

UNPRINCIPLED

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ABSTRACT

In June 2022, the U.S. Supreme Court decided two major cases under the religion clauses of the First Amendment. These decisions mark a fundamental shift in the law and the understanding of the religion clauses. This Article demonstrates that these decisions are remarkably unprincipled and more the result of an unreflective application of the Court majority's preconceptions than of reasoned judicial analysis. This is especially true of the Court's opinion in *Kennedy v. Bremerton School District*, in which the majority opinion severely mischaracterizes not only the law but also the facts in a manner rarely seen in prior decisions. In doing so, the Court abandons over fifty years of precedent in favor of its history and tradition approach. That approach is likely to be plagued by conflicting understandings of history and tradition and can be easily manipulated to justify conflicting outcomes. It leaves lower courts and government actors to somehow divine answers from the hopelessly discordant history and traditions of religion in the public sphere in the United States. Both *Kennedy* and *Carson v. Makin* render the Establishment Clause subservient to free exercise concerns, despite the Court's protestations to the contrary. The result is an understanding of the religion clauses that is likely to harm non-Christian religious minorities, smaller Christian groups, atheists, and agnostics.

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TABLE OF CONTENTS

I. INTRODUCTION	518
II. THROUGH THE LOOKING GLASS: <i>KENNEDY AND CARSON</i>	521
A. Kennedy	521
1. <i>The Facts</i>	521
2. <i>The Law</i>	526
B. Carson	540
III. INTENTIONAL OBFUSCATION OR FAILURE TO REFLECT ON PRECONCEPTIONS	543
IV. HISTORY AND TRADITION	552
V. THE NEGATIVE IMPACT OF <i>KENNEDY</i> AND <i>CARSON</i> ON RELIGIOUS MINORITIES AND NONBELIEVERS	561
VI. CONCLUSION	567

I. INTRODUCTION

Faith in the judicial system is reportedly at an all-time low.¹ The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*² has certainly sparked a massive amount of cynicism about the federal judiciary, or at least about the Supreme Court.³ Yet, comparatively little attention has been paid to a case decided under the First Amendment on the Monday following

1. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [<https://perma.cc/KS9N-SSLK>]; see Jeffrey M. Jones, *Trust in Federal Government Branches Continues to Falter*, GALLUP (Oct. 11, 2022), <https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx> [<https://perma.cc/Z47Q-KTK7>] (polling shows that faith in the federal judicial branch, along with the other branches, is at an all-time low).

2. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

3. See *supra* note 1. Of course, some of the distrust and cynicism about the federal judiciary is due to the increased politicization of the already politicized federal judicial appointments system since the Senate's refusal to confirm judges during the Obama administration. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, *supra* note 1.

Dobbs. In an ordinary year, that case, *Kennedy v. Bremerton School District*, which itself overturned more than fifty years of precedent while essentially rendering the Establishment Clause subservient to the Free Exercise Clause and the Free Speech Clause, would have garnered front page attention.⁴

Kennedy is a remarkably unprincipled decision and the “history and tradition” analysis it substitutes for more nuanced and longstanding Establishment Clause tests is an open invitation to further unprincipled decision-making. By “unprincipled,” I do not mean intentionally unprincipled. Rather, this Article asserts that the Justices in the majorities in these cases have completely failed to reflect on and understand the impact of their preconceptions in religious cases. Their drive towards their preconceptions about law and religion issues has caused them to distort the facts in cases, mischaracterize the law, and dramatically expand an innately malleable “history and tradition” test.⁵ Ironically, they have expanded the “history and tradition” approach in the mistaken belief that it will lead to more objectivity in law and religion decisions.⁶ The reality, as we shall see, is quite the opposite.

The majority opinion in *Kennedy* demonstrates the sort of unreflective jurisprudence and decision-making that may cause even those within the legal field to lose faith in the Court. As will be discussed in Part II of this Article, the *Kennedy* opinion dramatically mischaracterizes the facts of the case as shown in the record, mischaracterizes a number of Establishment Clause precedents, fails to cite directly on-point precedent while relying on a case decided the same day as the precedent it ignores, and arguably overturns decades of law by imposing the “history and tradition” test.⁷ Yet the Court does not apply its own test and simply assumes prior approaches are “ahistorical,”⁸ while ignoring any history and tradition that is incompatible with its decision.⁹

4. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

5. *See infra* Parts II and III.

6. *See Kennedy*, 142 S. Ct. at 2427–28 (“The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (internal quotation marks omitted))).

7. *See infra* Part II.

8. *Kennedy*, 142 S. Ct. at 2427.

9. The Court fails to cite cases that discuss history that is more separationist, such as *Engel v. Vitale*, 370 U.S. 421 (1962), *McCreary County v. ACLU*, 545 U.S. 844 (2005), and others. Caroline Mala Corbin has explained a similar problem with the Court's selective

Three days before *Dobbs*, the Court decided another case under the religion clauses, *Carson v. Makin*,¹⁰ which also pushed the boundaries of the law as understood prior to that case. Moreover, the *Carson* case abandoned the status/use distinction the Roberts Court itself created in 2017 and reinforced in 2020.¹¹ Both of these decisions, but especially the *Kennedy* decision, are unprincipled and especially threaten harm to religious minorities and nonbelievers.¹² Moreover, both decisions analyze the free exercise of religion in a manner that overrides concerns about the establishment of religion.¹³

Part II of this Article will discuss the *Kennedy* and *Carson* cases and the impact they have on concerns about government support for religion *vis a vis* the free exercise of religion. This Part will also address why *Kennedy*, and to a lesser extent *Carson*, are unprincipled to a degree rarely seen in other cases because the distortions of fact, law, and history in these decisions are unusually strong. Part III will address arguments asserting that the Court was behaving in an intentionally unprincipled way in these cases. These arguments mask a much more troubling possibility, namely, that the majority of the Court has been so blinded by their own preconceptions in these cases that they are incapable of reflective analysis. These preconceptions involve a school of legal, historical, and socioreligious thought that until June 2022 had never commanded a majority of the Court except in one case decided during the era of McCarthyism.¹⁴

Part IV will put the Court's "history and tradition" test to the test of history and tradition. This analysis demonstrates that the Court majority has viewed the history and tradition of law and religion in the United States through rose-tinted glasses, ignoring a vast amount of well-documented history regarding religion in the United States that is not convenient for the Court's preconceived notions. Part V will explain how the Court's new approach to law

use of originalism. Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 643–44, 659 (2019).

10. *Carson v. Makin*, 142 S. Ct. 1987 (2022).

11. *See id.* at 2001 (holding that discrimination need not be based on religious status to violate the Free Exercise Clause but can also be based on religious use); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254, 2257 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458–63 (2017).

12. *See infra* Part V.

13. *See infra* Sections II.A.2.a and II.B.

14. *E.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952).

and religion issues is likely to be harmful to religious minorities and nonbelievers. Part VI will offer a brief conclusion.

II. THROUGH THE LOOKING GLASS: *KENNEDY* AND *CARSON*

This Part will provide an overview of *Kennedy* and *Carson*, including some of their shortcomings. Critiques of the “history and tradition” test and the likely negative impact the Court’s new religion clause doctrine will have on religious minorities and nonbelievers will be addressed in Part IV and Part V, respectively.

A. *Kennedy*

The *Kennedy* opinion is shockingly unprincipled. The Court, despite a powerful dissent, ignores or decontextualizes most of the salient facts, mischaracterizes the facts it does address, fails to cite a highly relevant precedent that explains exactly why facts need to be contextualized in religion clause cases, mischaracterizes the scope of Establishment Clause precedent (while ignoring other Establishment Clause precedent that does not meet its preconceptions), overturns over fifty years of precedent, prostrates the Establishment Clause to the Free Exercise and Free Speech Clauses, and imposes the formerly limited history and tradition approach as “the” approach for evaluating establishment concerns. All of this is done in a manner that ignores the impact that Coach Kennedy’s actions could have on those with different or no religious beliefs and ignores the impact on non-Christian religious minorities and nonbelievers. As will be addressed below and in Parts III and IV, the *Kennedy* opinion could have only been written and signed by Justices who are blind to their legal and historical preconceptions and are unable to understand law and religion issues from any perspective other than their own.¹⁵

1. *The Facts.* The facts in *Kennedy v. Bremerton School District* are where the questions about the case begin. In a first for any article written by this Author, I must state that the facts are not as set forth in the majority opinion. This is not just a matter of a court spinning the facts in a manner that supports the outcome of the decision—that is not an unusual phenomenon. *Kennedy*

15. See *infra* Parts III–IV.

moves far beyond the ordinary spinning of facts to what might colloquially be referred to as “factual gaslighting.”

The *Kennedy* opinion distorts and decontextualizes the facts it relies on and ignores some of the most salient and relevant facts in the record.¹⁶ Significantly, if the facts were as the *Kennedy* majority claimed them to be, there would have been no need for the Court to overturn *Lemon v. Kurtzman* or the endorsement test, the latter of which has had significant support in some recent decisions despite the *Kennedy* Court’s protestations to the contrary.¹⁷ Joseph 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 under the *Lemon* test.¹⁸ But, of course, the facts were not even close to what the majority opinion suggests.

The dissent provides a blistering critique of the majority’s mischaracterization of the facts and includes photographs of what actually happened.¹⁹ Even so, the dissent is generous in its characterization of what the majority did. What follows is a comparison of the facts as reflected in the record and considered by the trial court and the Ninth Circuit, with the facts as outlined in the majority opinion.

The facts of the case documented in the record and the dissenting opinion were that Kennedy, an assistant coach for a public high school football team and junior varsity head coach, kneeled and prayed after football games at the fifty-yard line.²⁰ For years, he prayed with his own players and invited players, coaches from opposing teams, and others to pray with him in

16. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting).

17. *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

18. The Court has long held that the 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, e.g., *Good News Club v. Milford Cent. Sch.*, 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 noncurriculum-related school clubs and excludes a religious club from that forum). The outcome would be similar under a *Garcetti v. Ceballos* analysis if only quiet religious speech was excluded as the *Kennedy* Court counterfactually asserts. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (holding that only public religious speech is not insulated from employer discipline).

19. *Kennedy*, 142 S. Ct. at 2434, 2436, 2438–39 (Sotomayor, J., dissenting).

