NANZAN REVIEW OF AMERICAN STUDIES
Volume 45 (2023): 33-42

The 2022 Law and Religion Cases: Losing Faith in the United States Supreme Court

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Introduction

Public approval of the United States Supreme Court is at an all-time low. In July 2023, the Court's approval was at 40 percent, with 56 percent disapproving, the worst in modern U.S. history. A combination of factors have contributed to this precipitous drop. The Court overturning *Roe v Wade*[1] in *Dobbs v. Jackson Women's Health Organization*[2] is a prominent factor in its plummeting approval, as are the politicization of the judicial appointments process and the Court's recent well-publicized ethical dilemmas.

Even attorneys and Court observers, including this author, have begun to lose faith in the Court. This loss of faith in the Court by those who might be more willing to give the Court the benefit of the doubt in normal times is ironically connected, in part, to the way in which the Court has addressed cases involving faith. In fact, for many law and religion scholars *Dobbs* was not even the most questionable decision in June 2022. That dishonor falls to a case called *Kennedy v. Bremerton School District*.[3] It had many of the features of *Dobbs*. It overturned over fifty years of precedent that primarily helped those often outside the dominant power structure, but unlike *Dobbs* it did not even address the factors relevant to overturning precedent and it essentially gaslighted readers on the facts actually involved in the case.

Hypocrisy is a weak foundation for an institution. Yet, the story of the U.S. Supreme Court in recent years is heavily impacted by hypocrisy. Not just the hypocrisy of some of the justices themselves, but the hypocrisy of members of the United States Senate, most notably Mitch McConnell and his acolytes. It is hard to separate the steep decline in public faith in the Court from the steep decline in

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1. Supreme Court, *Gallup*, July 3, 2023, https://news.gallup.com/poll/4732/supreme-court.aspx.

2. 410 U.S. 113 (1973).

3. 597 U.S. ___, 142 S. Ct. 2228 (2022).

the integrity of the Court's gatekeepers in the Senate. McConnell did not start the increased politicization of the appointments process. The increased politicization can be seen at least as far back as the Bork hearings in the 1980s when the Democrats were the ones doing the politicization. Yet the level of politicization at that time pales in comparison to Mitch McConnell's brazenly cynical powerplays.

One can draw a line from McConnell's manipulation of the judicial confirmation process to the Court's controversial and legally questionable decisions in *Kennedy* and *Dobbs*, among other decisions. This article tells the story of an institution that has lost its way and whose stature—once high and mostly above the political fray—has fallen to new lows. The story's central focus is on the unprincipled decisions and behavior of the Court in recent years.

Prior to 2020 the Rehnquist Court and early Roberts Court certainly marked significant, albeit often gradual, shifts in precedent. These shifts often altered precedent by the Stone, Vinson, Warren, and Burger Courts between 1941 and 1986, which themselves shifted from earlier precedent. But the sheer scope of the unprincipled abandonment of precedent over a period of three years by the current Court from 2020–2023 has eroded faith in the Court as a neutral arbiter of disputes to a degree from which it may never recover.

Decisions on Faith and Loss of Faith in the Court

In June 2022 the United States Supreme Court decided two cases under the religion clauses of the First Amendment to the United States Constitution. The first case, *Kennedy v. Bremerton School District*,[4] is ostensibly a free speech and free exercise of religion case, but the Court used the case as an opportunity to overturn over sixty years of precedent under the Establishment Clause. The *Kennedy* case involved a football coach at a public high school who engaged in public prayer after games. The second case, *Carson v. Makin*,[5] held that when a government entity opens funding opportunities to private entities the government must include religious entities even if those entities proselytize, and even if the funding is for tuition. Of the two cases, *Kennedy* is the more troubling opinion because it mischaracterized the law, the facts, and reaches an issue that was unnecessary to reach under the law and facts as set forth by the Court.

