to align with upending traditional balancing of Free Exercise protections to limit government control over individuals, usually Christian individuals. This author wonders if the Court would have bent over backwards to uphold Coach Kennedy's alleged private prayer if Kennedy instead conducted his prayers as a practitioner of satanism.

blows to the separation of church and state. For example, the Supreme Court in *Groff v. DeJoy* overturned decades of precedent regarding requirements for businesses to accommodation for the religious beliefs of employees.[160] Therefore, the activist Conservative majority's active effort to overturn basic constitutional law, specifically by greatly expanding the Free Exercise Clause at the expense of the Establishment Clause, undermines legitimacy of the Court.[161] To combat this trend in religious jurisprudence, the Court must implement binding code of ethics with an enforcement mechanism and must return to balancing the Free Exercise Clause and Establishment Clause.

IV. Conclusion

The conservative *Kennedy* majority endorsed the idea that the two aspects of the First Amendment's protection of religion exist not in harmony, as the Founding Fathers intended, but instead at war. When reviewing the creation of the First Amendment, it becomes evident that the Founding Fathers, such as James Madison and Thomas Jefferson, did not intend for America to have an established religion. Despite the clear ideology of religious separation in the United States, the Roberts Court in *Kennedy* justifies its expansion of the Free Exercise Clause based on history and tradition. The case study of *Kennedy* demonstrates how the majority will twist facts and change legal interpretations to suit their needs, which the dissent refutes through countless corrections of the record and interpretations.

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[160] *Gross v. DeJoy*, 600 U.S. 447 (2023).

[161] Kelly Shackelford, *Supreme Court Respected Religious Liberty in 2022, But Will it in 2023,* FOX NEWS (Dec. 27, 2022), https://www.foxnews.com/opinion/supreme-court-respected-religious-liberty-2022-will-2023.

Without restraint, this Court will continue to erode the Establishment Clause unimpeded until nothing is left to protect citizens from government endorsed religion. To combat the growing boldness of the conservative majority to overrule precedent to expand Free Exercise for religious individuals, mostly Christian petitioners, a more stringent code of ethics that includes an enforcement mechanism must be adopted by the Court. Additionally, the Court could also restore legitimacy by returning to an interpretation of the First Amendment that balances the Free Exercise Clause and the Establishment Clause. Regrettably, the 2024 judicial term might provide the Court with even more chances to erode the Establishment Clause to expand the Free Exercise Clause of the First Amendment. *Kennedy* demonstrates an eagerness for the Court to transform religious freedom, a transformation that often benefits one religion to the detriment of other religions and government regulation of religious conduct. This is the antithesis of the espoused opinions of the Founding Fathers.