20. *Id.* at 2434–35.

violation of school-district policy.²¹ He also gave religiously themed speeches along with the prayer at the fifty-yard line.²² Additionally, he prayed with students in the locker room, but that was a tradition that was stopped once the school was informed, though players could still pray without the coaches.²³

The school district informed him that he needed to stop involving students in the fifty-yard line prayers but that he could come back out to the field and pray on his own after his coaching duties for the day concluded.²⁴ At first, he followed the school district's request, but then he had a change of heart and prayed immediately after the game, and players and coaches from the opposing team knelt to pray with him.²⁵ He was warned again and announced to the media that he would pray at the fifty-yard line at an upcoming game.²⁶

After the media coverage, the district began to receive threatening messages, letters, and e-mails.²⁷ The media coverage led to a frenzy after a game where fans came down from the stands to pray with Kennedy, trampling student band members and others.²⁸ The district had to use local police as security for games after these events.²⁹ School employees and administrators were threatened, the community became divided over the prayer, and it turned into a media spectacle.³⁰

Kennedy continued to kneel and demonstratively pray at the fifty-yard line immediately after games after being warned several times by the school district not to do so.³¹ The district offered to work with him on a compromise where he could come back to the field after his duties to pray and suggested other compromises, but he would only accept demonstrative prayer right after the game.³² Before turning the prayer into a spectacle, it might have been possible for him to quietly pray on his own at the fifty-yard line shortly after games but given all the attention he called to the prayer, and the fact that he was a school employee wearing school

21. *Id.* at 2434–36.

22. *Id.* at 2436.

23. *Id.* at 2436–37.

24. *Id.* at 2436–38.

25. *Id.* at 2437–38.

26. *Id.*

27. *Id.* at 2437.

28. *Id.* at 2438.

29. *Id.*

30. *Id.* at 2437–38, 2440.

31. *Id.* at 2436–39.

32. *Id.* at 2439–40.

logos, etc., the district was concerned about being viewed as endorsing the prayer and about his flouting school-district rules and requests.³³ After he ignored the district's repeated warnings, he was disciplined and not rehired.³⁴ He then sued.³⁵

The Court majority's characterization of the facts is summed up in the first line of the opinion: "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."³⁶ The majority states that Kennedy quietly prayed at the fifty-yard line after games and, after being warned about student involvement in the prayers, no longer prayed with students after games or in the locker room.³⁷ The majority states that the district was worried about perceptions that Kennedy might be endorsing religion through demonstratively praying when students were around and, thus, targeted Kennedy because of his prayers.³⁸ The majority suggests that it was the targeting of Kennedy's conduct due to the school district's Establishment Clause concerns that led to the media attention that eventually occurred.³⁹ It also states that Kennedy was willing to work with the district on a compromise but that the district disciplined him for his religious speech.⁴⁰

If the facts were as the majority states, it would have been a relatively easy win for Kennedy, and there would have been no need to overturn *Lemon* or call the endorsement test into question.⁴¹ If a coach just went quietly to the fifty-yard line after games—when people could engage in all types of speech—and said a quiet personal prayer, there would be little question if the speech was private. It would be possible that, for that short period after games before players and coaches went back to the locker room, the field became a limited public forum for coaches and players to

33. *Id.* at 2435–38.

34. *Id.* at 2439–40.

35. *Id.* at 2440.

36. *Id.* at 2415 (majority opinion).

37. *Id.* at 2416–17.

38. *Id.* at 2416–18.

39. *Id.* at 2417–18, 2427.

40. *Id.* at 2429–30.

41. *Id.* at 2427–28 (the Court overturned *Lemon* and the endorsement test without explicitly stating it was doing so).

talk about anything.⁴² Even if it were not a limited public forum, it would fall within the sort of protected speech government employees can have on government property.⁴³

Moreover, because no students would be involved and the prayer would not be demonstrable (other than perhaps a bowed head), there would likely not be an Establishment Clause violation under any of the Establishment Clause tests at that time, whether the *Lemon* test, the endorsement test, or the indirect coercion test. But those were not the facts!

The real facts suggest a public-school employee not only prayed with students but with students who might have felt coerced to pray or lose their positions or might have felt coerced due to peer pressure. Moreover, that same employee turned his fifty-yard-line prayer into a public spectacle that divided a community. There is no question that, prior to *Kennedy*, this would have been unconstitutional and could have led to liability for the school district if it had not interceded.⁴⁴

Moreover, the majority's reliance on a few decontextualized facts violates well-established precedent. Prior to *Kennedy*, the Court had held that the entire chain of events surrounding a situation analyzed under the Establishment Clause was important.⁴⁵ As discussed below, the majority opinion fails to cite *McCreary County v. ACLU*, which is directly on point regarding the importance of the timing and context of events under the Establishment Clause.⁴⁶ Moreover, the majority barely mentions *Santa Fe Independent School District v. Doe*,⁴⁷ which stands for the same proposition about timing and context.⁴⁸ Of course, as

42. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07, 120 (2001) (serving as one of the many decisions by the Court finding that private religious speech in a limited public forum is not state action, and is, therefore, protected speech).

43. See *Garcetti v. Ceballos*, 547 U.S. 410, 419–22 (2006); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 573–74 (1968). The *Kennedy* majority itself relies on *Garcetti* and *Pickering*, although it applies these decisions to its version of the facts. *Kennedy*, 142 S. Ct. at 2423–25.

44. See *McCreary County v. ACLU*, 545 U.S. 844, 850–53, 855, 881 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); *Lee v. Weisman*, 505 U.S. 577, 599 (1992); see also *Borden v. Sch. Dist. of the Twp. of E. Brunswick*, 523 F.3d 153, 174–75, 178 (3d Cir. 2008) (detailing how a school board discipline of coach under policy preventing coach from praying with students did not violate coach's free speech or free exercise rights and coach's conduct endorsed religion in violation of the Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406–08 (5th Cir. 1995) (detailing how a school district allowing a coach to pray with players violated the Establishment Clause).

45. See *McCreary*, 545 U.S. at 866; see also *Santa Fe*, 530 U.S. at 308–09, 315, 317.

46. See *infra* Part II.A.b; *McCreary*, 545 U.S. at 869–74.

47. See *infra* note 77 and accompanying text.

48. See *Santa Fe*, 530 U.S. at 308–09, 315, 317.

shown below, *McCreary County* and *Santa Fe* not only undermine the Court's decontextualizing of the facts in *Kennedy*, but they also undermine the *Kennedy* Court's narrative about the test the Court has applied in some recent Establishment Clause cases.⁴⁹

2. *The Law.* The *Kennedy* Court did not just mischaracterize the facts in the case, it also drastically mischaracterized the law. This took three main forms. First, the Court turned the understanding of the Establishment Clause on its head and continued its recent move toward rendering establishment of religion concerns subservient to free exercise and free speech concerns.⁵⁰ Second, and perhaps most troubling from an ethical perspective, the Court failed to cite precedent that was highly relevant to its decision but did not comport with its seemingly preconceived outcome and approach. Third, the Court mischaracterized the scope of precedent that could support looking to history and tradition as a relevant test under the Establishment Clause.

a. *Rendering the Establishment Clause Subservient to the Free Exercise and Free Speech Clauses.* The *Kennedy* Court expressly states what has become implicit in a number of cases decided since 2020: namely, that the Establishment Clause must give way to free exercise and free speech concerns.⁵¹ Ironically, the *Kennedy* Court does so while asserting that the clauses in the First Amendment should be read together as complementing each other.⁵² Rather than viewing the Establishment Clause as a limit on religious action that could be attributed to the government, the *Kennedy* Court subsumed it under the Free Exercise and Free Speech Clauses.⁵³ There is, of course, nothing wrong with reading the Free Exercise Clause and the Establishment Clause as complementing each other and as part of the same broader

49. See *infra* notes 64–81 and accompanying text.

50. See, e.g., *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262–63 (2020) (holding that state's exclusion of those who would claim tax exemptions for donations that could support students going to religious schools violated the Free Exercise Clause, despite the fact that the program as a whole was found unconstitutional by state supreme court).

51. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022).

52. *Id.*

53. *Id.* at 2427; *id.* at 2441 (Sotomayor, J., dissenting).

concept.⁵⁴ However, the *Kennedy* Court essentially reads the Establishment Clause out of the First Amendment anytime someone asserts a plausible free exercise or free speech argument. This is so even when the government has good reason to be concerned that the actions of the person asserting those rights could be attributed to the government and even where the government is concerned those actions could divide the community it serves.⁵⁵

This, of course, turns the Court's understanding of the Establishment Clause from incorporation through at least 2005 on its head.⁵⁶ In fact, even before incorporation, state courts understood that in religion cases there was a difference between those things that could be attributable to the government as state action and those that were truly private rights.⁵⁷ For example, some of these courts read religion provisions in state constitutions to prohibit reading the Bible and prayer in public schools.⁵⁸

Most importantly, a logical reading of the clauses in the First Amendment is that the clauses are complementary precisely because they draw a line between government action, which can violate the Establishment Clause, and private freedoms, which are protected under the Free Exercise and Free Speech Clauses.⁵⁹ Rather than address this highly complex balance, the Court simply assumes an answer, and as a practical matter, reads the Establishment Clause out of the First Amendment. As will be seen, the Court's history and tradition approach and misuse of,

54. See DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 140 (1986); see also Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 300–01 (2002); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1811 (2004) (“The Establishment and Free Exercise Clauses of the First Amendment together permit individuals and groups of individuals to opt out of a dominant community’s accepted norms. The Religion Clauses do this in two ways: first, by preventing a majority from establishing, through the coercive organs of the state, norms of religious belief or exercise; and second, by limiting (though not eliminating) the state’s interference with the exercise of nonmajoritarian norms of religious belief or exercise.”).

55. *Kennedy*, 142 S. Ct. at 2441–42 (Sotomayor, J., dissenting).

56. *Id.* at 2441. Compare *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947) (applying separation as the primary form of analysis in cases involving alleged government support for religion), and *McCreary County v. ACLU*, 545 U.S. 844 (2005) (applying concepts that would prevent government from promoting or endorsing religion), with *Kennedy*, 142 S. Ct. (rejecting separation, *Lemon*, and endorsement analysis).

57. See *Bd. of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211, 227, 250 (1872); *State ex rel. Weiss v. Sch. Dist. No. 8*, 44 N.W. 967, 979–80 (Wis. 1890).

58. *Minor*, 23 Ohio St. at 227; *People ex rel. Ring v. Bd. of Educ. of Dist. 24*, 92 N.E. 251, 252 (Ill. 1910); *Herold v. Parish Bd. of Sch. Dirs.*, 68 So. 116, 120 (La. 1915); *State ex rel. Freeman v. Scheve*, 91 N.W. 846, 847–48 (Neb. 1902); *Weiss*, 44 N.W. at 979–80.