The majority opinion in *Kennedy* demonstrates the sort of unprincipled jurisprudence and decision making that has caused loss of faith in the Court even among many lawyers and others in the legal community.[6] When one considers the record in the case and the lower court decisions that accurately cited that record when ruling against coach Kennedy, the dramatic mischaracterization of the facts

4. 597 U.S. ___, 142 S. Ct. 2228 (2022).
5. 597 U.S. ___, 142 S. Ct. 1987 (2022).
6. Ravitch, *Unprincipled*.

by the *Kennedy* Court comes off as a form of intellectual gaslighting.[7] But the *Kennedy* Court did not only misstate the facts; it also mischaracterized several key Establishment Clause precedents, failed to cite at least one on-point precedent that would have led to a different analysis, and overturned decades of law by reaching an issue that was unnecessary to reach if the facts were as the majority claimed.[8]

The *Kennedy* decision was handed down the Monday after the *Dobbs* decision. It is complete speculation, but perhaps this was to distract people from the *Kennedy* decision that like *Dobbs* overturned decades of settled precedent. Naturally *Dobbs*, which for the first time in U.S. history took a fundamental right away from people, vastly overshadowed the *Kennedy* decision. Similarly, the day before *Dobbs* was handed down, the Court decided another case under the religion clauses, *Carson v. Makin*.[9] This case too pushed the boundaries of prior law. The *Carson* decision abandoned a rule the Roberts Court had itself created in 2017 and reinforced in 2020.[10] Both of the June 2022 religion decisions threaten to be especially harmful to religious minorities and nonbelievers.

The facts in *Kennedy v. Bremerton School District*[11] are where the questions about the case begin. Simply put, the majority ignores important facts, distorts others, and in a few situations brazenly mischaracterizes still others.[12] *Kennedy* moves far beyond the ordinary spinning of facts to what might colloquially be referred to as "factual gaslighting."

What were the facts in *Kennedy* as supported by the record, lower court decisions, and the *Kennedy* dissent (which included pictures of what actually happened)? And what were the facts as stated by the *Kennedy* majority?

The actual facts as supported by the record, lower courts, and the *Kennedy* dissent are that Kennedy was an assistant coach for Bremerton High School football team in Washington State and junior varsity head coach. He kneeled and prayed after football games at the fifty-yard line.[13] For several years he prayed with his own players and invited players and coaches from opposing teams and others to pray with him in violation of school district policy.[14] He also gave religiously themed speeches along with the prayer at the fifty-yard line.[15]

Bremerton school district gave him notice that he must stop involving students in the fifty-yard line prayers. The district suggested that he could come back to

7. Ibid.
8. Ibid.
9. 597 U.S. ___, 142 S. Ct. 1987 (2022).
10. Ibid. at 2001.
11. 597 U.S. ___, 142 S. Ct. 2407 (2022).
12. Ibid. at 2434 (Sotomayor, J., dissenting).
13. Ibid.
14. Ibid. at 2435−36.
15. Ibid. at 2436.

the field after his coaching duties for the day were finished and pray on his own.[16] Initially, that is what he did, but after a change of heart he began to again pray immediately after games and he invited players and coaches from opposing teams to pray with him.[17] He held up helmets of both teams during these prayers. The school board warned him again about his conduct. After that he announced to the media that the school was telling him not to pray right after games and that he would pray at the fifty-yard line after an upcoming game.[18]

The media coverage led to the district receiving threatening messages and emails.[19] Moreover, his prayer caused a frenzy after a game. Some fans ran down from the stands to pray with him, trampling student band members in the process.[20] After this, the district needed security for games.[21] Moreover, school employees and administrators were threatened, and the community became divided.[22]

Despite this, Kennedy continued to demonstratively pray at the fifty-yard line immediately following games. He was warned several more times by the school district not to do so.[23] The district suggested he could come back to the field after his duties were finished to pray and offered to work with him on other possible accommodations, but Kennedy explained that he would only accept demonstrative prayer at the fifty-yard line right after the game.[24] Perhaps if he had not turned the prayer into a media spectacle and agreed to quietly pray at the fifty-yard line after games it would have been constitutionally permissible under extant law for him to do so, but given the attention he called to the prayer the district was concerned about being sued for endorsing his prayer. They were also concerned that he flaunted school district rules and requests.[25] He ignored repeated warnings by the district and as a result was not rehired.[26] He then sued.[27]

The first sentence of the *Kennedy* majority opinion sums up its characterization of the facts, "Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks."[28] The majority

16. Ibid. at 2436−38.
17. Ibid. at 2435, 2438.
18. Ibid. at 2437−39.
19. Ibid. at 2437.
20. Ibid.
21. Ibid. at 2438.
22. Ibid. at 2437, 2440.
23. Ibid. at 2436−40.
24. Ibid. at 2439.
25. Ibid. at 2436−40.
26. Ibid. at 2439−40.
27. Ibid. at 2440.
28. Ibid. at 2415 (majority opinion).

claims that Kennedy only engaged in quiet prayer after games.[29] The majority notes that the district was worried about being sued by those who might think that Kennedy was endorsing religion in his role as a school employee and therefore targeted Kennedy because of his prayers.[30] It suggests that it was the school's behavior of targeting Kennedy's prayer that led to the media attention.[31] The majority also claims that Kennedy was willing to work with the district to find a compromise but instead the district disciplined him for his religious speech.[32]

If the facts were as the *Kennedy* majority claimed them to be there would have been no need for the Court to overturn years of Establishment Clause precedent. Kennedy would have won the case under the Free Speech Clause and perhaps the Free Exercise Clause with little need to spend much time on the school board's Establishment Clause concerns.[33] But, of course, the facts were not even close to what the majority opinion suggests.

The *Kennedy* Court mischaracterized the law in addition to mischaracterizing the facts. This includes the Court's failure to cite highly relevant precedent. The Court also mischaracterized the scope of precedent it used to support looking to history and tradition as the test under the Establishment Clause. As I write in a forthcoming article:

> If one were to read nothing but the *Kennedy* majority opinion one would be forgiven for thinking the Court had clearly moved to a history and tradition approach in evaluating Establishment Clause issues and had clearly abandoned the Lemon and endorsement approaches well before *Kennedy* was decided. Of course, as the dissent points out this take on the state of the law under the Establishment Clause was supported by an assortment of dissenting opinions, plurality opinions, and a mischaracterization of the scope of a few cases.[34]

The *Kennedy* majority overturned decades of precedent when it abandoned

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29. Ibid. at 2417−18.

30. Ibid. at 2416−17.

31. Ibid. at 2418, 2427.

32. Ibid. at 2429−30.

33. The Court has long held that government cannot discriminate based on content in a limited public forum, and that the Establishment Clause does not provide a valid compelling interest for content discrimination unless there is evidence of government favoritism of religion; see for example *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (holding that the Establishment Clause does not constitute a compelling interest when a school opens a limited public forum for non-curriculum-related school clubs and excludes a religious club from that forum). The outcome would be similar under a *Garcetti* analysis if only quiet religious speech was excluded as the *Kennedy* Court counterfactually asserts. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

34. Ravitch, *Unprincipled*, *supra* note 5 at ___ (forthcoming 2024).

Lemon v. Kurtzman and the endorsement test.[35] Yet the majority did not even consider the factors ordinarily analyzed when the Court abandons precedent and violates stare decisis.[36] In fact, the *Kennedy* opinion devotes a scant few lines to its abandonment of prior precedent and its imposition of the history and tradition test:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" *Town of Greece*, 572 U.S., at 576; see also *American Legion*, 588 U.S., at ___ (plurality opinion) (slip op., at 25). "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" *Town of Greece*, 572 U.S., at 577 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence." 572 U.S., at 575; see *American Legion*, 588 U.S., at ___ (plurality opinion) (slip op., at 25); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437−40 (1961) (analyzing Sunday closing laws by looking to their "place . . . in the First Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions). The District and the Ninth Circuit erred by failing to heed this guidance.[37]

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35. *Kennedy*, ___ U.S. ___, 142 U.S. at 2427−28. Lemon was decised in 1971, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but the test was based on earlier cases. *Abington Tp. v. Schempp*, 374 U.S. 203 (1983) (the case that used what later became the first two prongs of the Lemon test); *Walz v. Tax Commisioner*, 397 U.S. 664 (1970) (discussing entanglement concerns that became the third prong of the Lemon test). By 1989 the endorsement test had been accepted by a majority of the justices on the Court. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); Ibid. at 623 (O'Connor, J., concurring) (concurrence joined in part by Justices Brennan and Stevens in support of the endorsement approach); Ibid. at 637 (Brennan, J., concurring in part and dissenting in part) (opinion joined by Justices Marshall and Stevens, looking to message sent by displays). It is worth noting that the endorsement test has been applied both as a separate test and as a gloss on the first two prongs of the Lemon test. *Kitzmiller v. Dover Area School Dist*., 400 F.Supp.2d 707, 713−14 (M.D. Pa. 2005).

36. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015); see also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, dba Kay's Kloset, 551 U.S. 877, 908 (2007) (Breyer, J., dissenting) (setting forth the various factors the Court has used over the years when addressing questions of stare decisis).

37. *Kennedy*, ___ U.S. ___, 142 U.S. at 2428.