59. *Kennedy*, 142 S. Ct. at 2441 (Sotomayor, J., dissenting).

and failure to cite, relevant precedent only exacerbates these issues.⁶⁰

b. Ignoring Inconvenient Precedent. In most situations when precedent goes directly against a court's legal approach and/or conclusions, the court will, at the very least, try to distinguish that precedent. Sometimes this takes the form of "spinning" the precedent,⁶¹ but failure to cite directly relevant precedent, an act which could lead to discipline for a lawyer,⁶² is a rarity. Yet in *Kennedy*, the Court does just that, and its failure to cite relevant precedent enabled it to mischaracterize what "recent law" under the Establishment Clause means, decontextualize the facts, and read the Establishment Clause as being subservient to the Free Exercise and Free Speech Clauses.⁶³

This intellectual sleight of hand begins when the Court limits the actionable facts to a small part of the record and ignores the lessons about temporal context set forth in the *McCreary County* case.⁶⁴ That case teaches that the temporal context of actions relevant under the Establishment Clause is important when analyzing questions under that clause.⁶⁵ It teaches that you cannot evaluate specific actions in a vacuum. What happens before and after the conduct that raises the potential Establishment Clause concerns matters.⁶⁶

60. See *infra* Sections II.A.2.b, II.A.2.c, and Part IV.

61. See DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 298, 300–02 (1997) (stating that the Rehnquist Court Justices "often take a selected term or phrase, 'deprive it of meaning and context, and claim that it supports the opposite of what it clearly meant originally'"); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1280, 1356, 1364 (1991) (explaining how spinning of precedent was used by the Burger Court to spin Warren Court precedent and then by the Rehnquist Court). This is exactly the sort of thing we have seen with religion clause precedent over the years. For example, in the aid context, the *Lemon* test was spun to support a modification that eliminated the divisiveness aspect of the entanglement prong and rolled that prong into the effects prong. *Agostini v. Felton*, 521 U.S. 203, 232–34 (1997). Five years later, the Court spun *Agostini* to support the move towards a formal neutrality approach in aid cases. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

62. MODEL RULES OF PRO. CONDUCT, r. 3.3(a)(2) (2023).

63. See *Kennedy*, 142 S. Ct. at 2446–47 (Sotomayor, J., dissenting).

64. *McCreary County v. ACLU*, 545 U.S. 844, 869–74 (2005).

65. *Id.* at 866.

66. *Id.* at 861–66.

In *McCreary County*, which was decided the same day as *Van Orden v. Perry*,⁶⁷ a decision upon which the *Kennedy* majority relies, the Court held that a county's history of Ten Commandments displays was designed to promote religion.⁶⁸ The context and pattern of behavior by the county were central to the Court's holding.⁶⁹ There were sectarian dedication ceremonies for the displays, and the history of the displays demonstrated the town's purpose to support Christianity.⁷⁰ The Court applied the *Lemon* test and the endorsement test.⁷¹ The *McCreary County* Court also cited to *Santa Fe Independent School District v. Doe*,⁷² where a 6-3 majority held that the pattern and context of the school board's actions to promote sectarian religious practices could not be ignored in finding that a policy promoting prayer at football games was unconstitutional.⁷³

The lesson of these cases is clear in *Kennedy*. The school district had a valid concern that the pattern and history of *Kennedy*'s practices violated the Establishment Clause because they could be attributed to him in his role as a state employee.⁷⁴ The cases also stand for applying the endorsement and *Lemon* tests to Establishment Clause concerns.⁷⁵

These decisions must have been quite inconvenient for the *Kennedy* majority given that they both fall within the majority's timeline of cases "[i]n the last two decades" that it relies upon to abandon the endorsement test, which was relied upon quite a bit in those cases.⁷⁶ So inconvenient, in fact, that the *Kennedy* Court fails even to cite *McCreary County* and makes just one brief citation to *Santa Fe* without any discussion of its content.⁷⁷ It is unfathomable that the majority was unaware of the content of

67. *Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (plurality opinion).

68. *McCreary*, 545 U.S. at 850, 881; *Kennedy*, 142 S. Ct. at 2427 (majority opinion).

69. *McCreary*, 545 U.S. at 866.

70. *Id.* at 851, 857.

71. *Id.* at 859–60.

72. *Id.* at 860.

73. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09, 315, 317 (2000).

74. *See, e.g., Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 174, 178 (3d Cir. 2008) (holding that a coach's religious practices violated the Establishment Clause and that "[t]he School District has a legitimate educational interest in avoiding Establishment Clause violations").

75. *McCreary*, 545 U.S. at 859–60; *Santa Fe*, 530 U.S. at 309–10, 314.

76. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427, 2428 n.4 (2022).

77. *Id.* at 2431–32.

these cases given that it relies on a plurality opinion decided the same day as one of them.⁷⁸

These cases are relevant to how the *Kennedy* majority treats the facts because they make clear that it was inappropriate for the Court to take Kennedy's behavior out of context and rely only on a small part of his pattern of behavior.⁷⁹ Moreover, they show that the *Kennedy* majority also mischaracterized the law when it said the Court had abandoned the endorsement test in favor of a history and tradition test.⁸⁰ This was not a minor oversight, as it is impossible that Justice Gorsuch or the other Justices in the majority were unaware of these cases and the principles and approaches used in these cases.

A potential criticism of this line of analysis would be that *McCreary County* is a case involving religious symbols on public property and not religious conduct by a government employee. This criticism would make sense except that the cases the *Kennedy* majority relied upon for overturning the *Lemon* and endorsement tests and applying the history and tradition approach included at least two religious symbolism cases.⁸¹ This was a necessity for the *Kennedy* majority because, other than the legislative prayer cases, which the Court has long acknowledged is a unique context where history is especially relevant,⁸² the only recent cases that support the majority's history and tradition approach were religious symbolism cases, and the *Kennedy* majority mischaracterized the scope of those cases.⁸³ Other than those cases, the *Kennedy* majority relies upon dissenting opinions or plurality opinions and ignores decisions that commanded a majority of the Court,⁸⁴ or it

78. *Id.* at 2427. That precedent is *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion), which was decided on the same day as *McCreary*.

79. *See Santa Fe*, 530 U.S. at 308–09, 315, 317; *McCreary*, 545 U.S. at 866.

80. *See Santa Fe*, 530 U.S. at 306–08; *McCreary*, 545 U.S. at 866.

81. *Kennedy*, 142 S. Ct. at 2427–28 (first citing *Van Orden*, 545 U.S. 677; and then citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (plurality opinion)).

82. *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014) (recognizing the importance of the history of the specific practice of legislative prayer and its unbroken history from the time of the framing); *Marsh v. Chambers*, 463 U.S. 783, 786, 790 (1983) (same).

83. *Compare Kennedy*, 142 S. Ct. at 2427–28, with *Am. Legion*, 139 S. Ct. at 2074, 2081–82 (showing that *Kennedy* indicates *American Humanist* abandoned the *Lemon* endorsement test completely, while *American Humanist* merely represents that the test is not appropriate in the religious symbolism context when longstanding war memorials are the issue); *Van Orden*, 545 U.S. at 681, 683, 686.

84. *Kennedy*, 142 S. Ct. at 2446 (Sotomayor, J., dissenting).

relies on decisions that do not stand for the propositions it asserts they stand for.⁸⁵

A related criticism would be that both *McCreary County* and *Santa Fe* involved actions by government entities supporting religion, whereas coach Kennedy's actions were opposed by the school board in violation of the Free Speech and Free Exercise Clauses.⁸⁶ Again, if you ignore what the Court actually did in *Kennedy*, this criticism makes sense. The Court distorted or ignored the facts that made the school board concerned that Kennedy's actions could be attributed to it for liability purposes and then used that to overturn the *Lemon* and endorsement tests upon which the school district's concerns were partially based;⁸⁷ they were only partially based because the school board was also concerned that coach Kennedy's actions were coercive.⁸⁸ As discussed below, the Court's argument that *Lemon* had long been criticized was accurate, but other than in dissenting opinions and one plurality opinion, the same was not true for the endorsement approach.⁸⁹

The school district reasonably believed that Kennedy's actions exposed it to liability under the Establishment Clause given the vast array of relevant precedent.⁹⁰ Moreover, the record overwhelmingly supported this concern.⁹¹ A coach who had authority over players' playing time and potential college scholarships was engaged in group prayer and religiously tinged

85. See *infra* notes 120–143 and accompanying text.

86. Compare *Kennedy*, 142 S. Ct. at 2423–36 (explaining that the coach's actions that were opposed by the school district were not acting as a government entity), with *McCreary County v. ACLU*, 545 U.S. 844, 850 (2005) (explaining that county executive defendants placed religious symbol in the county courthouse), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (explaining how independent public school district defendant endorsed religious policy).

87. Compare *Kennedy*, 142 S. Ct. at 2423–28, with *id.* at 2434 (Sotomayor, J., dissenting) (describing how the majority ignores facts in the record and those referenced by the dissent and further showing that the majority relied on improper facts to overturn *Lemon* and the endorsement tests).

88. See *id.* at 2442–43, 2450–53 (Sotomayor, J., dissenting).

89. That plurality opinion was *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767–68 (1995) (plurality opinion). Aside from the fact that this case preceded both *Santa Fe* and *McCreary*, while a majority of the Court applied the endorsement approach along with *Lemon* in those cases, a majority of the Court in *Capitol Square* would have applied the endorsement approach. *Id.* at 772 (O'Connor, J., concurring) (concurrency joined by Justices Breyer and Souter); *id.* at 797 (Stevens, J., dissenting); *id.* at 817 (Ginsburg, J., dissenting).

90. *Kennedy*, 142 S. Ct. at 2438–39, 2441–43 (Sotomayor, J., dissenting).

91. *Id.* at 2443.

speeches after games.⁹² Student players would have been well within the realm of normal thought if they worried that not going along with the prayer might impact their playing time.⁹³ In fact, parents complained to the school district that this is exactly what happened.⁹⁴ Further, coaches are authority figures who can have an intense impact on student ideas and ideals.⁹⁵

Another potential critique is that the *Kennedy* decision was primarily focused on freedom of speech and free exercise.⁹⁶ This is, of course, true, but it is also evading the question. The majority's mischaracterization of the facts and failure to address the above-mentioned precedent allowed it to minimize the concern relied on by the school district, the district court, and the Ninth Circuit. All of whom found that Kennedy's actions could be attributed to the school district and, therefore, that a reasonable observer could easily believe the school district was endorsing Kennedy's actions or was, at the very least, legally responsible for those actions under the Establishment Clause.⁹⁷

Thus, the Court is able to avoid a detailed discussion of an issue addressed in *Santa Fe v. Doe* and several other cases, namely, whether religious speech at school-sponsored events is private speech given the totality of the circumstances.⁹⁸ Because *Kennedy* involved a government employee with power over students' futures, this question becomes even more salient.⁹⁹ Framing the case as a private religious speech case without detailed analysis of whether the speech was indeed private given

92. *Id.*

93. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995) (stating a student participated in coach-directed prayer at first because of a fear of being singled out, and when she later stopped, other students, spectators, and even a teacher harassed her); *Ryan v. Mesa Unified Sch. Dist.*, 64 F. Supp. 3d 1356, 1357, 1361, 1363–64 (D. Ariz. 2014) (stating that students were kicked off a softball team by their coach for not participating in prayers and stopping prayer practice supported by the coach and explaining that Section 1983 claims against the school were dismissed but the claim against the coach was allowed).