Notice the prominent use of concurring and plurality opinions cited by the majority in support of its massive shift in Establishment Clause analysis as well as the failure to cite majority opinions such as *McCreary County*, *Santa Fe*, and *Abington Township v. Schempp*.[38] The Court also decontextualizes the few majority opinions it does cite such as *American Humanist*, *Torcaso v. Watkins*, and *Walz v. Tax Commissioners* that ironically were the basis for the third prong of the Lemon test that the *Kennedy* Court abandons.[39]

Moreover, the Court fails to reference the discussion of history in *Everson v. Bd. of Education*,[40] *Engel v. Vitale*,[41] and other cases that viewed history from a very different vantage point than the *Kennedy* Court. Nor does the Court cite these cases in its discussion of the history and tradition approach.[42] This seems an odd oversight since the *Kennedy* Court already had to reach to find any cases outside the legislative prayer and historical monuments context that could be argued to support its shift to the history and tradition approach. This is because most of the cases the Court cites do not stand for the proposition that history and tradition is *the* approach in Establishment Clause cases.[43] Yet, like the few majority opinions the Court cites outside of the legislative prayer and historical monument contexts, *Everson*, *Engel*, and their progeny discuss history quite a bit. Why ignore them? Perhaps the basis for their exclusion from the *Kennedy* opinion is that the history and tradition they evaluate and apply is directly contrary to the *Kennedy* Court's preconceptions?

Carson v. Makin[44] also mischaracterizes precedent. *Carson*, like *Kennedy*, dramatically shifts the law. It too makes establishment of religion concerns, but also the principle of federalism, beholden to the Free Exercise Clause. Yet, compared to *Kennedy*, *Carson* is less problematic because it generally states the facts accurately and relies on precedent that actually says what it cites it for, albeit quite recent precedent.[45]

In *Carson*, the Court dramatically expanded its 2020 decision in *Espinoza v. Department of Revenue*,[46] which was itself a massive expansion of prior law.[47]

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38. *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000).

39. See infra notes 119−56 and accompanying text.

40. 330 U.S. 1 (1947).

41. 370 U.S. 421 (1962).

42. *Kennedy*, 124 U.S. at 2427−28.

43. See infra notes 119−56 and accompanying text.

44. ___ U.S. ___, 142 S. Ct. 1987 (2022).

45. *Carson* relied heavily upon *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020), and *Trinity Lutheran v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017).

46. 591 U.S. ___, 140 S. Ct. 2246 (2020).

47. Nelson Tebbe and Micah Schwartzman, *The Politics of Proportionality* 120 *Michigan Law Review* 1307, 1332−33 (2022) (book review); Steven K. Green, *The Supreme Court's*

Espinoza held that a state could not deny access to public funding or tax exemptions based on religious status, even pursuant to state constitutional concerns.[48] In doing so the Court adhered to a distinction between state refusal to provide funding based on religious status versus religious use, with the former being prohibited while the latter was not prohibited.

In *Carson* the Court went much further and abandoned the status/use distinction. The Court held as a practical matter that Maine must provide vouchers to religious schools if it does so for secular private schools.[49] The majority opinion minimizes the fact that religious schools could be included in Maine's funding program so long as they do not require students to engage in religious exercises or education.[50]

Other than that minimization, however, the majority and dissent agree about the facts. Maine is a heavily wooded and mountainous state with vast expanses that have no major development or towns.[51] As a result, Maine provides tuition reimbursement for parents who send their kids to private schools in areas that do not have adequate populations to support public schools.[52] Maine provides the tuition reimbursement (often called vouchers) for any private school, whether religious or secular, but schools accepting the tuition reimbursement could not require students whose tuition was paid for with state funds to take religion classes or engage in religious activities.[53]

In *Carson*, the Court abandoned the status/use distinction discussed above,[54] and held that Maine must fund religious schools that teach religion and even those that proselytize if it funds other private schools, unless Maine can meet strict scrutiny.[55] Despite Maine's geographic situation and lack of public schools, in some areas the Court held that Maine's interest in not funding religious education and/or proselytization with tax dollars is an inadequate interest to justify excluding religious schools from the tuition reimbursement program.[56]

Therefore, from June 2022 on, to avoid violating the Free Exercise Clause, states must include religious schools (including those that proselytize and directly

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48. 591 U.S. ___, 140 S. Ct. 2246. Importantly, contrary to the assertion of some of the Justices in the majority, the Montana provision that was reenacted in the 1970s was no longer a baby Blaine amendment. Greene, *supra* note 159.