94. *Kennedy*, 142 S. Ct. at 2440 (Sotomayor, J., dissenting).

95. *Id.* at 2443.

96. *See id.* at 2421–26 (majority opinion).

97. *Id.* at 2440–43 (Sotomayor, J., dissenting).

98. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302–05 (2000).

99. *Kennedy*, 142 S. Ct. at 2441–43 (Sotomayor, J., dissenting).

longstanding Establishment Clause concerns simply begs the question.¹⁰⁰

Consider the following scenario: An atheist coach decides to go to the middle of the field after games under similar circumstances to coach Kennedy. The coach is wearing school apparel and raises his arm holding the two teams' helmets while surrounded by players and declares, "there is no G-d and we won based on our skill. Remember we don't need divine grace to prevail, just courage and will to win." The coach does similar things at multiple games and religious parents complain that their children feel compelled to participate because of concerns over what the coach will think if they don't. The coach turns the events into a media spectacle after being warned he could be disciplined. This is what happened in *Kennedy* with the only difference being the message.¹⁰¹

According to the *Kennedy* majority, this is just quiet free speech by the coach, so it should be protected speech.¹⁰² To the extent that the Justices in the *Kennedy* majority might argue the speech is discriminatory under the Free Exercise Clause, the answer from *Kennedy* would be it is protected private speech, so it doesn't matter how it might be perceived by observers.¹⁰³ Also, for non-Christians, the invocation of Jesus by Coach Kennedy could be perceived as equally discriminatory to the message in the hypothetical.

The point is that any criticism of the analysis in this Article based on the fact that *Kennedy* was primarily decided as a religious speech case is question-begging because these criticisms must assume that *Kennedy* was already established law before it was decided. This creates an obvious causal loop.¹⁰⁴ As mentioned earlier, if the facts and law were as the *Kennedy* Court suggested, there would have been no need to overturn the *Lemon* or endorsement tests because the speech would have been quiet, protected private speech in a limited public forum, or protected

100. See *id.* at 2434–36 (explaining coach Kennedy engaged in each of these activities and showing that the dissent includes photographs of several of these).

101. *Id.* at 2437.

102. *Id.* at 2415–16.

103. *Id.* at 2424. Of course, from the perspective of non-Christians, prayers in Jesus's name may be just as discriminatory as prayers denying Jesus are to some Christians.

104. See F. Lobo & P. Crawford, *Time, Closed Timelike Curves and Causality*, in 95 NATO SCIENCE SERIES II: MATHEMATICS, PHYSICS, AND CHEMISTRY 289 (Rosolino Buccheri et al. eds., 2003).

under *Garcetti*,¹⁰⁵ and the Establishment concerns of the school district could have been easily dismissed even under the *Lemon* or endorsement tests.¹⁰⁶ This Article takes no position on the *Kennedy* Court's use of free speech principles qua free speech, but rather questions the argument that what *Kennedy* engaged in was private religious speech, and the role that Establishment Clause concerns would play in understanding this argument prior to *Kennedy*.

c. Mischaracterizing Prior Law to Support the History and Tradition Approach. 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 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.¹⁰⁷

To be clear, in a few limited contexts, namely legislative prayer and longstanding religious monuments, such as World War I memorials, the law had moved toward a history and tradition approach.¹⁰⁸ Yet, the Court had never abandoned the endorsement test or a totality of the circumstances style contextual approach to the facts in Establishment Clause cases.¹⁰⁹ At best, for those advocating the history and tradition approach, the precedent was a mixed bag.

105. See *supra* notes 41–45 and accompanying text; see, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (providing that private speech in a public forum is protected speech and content discrimination must meet strict scrutiny test to be constitutional); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (stating that speech by government employees can be protected speech depending on several factors).

106. When private speech occurs in a public forum, Establishment Clause concerns, whether under the *Lemon* or endorsement tests, are unlikely to meet strict scrutiny. *Good News Club*, 533 U.S. at 106, 113–14; *Lamb's Chapel*, 508 U.S. at 391, 395. This makes sense because, as a general matter, the government is not favoring religion in these situations.

107. *Kennedy*, 142 S. Ct. at 2446–47 (Sotomayor, J., dissenting).

108. See, e.g., *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–82 (2019) (regarding World War I memorial); *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014) (regarding legislative prayer in town council).

109. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 866–70 (2005) (applying endorsement approach to *Lemon* test); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–09, 315 (2000) (same).

Given that the *Kennedy* majority overturned more than fifty years of precedent when it overturned *Lemon v. Kurtzman* and over thirty years of precedent when it rejected the endorsement test,¹¹⁰ one would expect the majority to at least consider the factors relevant to abandoning precedent given *stare decisis*,¹¹¹ but the *Kennedy* opinion spends only a few lines abandoning these longstanding precedents and installing 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.” “[T]he line” that courts and governments “must draw between the permissible and the impermissible” has to “accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.” An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “exception” within the “Court’s Establishment Clause jurisprudence.” The District and the Ninth Circuit erred by failing to heed this guidance.¹¹²

In this key passage, the Court relies heavily on plurality and concurring opinions to support its massive shift in Establishment Clause analysis. It also fails to cite or, when cited, fails to discuss relevant majority opinions, such as *McCreary County, Santa Fe*, and *Abington Township v. Schempp*.¹¹³ The Court also decontextualizes the few majority opinions it does cite, such as *American Legion v. American Humanist Association*, *Torcaso v.*

110. *Kennedy*, 142 S. Ct. at 2427–28. *Lemon* was decided in 1971, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but the test was based on earlier cases. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (using what later became the first two prongs of the *Lemon* test); *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (discussing entanglement concerns, which became the third prong of the *Lemon* test). By 1989, the endorsement test had been accepted by a majority of the Court. *County of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989); *id.* at 627–28 (O’Connor, J., concurring) (concurrence joined in part by Justices Brennan and Stevens in support of the endorsement approach); *id.* at 641, 643 (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 Sch. Dist.*, 400 F. Supp. 2d 707, 713–14 (M.D. Pa. 2005).

111. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (2015); see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 923–26 (2007) (Breyer, J., dissenting) (setting forth the various factors the Court has used over the years when addressing questions of *stare decisis*).

112. *Kennedy*, 142 S. Ct. at 2428 (alteration in original) (citations omitted).

113. See *McCreary*, 545 U.S. 844; *Santa Fe*, 530 U.S. 290; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

Watkins, and *Walz v. Tax Commissioners*, which ironically was the basis for the third prong of the *Lemon* test that the *Kennedy* Court abandons.¹¹⁴

Moreover, the Court fails to reference the discussion of history in *Everson v. Board of Education*,¹¹⁵ *Engel v. Vitale*,¹¹⁶ 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.¹¹⁷ This seems an odd oversight because the *Kennedy* Court already had to reach to find any cases outside the legislative prayer and historical monuments context that could arguably 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.¹¹⁸ Yet, unlike 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.¹¹⁹ 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?

The irony of the Court citing *Torcaso v. Watkins* to support its history and tradition approach is shocking, if not twisted. To the extent the *Torcaso* opinion relies on history, it relies on the strongly separationist history from *Everson* and its progeny, to which the *Kennedy* Court does not cite.¹²⁰ Moreover, the *Torcaso* Court never claimed that “history and tradition” was the only way to analyze Establishment Clause claims. *Torcaso* involved a Maryland requirement that those holding public office take an oath that they believe in God.¹²¹ The Court had no problem finding that unconstitutional and cited a string of decisions adopting a strongly separationist approach.¹²² The irony here should be

114. See *infra* notes 120–149 and accompanying text.

115. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 14–16 (1947).

116. See *Engel v. Vitale*, 370 U.S. 421, 425–30 (1962).

117. See *Kennedy*, 142 S. Ct. at 2428.

118. See *infra* notes 120–149 and accompanying text.

119. See generally *Everson*, 330 U.S. 1 (discussing and relying on history and dissents further expounding the same history); *Engel*, 370 U.S. 421 (focusing heavily on the history of government-supported prayer).

120. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 492–94 (1961).

121. *Id.* at 489–92, 495–96.

122. See *id.* at 492–96.

obvious because, to the extent the *Kennedy* Court relies on a history and tradition approach, it is apparent it does so to undo the very separationist history the *Torcaso* Court upholds.¹²³

As discussed in Part IV, this is one of the fundamental problems with a history and tradition approach. There are good arguments and historical works supporting a variety of positions on the history and tradition of the United States on law and religion questions.¹²⁴ Thus, history and tradition can simply be a justification for the Justices' preferred approach or preconceived notion of what "establishment" means.¹²⁵

The *Walz* Court mentioned historical aspects of tax exemptions for religious entities, but it was primarily concerned about the distinction between subsidies and exemptions, the fact that religious entities were not singled out for exemptions under the program challenged in that case, and concerns about entanglement between government and religion, which is part of the very test the *Kennedy* Court overturned.¹²⁶

The remaining majority opinions the *Kennedy* Court cited in support of its shift to the history and tradition approach are easily distinguishable. They fall broadly into two categories. First, legislative prayer, and second, longstanding religious monuments.

In the legislative prayer context, an approach analogous to the history and tradition approach has been applied since at least 1983 when the Court decided *Marsh v. Chambers*.¹²⁷ As the *Marsh* Court explained, and more recent cases have reinforced, legislative prayer is one of the few historical practices in the religion area that has continued since the time of the founding to today.¹²⁸ History and tradition might help when we actually know the history and tradition. "Might be" because there are strong arguments that even when there is evidence of original understandings or longstanding practices, these should not be determinative.¹²⁹ However, that is a debate beyond the scope of

123. Cf. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–29, 2431 (2022) ("Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.").

124. See *infra* Part IV.

125. See *infra* Part IV.

126. *Walz v. Tax Comm'n*, 397 U.S. 664, 672–78 (1970).

127. See generally *Marsh v. Chambers*, 463 U.S. 783 (1983).

128. *Id.* at 786–90; see, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014).

129. See Mark Strasser, *An Analysis of the Federal Constitutional Right to Same-Sex Marriage*, 19 CONST. COMMENT. 761, 765 (2002) ("The difficulty with the history and

this Article. Suffice it to say that, whether right or wrong, as a matter of constitutional interpretation, applying a history and tradition approach in the legislative prayer context has the merit of a relatively consistent history and tradition,¹³⁰ albeit not an unquestioned one.¹³¹ However, in most other contexts, the history and tradition approach is just a front for justifying Justices' preconceptions.¹³²

In the *American Humanist Association* case, the Court applied the history and tradition approach to a World War I monument.¹³³ The majority opinion was clearly limited to this sort of longstanding monument and by its terms did not extend beyond that.¹³⁴ In fact, concurring opinions both argued for and against using the history and tradition approach beyond that context,¹³⁵ but the majority opinion was limited to such longstanding monuments.¹³⁶ The only other majority opinion to apply a history and tradition approach in the Establishment Clause context is *Lynch v. Donnelly*,¹³⁷ which also dealt with religious symbolism. However, *Lynch* was later distinguished¹³⁸ and has perhaps become best known for Justice O'Connor's concurring opinion introducing the endorsement approach the *Kennedy* Court overturned—an approach that was adopted by majorities in several cases after *Lynch*.¹³⁹

tradition test, however, is not merely that it is too indeterminate but that it is unable to account for those interests that have been recognized as protected by the right to privacy.”). See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (explaining that using original intent or understandings violates the framers' intent and understandings).

130. *Marsh*, 463 U.S. at 786–90.

131. JAMES MADISON, DETACHED MEMORANDA (1817), reprinted in 5 THE FOUNDERS CONSTITUTION 103, 104 (Phillip B. Kurland & Ralph Lerner eds., 1987).

132. See *infra* Parts III–IV.

133. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

134. See *id.* at 2082–86, 2089–90.

135. Compare *id.* at 2090–91 (Breyer, J., concurring) (urging that history and tradition is not ordinarily the approach used in Establishment Clause cases), with *id.* at 2101–02 (Gorsuch, J., concurring) (urging for a broad history and tradition test).

136. *Id.* at 2089–90 (majority opinion).

137. See *Lynch v. Donnelly*, 465 U.S. 668, 674–78 (1984).

138. *McCreary County v. ACLU*, 545 U.S. 844, 864–65, 869 (2005); *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 597–99 (1989).

139. *Lynch*, 465 U.S. at 691–92 (O'Connor, J., concurring); see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–09, 315 (2000); see also *Allegheny*, 492 U.S. at 592–94 (discussing the endorsement approach).

McGowan v. Maryland is the central case the majority cites to stand for the proposition that history and tradition must be addressed in regard to some Establishment Clause cases.¹⁴⁰ Even so, *McGowan* does not stand for the proposition that history and tradition is the only way to analyze Establishment Clause claims.¹⁴¹ The case involved a challenge to a “blue law,” which prohibited the sale of certain items on Sundays.¹⁴² Blue laws include “Sunday Closing Laws,” which the Court also addressed in the case.¹⁴³ These laws have a highly damaging impact on Saturday Sabbatarians, such as Orthodox Jews and Seventh Day Adventists.¹⁴⁴ The Court upheld the law for a variety of reasons, and it analyzed the history and modern situation of blue laws.¹⁴⁵ To the extent the *McGowan* Court did this, *McGowan* could rightfully be cited by the *Kennedy* majority for the broad proposition that history and tradition can be relevant to Establishment Clause cases; however, some of the Justices that decided *McGowan* also decided *Engel v. Vitale*,¹⁴⁶ which suggests that as a broader matter, the relevant history and tradition is separationist to the extent history and tradition may be relevant in these cases.¹⁴⁷ Also, as addressed in Part V,¹⁴⁸ the *Kennedy* opinion will likely lead to privileging more dominant religions and harming religious minorities and nonbelievers, and this is one of the main criticisms of *McGowan* as well.¹⁴⁹

140. See *McGowan v. Maryland*, 366 U.S. 420, 431 (1961).

141. *Id.* at 453.

142. *Id.* at 422–23.

143. *Id.* at 445.

144. STEPHEN M. FELDMAN, PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF SEPARATION OF CHURCH AND STATE 232–33, 235, 253 (N.Y. Univ. Press 1997); De’Siree N. Reeves, *Missing Link: The Origin of Sherbert and the Irony of Religious Equality*, 15 STAN. J.C.R. & C.L. 201, 213–14, 219, 225 (2019); Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 79 (1992).

145. *McGowan*, 366 U.S. at 426–28, 431–37, 447–48.

146. *Engel v. Vitale*, 370 U.S. 421 (1962).

147. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 10–16 (1947) (relying on separationist history); see also *Torcaso v. Watkins*, 367 U.S. 488, 491, 493, 495–96 (1961) (same); *Engel*, 370 U.S. 421, 429, 431, 433, 435 (same).

148. See *infra* Part V.

149. See FELDMAN, *supra* note 144, at 232; Hall, *supra* note 144, at 78–79; see also Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI.-KENT L. REV. 775, 779–81 (2012) (suggesting that religious bias caused the Court to disregard the impact of blue laws when upholding those laws in *McGowan*).

B. Carson

Carson v. Makin also takes significant liberties with precedent and downplays at least one important fact.¹⁵⁰ It represents a massive shift in the law and minimizes both establishment of religion concerns and the principle of federalism in cases involving the Free Exercise Clause, effectively undermining both. Yet, compared to *Kennedy* it is less problematic because it states the facts in a somewhat accurate manner and relies on precedent that actually says what it cites it for—albeit that precedent was less than five years old at the time *Carson* was decided.¹⁵¹ Still, its submission of establishment concerns to free exercise concerns is highly problematic.

In *Carson*, also decided in June 2022,¹⁵² the Court dramatically expanded its 2020 decision, *Espinoza v. Department of Revenue*,¹⁵³ which itself was a massive expansion of prior law.¹⁵⁴ *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.¹⁵⁵ In *Carson*, the Court went much further and held, as a practical matter, that Maine must provide certain vouchers to religious private schools if it did so for secular private schools.¹⁵⁶

Maine provided tuition reimbursement to private schools in areas of the state that did not have enough students to support public schools.¹⁵⁷ For context, Maine has vast expanses of territory without major towns or cities.¹⁵⁸ Maine provided the vouchers to any school, secular or religious, so long as the school did not “promote[] the faith or belief system with which it is associated

150. *Carson v. Makin*, 142 S. Ct. 1987 (2022).

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

152. *Carson*, 142 S. Ct. 1987 (decided June 21, 2022).

153. *Espinoza*, 140 S. Ct.; *Carson*, 142 S. Ct. at 2002.

154. Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1332–34 (2022) (book review); see Steven K. Green, *The Supreme Court’s Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505, 531–38 (2021).

155. See generally *Espinoza*, 140 S. Ct. 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 154, at 537–38.

156. *Carson*, 142 S. Ct. at 2000. This is the practical result of the decision despite the Court’s protestations to the contrary. *Id.* at 2009–10, 2012 (Breyer, J., dissenting).

157. *Id.* at 1993 (majority opinion).

158. See *id.*

[with] and/or present[ed] the [academic] material taught through the lens of this faith.”¹⁵⁹ The majority opinion minimized the fact that religious schools could be included in the funding so long as they did not require students to engage in religious exercises or education.¹⁶⁰

The Court abandoned the status/use distinction from its recent decisions,¹⁶¹ and held that Maine must fund religious schools that taught religion and even those that proselytize if it funded other private schools, unless the Maine law could overcome strict scrutiny.¹⁶² 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 was not an adequate interest to justify the ban.¹⁶³

Therefore, from June 2022 on, to avoid violating the Free Exercise Clause, states must include religious schools (including those that proselytize and directly teach religion) in any public benefit program open to nonreligious private schools or even to private religious schools that do not mandate the teaching of religion.¹⁶⁴ This is regardless of the state’s interest in not promoting religion and regardless of a state constitution’s antiestablishment provision(s).¹⁶⁵ The only practical way to avoid funding religious schools would be to have no funding for private education at all,¹⁶⁶ which in Maine is not a practical option given the state’s geography. *Carson* is the pièce de résistance of the Court’s move to completely change the understanding of the antidiscrimination principle under the Free Exercise Clause from primarily protecting against intentional discrimination, which was mostly targeted at religious minorities, to primarily protecting the religious interests of those with large enough

159. *Id.* at 2007–08 (Breyer, J., dissenting).

160. *Id.* at 2007.

161. *Id.* at 2001–02 (majority opinion).

162. *Id.* at 1996–97; *see id.* at 2008 (Breyer, J., dissenting).

163. *Id.* at 1997–98 (majority opinion).

164. *See id.* at 1998.

165. *Id.* at 2010 (Breyer, J., dissenting).

166. *Id.* at 2000 (majority opinion).

populations to support their own religious schools.¹⁶⁷ This shift took only five years.¹⁶⁸

Carson, like *Espinoza* and *Kennedy*, minimizes the importance of state establishment concerns not only under the U.S. Constitution but under state constitutions as well.¹⁶⁹ This is part of a recent shift by the Court, discussed above, to read establishment concerns as being inadequate to trump free exercise concerns.¹⁷⁰ This process has been quick and nearly total. We have moved from being concerned about forms of government support

167. Compare *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (protecting Santeria church and practitioners from intentional discrimination by the dominant religious groups in city of Hialeah in case where discriminatory statements were made by government officials against Santeria and law was gerrymandered to prevent Santeria worship), with *Carson*, 142 S. Ct. 1987 (invalidating Maine tuition voucher program that was designed to provide nonsectarian education to students where no public schools exist due to harsh geography in Maine).

168. It began with *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017) and culminated with *Carson* in June 2022.

169. An argument that was 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. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE*, 297–98, 321–25 (Harv. Univ. 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 revised in 1972, were baby-Blaine amendments, although 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*, 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 passed in 1889, as part of Montana becoming a state, was a baby-Blaine amendment. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2271 (2020) (Alito, J., concurring). But that provision was revised in 1972 at a time when 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. at 2293 n.2 (Sotomayor, J., dissenting); G. Allen Tarr, *Espinoza and the Misuses of State Constitutions*, 72 RUTGERS L. REV. 1109, 1125–26 (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 MONT. L. REV. 41, 46–52 (2016).