49. ___ U.S. ___, 142 S. Ct. 1987. This is the practical result of the decision despite the Court's protestations to the contrary. Ibid. at 2010 (Breyer, J., dissenting).

50. 142 S. Ct. 1987.

51. Ibid.

52. Ibid. at 1993.

53. Ibid. at 2007–08 (Breyer, J., dissenting).

54. Ibid. at 2001.

55. Ibid. at 1996–2002.

56. Ibid. at 1997–2000.

teach religion) in any funding program open to nonreligious schools or even to religious schools that do not mandate the teaching of religion.[57] This is applicable regardless of the state's interest in not promoting religion and regardless of a state constitution's antiestablishment provision(s).[58] The only practical way to avoid funding religious schools would be to have no funding for private education at all.[59]

Carson, like *Kennedy*, minimizes the importance of establishment concerns, including establishment concerns under state constitutions and laws.[60] This is part of the Court's recent shift to read establishment concerns as being inadequate to trump free exercise concerns,[61] a process that has been quick and nearly total. This abrupt shift in the law applicable to religion and religious entities, which goes against longstanding precedent, has contributed to the recent loss of faith in the Court discussed in the first section of this article.

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57. Ibid.

58. Ibid. at 2006−10 (Breyer, J., dissenting).

59. Ibid. at 2000.

60. An argument that has been raised against state constitutional provisions that preclude government financial support for religious schools is that some of these state provisions are so-called "baby Blaine" amendments, many of which were heavily based in anti-Catholic animus; see Philip Hamburger, *The Separation of Church and State* (Harvard University Press, 2004). Thus, it is important to note that neither the Maine statutory provisions at issue in *Carson* nor the Montana Constitutional provision at issue in *Espinoza*, *as reenacted in 1972*, were baby Blaine amendments, although there are strong arguments that the original Montana provision was a baby Blaine. In this regard the state law in *Carson* is easier to address because it was a statute and the prohibition on funding for sectarian schools dated back only to 1981. *Carson*, ___ U.S. ___, 142 S. Ct. at 1993−94. The state constitutional provision in *Espinoza* is a bit tougher to analyze—but only a bit—because the original provision that was passed in 1889 as part of Montana becoming a state was arguably a baby-Blaine amendment. *Espinoza*, 140 S. Ct. 2259. But that provision was reenacted in 1972 at which time support for the no-aid provision was not based in anti-Catholic animus but rather in support of public education and concerns over divisive religious disagreements. *Espinoza*, 140 S. Ct. 2246, 2287 (2020) (Breyer, J., dissenting); G. Allen Tarr, *Espinoza and the Misuses of State Constitutions*, 72 *Rutgers Law Review* 1109, 1125−27 (2021); Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools:* "*Badge of Bigotry*" *or National Model for the Separation of Church and State?* , 77 *Montana Law Review* 41 (2016).

61. Ibid. One of the things that has mystified some observers of this trend is that Justices Breyer and Kagan joined in the *Trinity Lutheran* opinion, albeit in its most limited reading, apparently thinking that the limited reading would survive. This, along with their joining in the *American Humanist* majority opinion is the focus of a thoughtful article by Micah Schwartzman and Nelson Tebbe; see Micah J. Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 *Supreme Court Review* 271 (2020) (arguing that some Justices have engaged in a form of appeasement in several recent religion clause cases to minimize conflict and perhaps to limit the scope of those decisions, but that this approach has not worked as the current Court has quickly abandoned limiting principles and compromise).

Conclusion

In an ironic twist, the U.S. Supreme Court's recent decisions about faith have contributed to the loss of faith in the Court. While not as well publicized as its recent decisions overturning the constitutional right to an abortion, expansion of gun rights, and destruction of affirmative action in college admissions, the religion decisions handed down by the Court in June 2022—especially *Kennedy v. Bremerton School District*—call the current Court's impartiality into question by distorting facts and law. These decisions reflect the current Court's radical jurisprudence that gleefully abandons long recognized understandings and rights.

Of course, slow changes in the application and understanding of precedent have been common in U.S. history, even in the context of constitutional law. This provides the opportunity to develop precedent as it is applied to new situations and to consider arguments on both sides of an issue. Yet, the current Court's abrupt abandonment of decades of precedent in culture war cases only adds to the publics' loss of faith in the Court. Whether the court will be able to recover from its current fall is more likely to be determined by its decisions than by the other issues it faces such as ethics concerns. Yet the June 2022 religion cases give little hope for a quick recovery of faith in the Court.