170. See *supra* Section II.A.2.a. 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 generally Micah J. Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 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).

for religion in educational contexts such as vouchers,¹⁷¹ to allowing that support,¹⁷² to now mandating it whenever the government opens a program for similarly situated private entities.¹⁷³ At the same time, the Court has been active in determining what the comparison categories are for discrimination under the Free Exercise Clause and is next likely to redefine the line between what is public and what is private in the education context.¹⁷⁴

III. INTENTIONAL OBFUSCATION OR FAILURE TO REFLECT ON PRECONCEPTIONS

In his classic and highly influential book *The Nature of the Judicial Process*, Justice Benjamin Cardozo, while still a Justice on the New York Court of Appeals, explained a phenomenon that seems to have overwhelmed the *Kennedy* and *Carson* majorities:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’s phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.¹⁷⁵

This quote is both an explanation of judgmental human nature and a warning against judges imposing their preconceptions without acknowledgment of when the sides in a case are roughly even, or “nicely balanced,” to use Justice

171. *Lemon v. Kurtzman*, 403 U.S. 602, 624–25 (1971); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

172. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002).

173. *See Carson v. Makin*, 142 S. Ct. 1987, 1997–2000 (2022).

174. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–69 (2020) (defining categories of comparison for finding religious discrimination despite different finding by state health authorities); *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–32 (2018) (finding entire civil rights commission discriminated against baker based on the combination of discriminatory statements by one council member and a questionable characterization of broader council statements and even more questionable comparison to situation involving different bakers).

175. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12–13 (Yale Univ. Press 1921).

Cardozo's terminology.¹⁷⁶ This is to say nothing of when the "balance" of facts and precedent goes against the judicial decision as it did in *Kennedy*.

The current Court seems more blind to its preconceptions in religion cases than any Court in history. It is possible and tempting to assume intentionality, especially given the unprincipled decisions in *Kennedy* and *Carson*.¹⁷⁷ Importantly, intentionality—that is, the Court intentionally distorting facts and law—might be better than a failure to consider one's preconceptions because intention suggests the Justices have decided to proceed in a specific way regardless of facts and precedent and, thus, at some point might stop. If, however, as this Article asserts, the Justices in the *Kennedy* and *Carson* majorities failed to heed the warning of Justice Cardozo, and at least arguably some of the lessons from both sides in the formalist-realist debates of the Twentieth Century,¹⁷⁸ they are so blind to their preconceptions that they will be unable to stop misstating facts and law because they have drunk the metaphorical Kool-Aid of a specific view of these issues—both factually and legally—rather than considering each case on its own merits.

In light of recent arguments made about the Justices' religious preconceptions, it is essential to clearly state that while religious affiliation can have an impact on judging, it is not always determinative. Michael Heise and Gregory Sisk have expertly demonstrated this. They have shown that political leanings are a more powerful determining factor in religion cases than religious affiliation alone.¹⁷⁹ Thus, arguments that because five of the six

176. *See id.*

177. Editorial Board, *The Supreme Court Has a Crisis of Trust*, N.Y. TIMES, Oct. 2, 2022, at SR 11 ("Over the past several years, the court has been transformed into a judicial arm of the Republican Party."); *see* Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2304, 2323 (2023) (suggesting the Court will not grant religious exemptions to state anti-abortion laws because of the majority Justices' political predispositions and the malleability of their free exercise framework); *cf.* Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208, 235–38 (2022).

178. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187–90, 212–13, 215–17 (1986).

179. Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185, 200 (2012); Gregory C. Sisk &

Justices in the majority are Catholic it somehow explains these decisions are discriminatory. Justice Sotomayor, Justice Brennan, and Justice Frank Murphy (who sat on the *Everson* Court) are also Catholic and it was not generally argued that their strongly separationist views on many law and religion issues were a result of their religious affiliation.¹⁸⁰

The preconceptions that this Article suggest influence the current Justices are socially conservative views of the world and American legal and socioreligious history. Views that minimize the harms to religious minorities and nonbelievers caused by the Court's recent decisions while viewing socially conservative Christians as the victims of discrimination.¹⁸¹ Views that ignore the fact that the move toward separationism by the Court, as Justice O'Connor powerfully explained, has served to protect religion in a religiously pluralistic society.¹⁸² Views that look upon a history that never existed as truth,¹⁸³ while ignoring the horrific traditions and history of religious persecutions—especially against Catholics, Native American Religions, Jews, and members of the LDS Church—throughout U.S. history,¹⁸⁴ except when it is convenient to acknowledge this discrimination.¹⁸⁵

Numerous philosophical schools explain how preconceptions can shape human, and thus judicial, understandings. As this Author has suggested previously, philosophical hermeneutics provides an especially powerful descriptive frame for understanding the impact of preconceptions on interpretation.¹⁸⁶

Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1216, 1229 (2012); John M. Scheb II et al., *A Supreme Court Without Protestants: Does It Matter?*, 94 JUDICATURE 12, 39 (2010).

180. Scheb II et al., *supra* note 179, at 13–15, 39 (“[I]deology, far more than religious affiliation, determines voting behavior.”).

181. Driver, *supra* note 177, at 249–52, 255–56.

182. *McCreary Cnty v. ACLU of Ky.*, 545 U.S. 844, 882–83 (2005) (O'Connor, J., concurring).

183. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 169 (2001).

184. RELIGIOUS INTOLERANCE IN AMERICA: A DOCUMENTARY HISTORY 50–51, 73–74, 128–29, 147–48 (John Corrigan & Lynn S. Neal eds., Univ. N.C. Press 2d rev. ed. 2010); FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 4–18 (Ne. Univ. Press 1999).

185. See, e.g., *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020); *id.* at 2268–73 (Alito, J., concurring).

186. FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 84–85 (2007); Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1069 (2005).

Despite the fact that some scholars have used this philosophy to support normative conclusions,¹⁸⁷ it is a strictly descriptive theory.

Interpretation is a necessary fact of life. We are always interpreting,¹⁸⁸ whether we know it or not. Every interaction we have, every program we watch, and every text we read is impacted by our preconceptions. There is nothing mysterious or complex about much of this, and we usually do not realize we are interpreting when we engage with situations, people, or texts with whom we share a language and similar traditions.

Simply put, hermeneutics are an inescapable part of everyday life. The more complex the interpretive task, such as applying a text written in a different time and culture to a situation arising today, the more our preconceptions may impact the meaning of the text or situation we are interpreting.¹⁸⁹ Of course, there are many approaches to interpretation, and these often overlap on salient points. As this Author has written elsewhere, however, philosophical hermeneutics seem especially useful in the context of legal interpretation because of the potential time lag and cultural shifts between the drafting of laws and their application to a variety of fact scenarios.¹⁹⁰

Hans-Georg Gadamer, who framed many of the key aspects of philosophical hermeneutics,¹⁹¹ explained that there is no absolute method of interpretation.¹⁹² Each interpreter brings his or her own preconceptions into the act of interpreting a text (text can refer to more than just a written text).¹⁹³ These preconceptions are influenced by the tradition, including social context, in which the

187. RAVITCH, *supra* note 186, at 9, 54–55; *see also* Stephen M. Feldman, *How to Be Critical*, 76 CHI.-KENT L. REV. 893, 901, 906–08 (2000) (showing that unlike many scholars working with critical theory and philosophical hermeneutics, Feldman has a deep understanding of Gadamerian Hermeneutics, understands that Gadamer was not proposing a normative theory, and argues that Gadamerian and Derridian theory are not inherently antithetical, although they are certainly in some tension with each other).

188. HANS-GEORG GADAMER, *TRUTH AND METHOD* 388–89 (Joel Weinsheimer & Donald G. Marshall trans., Continuum 2d rev. ed. 1999) (1986).

189. RAVITCH, *supra* note 186, at 84–85.

190. *Id.* at 54–55.

191. Gadamer was a student of Heidegger, but Gadamer's discussion of philosophical hermeneutics is more considered. JEAN GRONDIN, *INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS* 113, 122, 124–25 (Joel Weinsheimer trans., Yale Univ. Press 1994) (1991).

192. *See* GADAMER, *supra* note 188, at 476; *see also* Hans-Georg Gadamer, *Hermeneutics as a Theoretical and Practical Task*, in *REASON IN THE AGE OF SCIENCE* 111–12, 114 (Thomas McCarthy ed., Frederick G. Lawrence trans., 10th prtg. 1998) (1978).

193. *See* GADAMER, *supra* note 188, at 266–67, 269.

interpreter exists.¹⁹⁴ The interpreter's tradition(s) provides them with a horizon that includes their interpretive predispositions.¹⁹⁵ This horizon is the range of what the interpreter can see when engaging with a text.¹⁹⁶ The concept of *dasein*, or being in the world, captures this dynamic.¹⁹⁷ We exist in the world around us and that world influences how we view things.¹⁹⁸ Thus, our traditions and context are a part of our being.¹⁹⁹

Still, the text has its own horizon of meaning.²⁰⁰ That horizon is influenced by the context (or tradition) in which it was written, those influencing or interpreting it over the passage of time, and the interpreter's understanding of the text.²⁰¹ In the legal context, precedent has generally been understood to be a significant part of the horizon of legal text.²⁰² Even the Supreme Court has historically shown strong fealty to its own precedent, at least until recently.²⁰³

Philosophical hermeneutics suggest that to understand a text, a give and take must occur between text and interpreter, a dialogue between one's being and the object that one seeks to understand.²⁰⁴ This conversation transforms both the text and interpreter as they engage in the give and take.²⁰⁵ It should not, however, allow the horizon of the interpreter to completely overwhelm the horizon of the text.²⁰⁶

194. See *id.* at 267–68; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 621–22 (1990).

195. See GADAMER, *supra* note 188, at 306.

196. See *id.* at 302–03.

197. *Id.* at 259–60.

198. See Eskridge, *supra* note 194, at 621.

199. See *id.* at 621–23.

200. See GADAMER, *supra* note 188, at 303.

201. See Eskridge, *supra* note 194, at 620–21, 623–27; Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Works of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 537–38 (1988). This may actually be an under-inclusive list. See Gadamer, *supra* note 192, at 98.

202. See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015); see also *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (“[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

203. See *Kimble*, 576 U.S. at 455–56; *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240–42 (2022).

204. The dialogue is central to Gadamer’s theory of interpretation. GADAMER, *supra* note 188; see also Eskridge, *supra* note 194, at 623–24.

205. See Eskridge, *supra* note 194, at 623–24.

206. See GADAMER, *supra* note 188, at 266–67, 305.

The interpreter necessarily projects their preconceptions into the interpretive process but should also reflect upon these preconceptions and the horizon of the text,²⁰⁷ something this Article asserts the *Kennedy* and *Carson* Courts failed to do. The horizon of the text has a binding quality in that if the interpreter openly enters into dialogue with the text, the horizon of the text will limit the range of preconceptions that the interpreter can project consistently with the horizon of the text.²⁰⁸ Because the text and interpreter are engaged in a dialogue to reach a common truth, neither text nor interpreter are the sole source of meaning.²⁰⁹

Gadamer did not believe that the lack of a clear interpretive method prevents one from reaching understanding.²¹⁰ Philosophical hermeneutics is not a form of nihilism as some critics have suggested.²¹¹ Through a dialogue between text and interpreter, one can reach a better understanding of the horizon of the text than one who does not engage in such dialogue and simply assigns a reflexive meaning to the text, as the majority of Justices did in *Kennedy* and *Carson*.

If we are embedded creatures, embedded in our traditions and context, as the concept of *dasein* suggests, there is no Archimedean point from which we can say that a given methodology is objective—such as history and tradition—at least in contested interpretive contexts.²¹² This does not mean nihilism must reign. After all, as Gadamer points out, the dialogue between text and interpreter can lead to meaning, and because the interpreter must throw out preconceptions that are inconsistent with the horizon of the text to fuse horizons and interpret, it seems obvious that the interpretive possibilities are limited to the range of what fits within both the horizon of the interpreter and the horizon of the text.²¹³ In this regard, legal interpreters generally use a variety of

207. See *id.* at 266–68.

208. See *id.* at 268–69; Eskridge, *supra* note 194, at 627.

209. See Eskridge, *supra* note 194, at 614, 623–24.

210. See generally GADAMER, *supra* note 188.

211. Ravitch, *supra* note 186, at 156–57.

212. Cf. GADAMER, *supra* note 188, at 265–71, 306–07, 373–75.

213. See generally *id.*

interpretive modes from within the legal tradition when interpreting law.²¹⁴

Judges are, of course, products of their context. Thus, they exist in the world as entities whose preconceptions influence the horizon of what they can see. This is true of all judges and not just those criticized in this Article. Yet, as Justice Cardozo warned, judges need to be aware of their biases, and when the facts and law are balanced in a case, judges should openly acknowledge the limits of the law in answering the question before the court.²¹⁵ As explained in Part II of this Article, in *Kennedy* and *Carson*, the facts and the law mostly worked against the Court's decisions.²¹⁶ The Court, however, overwhelmed the facts and law with the Justices' own preconceptions.

To acknowledge the role that various contexts, including judges' contexts, play in law and legal interpretation is simply to acknowledge the obvious.²¹⁷ It is not dangerous, nor will it undermine the legal system, because the texts legal actors must confront have their own horizons and most often a shared tradition, which constrains the legal interpreter and prevents the spiral towards nihilism. For example, in cases involving a breach of contract—or as discussed here, a case involving law and religion issues—a long history of legal interpretation exists to help the judge frame the legal principles that guide the decision. This does not mean that the precedent will necessarily answer the specific questions in a case, but it does usually constrain the modes of legal analysis because of the importance of concepts such as *stare decisis*.

Gadamer also teaches the importance of reflection in the interpretive process, which as Justice Cardozo eloquently explained, may be a good judge's greatest asset.²¹⁸ Reflection may offer a way to expand one's horizon; at least where one's cultural embeddedness does not preclude this. At the very least, reflection allows a judge to consider both sides in a case without assuming one side is automatically correct just because their arguments gel better with the judge's preconceptions.

214. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (Oxford Univ. Press 1984); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (Blackwell 1991); RAVITCH, *MASTERS OF ILLUSION*, *supra* note 197 at 6–8.

215. CARDOZO, *supra* note 175.

216. See *supra* Part II.

217. Cf. RAVITCH, *supra* note 186, at 9–10.

218. See GADAMER, *supra* note 188, at 266; BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 25–28 (1924).

In the field of law and religion, judges' and Justices' preconceptions appear to play a major role in legal outcomes.²¹⁹ Importantly, these preconceptions seem to be impacted by more than simply a judge's or Justice's religious background, although religious background does seem important at least in some cases.²²⁰ Judges' political leanings, views on legal interpretation, views regarding the proper role of government in our constitutional system, as well as the judges' authoritarian tendencies (or lack thereof) all seem to play a role.²²¹ These preconceptions are likely to take on an even greater role now that the Court has adopted a history and tradition approach because of the many problems involved in interpreting often conflicting and multifaceted past practices in light of our current context and traditions.

In *Reason in the Age of Science*, Gadamer suggests that hermeneutics cannot be artificially separated from practice.²²² He argues for an inherent praxis between "theoretic awareness about the experience of understanding and the practice of understanding."²²³ This is not an argument for a teleological approach or for any sort of normative approach, but rather an argument for a better understanding of understanding. In law, and especially law and religion, this call can be heeded by people of all theoretical and socioreligious stripes and by those who accept philosophical hermeneutics as valid theory and those who do not.

For judges, there are numerous legal precedents, legal texts, and factual scenarios to consider. But when judges or Justices

219. Some of the most interesting research on the factors that affect judicial decisions in religion cases has been conducted by Michael Heise and Gregory Sisk. Their work does not address hermeneutics or preconceptions, but it provides a detailed empirical study of decisions on religion issued by lower court judges (Federal District Court and Court of Appeals). The studies show that a variety of factors, including judges' backgrounds and political affiliations, correlate with decisions favoring more or less strict interpretations of the religion clauses. *See, e.g.*, Heise & Sisk, *supra* note 179, at 190, 200–01, 206, 208–09; Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1028–30 (2005); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 514–16 (2004).

220. *See* Heise & Sisk, *supra* note 179, at 206, 208–09; Sisk, *supra* note 219, at 1028–29.

221. *See* CARDOZO, *supra* note 175, at 12–13.

222. Gadamer, *supra* note 192, at 113–14.

223. Hans-Georg Gadamer, *Hermeneutics as Practical Philosophy*, in *REASON IN THE AGE OF SCIENCE* 88, 112 (Thomas McCarthy ed., Frederick G. Lawrence trans., 10th prt. 1998) (1978).

predetermine an outcome with seemingly no reflection or consideration of the other side, they can go beyond the normal spinning of facts and law to justify imposing their own preconceptions in a manner that disregards facts and law that do not fit those preconceptions. The judges' or Justices' preconceptions become the deciding factor rather than legal sources or the facts in the record. In other words, the horizon of the interpreter overwhelms the horizon of the text due to a lack of reflection.

The current Court seems to have chosen this path of radical legal nihilism—mischaracterizing facts and twisting the law to an extent that has rarely been seen and goes far beyond the normal spinning often seen in judicial decisions. The current Court has utterly failed to heed the warnings Justice Cardozo made more than one hundred years ago,²²⁴ repeatedly reflected by both sides in the realist-formalist debates of the last century,²²⁵ and reflected so clearly in the hermeneutic circle of projection of preconceptions and reflection.²²⁶

The latter demonstrates that even though humans, including judges, are heavily influenced by preconceptions, we can reflect as we approach the interpretive tasks before us so that we can at least consider possibilities beyond those immediately projected by our preconceptions. Judges have numerous tools to do so, such as precedent, legal texts, and the facts in a case. Yet, if a judge or Justice does not take a careful, serious look at these tools because their preconceptions are so overwhelming, they will miss what may seem obvious to others and may be justifiably accused of intentionality, even when their real weakness is a failure to engage with their own mind and an inability to see things from any perspective other than their own. As suggested above, this is far scarier than intentionality because it suggests the judge or Justice might be incapable of stopping.

All of this suggests what should be obvious already, namely, that the current Court's history and tradition approach will simply be a projection of the current Justices' preconceptions about history and tradition. However, as Part IV will demonstrate, the current Justices' views of history and tradition are quite stilted. The current Court seems to have a particular perception of history and tradition in mind, but as will be seen, the Court's apparent

224. See *supra* Part III.

225. See *supra* note 178 and accompanying text.

226. GADAMER, *supra* note 188, at 266–67.

understanding of history and tradition is both incomplete and subject to alternative understandings that are equally, or more, supported by evidence.

IV. HISTORY AND TRADITION

The *Kennedy* majority foisted its “history and tradition” approach upon the Establishment Clause.²²⁷ Yet, the *Kennedy* Court failed to analyze that approach under the facts of the case.²²⁸ This Part will explore the Court’s history and tradition test against the backdrop of the immensely conflicting history and traditions of the United States in law and religion contexts. Unfortunately, the history and tradition test is no clearer or more objective than the tests it replaces, and in fact, it is easier to manipulate what counts as relevant history and tradition based on preconceptions.

Importantly, the *Kennedy* Court does not address whether the test applies specific history and tradition that occurred in the legislative prayer cases,²²⁹ or general history and tradition. As will be seen, neither approach would support the outcome if applied to the *Kennedy* case. Perhaps that is why the Court did not apply its newly minted approach in the case.

History and traditions regarding religion in the United States are so hopelessly unclear that they have been used to support both strongly separationist views and, more recently, the current Court’s anti-separationist views.²³⁰ At best, the history and

227. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

228. *See generally id.* (the Court never applied its history and tradition approach to the facts in the case or to the school district’s Establishment Clause concerns).

229. Contrary to the *Kennedy* Court’s assertion that the history and tradition approach is “the” general approach for Establishment Clause cases, the legislative prayer cases are clear that it is the history and tradition of a specific practice that is relevant. *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (“*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”).

230. *Compare Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947), *Engel v. Vitale*, 370 U.S. 421, 425 (1962), and *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875–76, 878 (2005), with *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2258–59 (2020), *Town of Greece*, 572

tradition approach is simply a justification for whatever a Court majority chooses to do. In evaluating history and tradition, the Court has provided remarkably conflicting views.²³¹ The *Kennedy* Court's imposition of the history and tradition test will leave school boards, other government entities, and lower courts in the impossible situation of acting as legal and socioreligious historians—a task at which the Court itself has utterly failed.

A major issue is that various Justices and interpretive schools have seized on varying narratives about history and tradition in the United States. Justices and scholars disagree with each other about the original understandings of the religion clauses and the religious history and traditions in the United States.²³² Even leading legal historians have significant disagreements about the meaning of U.S. religious history and traditions.²³³ And, of course, many scholars disagree about what the connected concepts of original intent and original understanding should mean.²³⁴ Should courts consider soft originalism, essentially the broad intent/understandings of the framers, as suggested by Cass Sunstein and others, or narrower intent or understandings?²³⁵ There is also significant disagreement about whether original understandings should even be considered in constitutional interpretation,²³⁶ which is a topic beyond the scope of this Article.

U.S. at 584–85, and *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) (accusing the majority of abandoning longstanding commitment to separation of church and state). Additionally, as Caroline Mala Corbin has explained, over the years the Court has used concepts like originalism and historical understandings in an opportunistic manner, applying these concepts when they suit the majority and ignoring them when they don't. Corbin, *supra* note 9, at 620.

231. See *supra* note 230.

232. See *Everson*, 330 U.S. at 15–16; *Engel*, 370 U.S. at 425; *McCreary*, 545 U.S. at 875–76; *Espinoza*, 140 S. Ct. at 2258–59; *Town of Greece*, 572 U.S. at 577–78; see also Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1718–19 (2006); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 BYU L. REV. 1617, 1618–19 (2004); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693–95 (1997); and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414–15 (1990).

233. Compare STEVEN K. GREEN, *SEPARATING CHURCH AND STATE: A HISTORY* (Cornell Univ. Press 2022), and LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (Univ. of N.C. Press rev. 2d ed. 1994), with HAMBURGER, *supra* note 169.

234. See Corbin, *supra* note 9, at 226–27; see also articles cited *infra* note 243; Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1673–74 (2018).

235. Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POLY 311, 312–13 (1995).

236. See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1026 (1998); Powell, *supra* note 129, at 948; see also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Harv. Univ. Press 1991).

However, it is worth mentioning H. Jefferson Powell's assertion that if one wants to follow original intent or understandings, one should not apply original intent or understandings because the framers did not want the Constitution to be interpreted based on their understandings.²³⁷

The Court and many scholars seem to favor one side or another in this debate over history and tradition.²³⁸ Yet, what if both sides, and the many positions in between, have significant support for their preferred history and traditions? This suggests that history and tradition is not determinative and, in fact, is only a justification for imposing the majority Justices' biases and preconceptions.²³⁹ This becomes even more dangerous when history and tradition is relied upon as "the" approach to interpreting the Establishment Clause.

Whatever one thinks of the use of history in the *Everson v. Bd. of Education* and *Engel v. Vitale* cases, the Court never claimed that history is the only thing that should be considered when evaluating the Establishment Clause or any other constitutional provision.²⁴⁰ In fact, in *Abington Township v. Schempp*, Justice Clarke, writing for the majority, explains that these decisions protect religious pluralism and help navigate the role of government *vis a vis* religion in an increasingly religiously diverse society.²⁴¹ In *Abington*, the Court also gleaned a two-prong test from the broader historical concepts addressed in *Everson* and *Engel*.²⁴² That test eventually became the first two prongs of the *Lemon* test, which has naturally led to speculation about whether the school prayer cases are still good law after *Kennedy*.²⁴³

237. Powell, *supra* note 129, at 948.

238. See *supra* notes 228–233.

239. Ravitch, MASTERS OF ILLUSION, *supra* note 186, at 1–6, 8–11; see generally Corbin, *supra* note 230, at 618–20.

240. See *Everson v. Bd. Of Ed. Of Ewing Twp.*, 330 U.S. 1, 3–18 (1947); *Engel v. Vitale*, 370 U.S. 421, 422–36 (1962).

241. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214, 222 (1963).

242. *Id.* at 220–22.

243. In an exceptionally thoughtful and likely prescient piece written shortly after the *Kennedy* decision, Ira C. Lupu and Robert W. Tuttle grapple with the *Kennedy* Court's inexplicable failure to address the school prayer cases and predict that those cases may be overturned or distinguished nearly out of existence. See Ira C. Lupu and Robert W. Tuttle, *Kennedy v. Bremerton School District – A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y BLOG (June 28, 2022), <https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment>

Does overturning *Lemon* mean overturning the cases from which the *Lemon* test arose? One hint might arise from the *Kennedy* Court's focus on *Walz v. Tax Commission*, which gave rise to the entanglement prong of the *Lemon* test.²⁴⁴ The Court cites the case for its mention of history that the Court apparently agrees with, but completely ignores the significant parts of the case that focus on entanglement and the distinction between subsidies and exemptions.²⁴⁵ Perhaps the Court will ignore the test in *Abington* and focus on references to history? But, if so, that history points in a very different direction than the history the *Kennedy* Court apparently prefers.

The moment the Court picks a side in the history and tradition debates, it essentially determines the outcome under the history and tradition approach. Court majorities can justify opposing results and interpretations using their preferred understandings of history and traditions. As this Author has written about originalism in the religion clause context, it becomes a "battle of the framers."²⁴⁶ Because history does not provide one clear answer to most questions under the religion clauses and can support multiple positions, the history and tradition test simply serves to make the rule of five the most important rule in constitutional interpretation. Whichever understanding can get five votes or more on the Supreme Court wins.

Adding tradition to original understandings only makes this problem worse because it adds more opportunity for judges and Justices to cherry pick traditions that meet their preconceptions.²⁴⁷ The current Court seems to view certain traditions positively while ignoring the accompanying discriminatory traditions discussed below.²⁴⁸ Moreover, in *Kennedy*, the Court never addresses the history and tradition relevant to that case or whether the relevant history and tradition is that which focuses on the issues involved in

shment/ [https://perma.cc/2GUC-GKV8] ("We predict, with sorrow, that the *School Prayer Cases* will collapse into no more than an offshoot of *West Virginia Board of Education v. Barnette*, which prohibits making compulsory the recitation of The Pledge of Allegiance.").

244. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 670 (1970).

245. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

246. RAVITCH, *MASTERS OF ILLUSION*, *supra* note 186, at 2–6.

247. *See supra* Part III; *see also supra* note 214 and accompanying text.

248. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

the case or broader traditions.²⁴⁹ In prior cases, both approaches were used, albeit in very limited contexts.²⁵⁰

Considering narrow traditions in a context could be helpful but, as will be seen, would work against coach Kennedy. Looking at broader traditions which the Court sometimes seems to prefer raises the entire host of issues addressed throughout this Article. These broader traditions are rarely clear and were often associated with even broader discriminatory patterns.

Applying a more focused look at history and tradition to the facts in *Kennedy*, one might cynically wonder whether Thomas Jefferson or Henry Clay had a linebackers coach, and whether that coach prayed at the nonexistent public high school football games at the almost nonexistent public schools of their times, or whether Ulysses S. Grant or Teddy Roosevelt experienced the same. Of course, we know that neither football nor public schools existed in most of the country throughout much of U.S. history.²⁵¹ It is apparent, as explained below, that in many parts of the United States throughout history, there was no history or tradition at all of the sort of highly sectarian prayer and media attention engaged in by Kennedy.²⁵² Ironically, Kennedy's behavior may have been

249. See *Kennedy*, 142 S. Ct. 2407; Lupu and Tuttle, *supra* note 243.

250. Significantly, both *Town of Greece* and *American Humanist* clearly focus on the specific practices at issue in those cases: legislative prayer and longstanding war memorials, respectively. See *Town of Greece*, 572 U.S. 565; *American Humanist*, 139 S. Ct. 2067.

251. WAYNE J. URBAN ET AL., *AMERICAN EDUCATION: A HISTORY*, 50–168 (Routledge 6th ed. 2019).

252. *Id.*; *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (explaining that history and tradition in the United States from the time of the framers have included nonsectarian prayer: "I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." (citation omitted)). In this context, what counted as sectarian has changed through history and throughout the 19th century; much of the organized pan-Protestant prayer created conflicts with Catholics and others and was sometimes stopped or held unconstitutional by state supreme courts under state constitutions. *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 235–36 (1872); *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 44 N.W. 967 (Wis. 1890); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 61–62 (Farrar et al. eds., 2005); JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS* 4–6, 12–51 (Yale Univ. Press 2004).

viewed as sacrilegious by some framers and by many people throughout U.S. history.²⁵³

Focusing on the times in which public schools and public-school football teams have thrived in the United States, the history and tradition recognized by the courts pointed in a much more separationist direction.²⁵⁴ In school districts that violated the law that grew out of this more separationist history, discrimination against religious minorities and dissenters was widespread.²⁵⁵ This often remains true today.²⁵⁶ It was also true in the era before the modern public schools when anti-Catholicism thrived.²⁵⁷

In fact, sadly, one of the most widespread “traditions” in the history of the United States was discrimination against Catholics, and this was nowhere clearer than in the early common schools that preceded the modern public schools.²⁵⁸ Moreover, as demonstrated by the practices challenged in *Abington Township v. Schempp*,²⁵⁹ discriminatory practices in the public schools were common throughout much of U.S. history.²⁶⁰ The policies in that case of reading the Bible without commentary were directly aimed

253. Many early Americans, and certainly several early American political and social movements, focused heavily on religion being within the private sphere for individuals, families, and churches, not within the public sphere. See, e.g., MARK DOUGLAS MCGARVIE, *LAW AND RELIGION IN AMERICAN HISTORY: PUBLIC VALUES AND PRIVATE CONSCIENCE* (Cambridge Univ. Press 2016) (documenting this phenomenon). Moreover, many American Christians from the framing were quite familiar with the teachings of Matthew 6:6 and Mark 12:17. Mark 12:17, famous even among non-Christians, says “Give back to Caesar what is Caesar’s and to G-d what is G-d’s.” Matthew 6:6, which also has had a major impact on Christians, but is less famous, says “But when you pray, go into your room, close the door and pray to your Father, who is unseen. Then your Father, who sees what is done in secret, will reward you.” Zondervan NIV Study Bible (Kenneth. L. Barker et al. eds., Full rev. ed. 2020). Obviously, the sort of prayer and media attention Kennedy attracted to that prayer would be viewed as a violation of these verses by many who adhere to them.

254. See, e.g., *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

255. Ravitch, *supra* note 184, at 3–4.

256. Driver, *supra* note 177, at 255–60; Benjamin P. Edwards, *When Fear Rules in Law’s Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL’Y & L. 437, 456 (2013).

257. See Ravitch, *supra* note 186, at 75; Driver, *supra* note 177 at 261; see also Corrigan & Neal, *supra* note 184.

258. See Corrigan & Neal, *supra* note 184, at 50–55; Hamburger, *supra* note 169, at 191–92; Ravitch, *supra* note 184, at 4–6; see also LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL* 72–85 (Univ. of Missouri Press 1987); see *infra* note 274 and accompanying text.

259. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 267 (1963).

260. See *infra* notes 267–71 and accompanying text.

at Catholics;²⁶¹ however, the prayer and Bible-reading practices also led to discrimination against Jews, Unitarians, atheists, and others.²⁶²

Catholics were prohibited from reading Bibles without commentary, and the idea of reading Bible passages without context and commentary was originally targeted at Catholics, even though many Catholics came to accept Bible reading in the schools after the “red scare” in the 1950s.²⁶³ This was part of a much stronger anti-Catholic history that sadly is much clearer than the cherry-picked history preferred by the current Court,²⁶⁴ or even the separationist history preferred by earlier Courts.²⁶⁵ Anti-Catholicism is just one of the many historical and traditional discriminatory practices in the United States, from the persecution of members of the Church of Jesus Christ of Latter-Day Saints,²⁶⁶ persecution of Jews,²⁶⁷ the more recent persecution of Muslims,²⁶⁸ persecution of various Protestant Christian denominations,²⁶⁹ persecution of atheists, and of course, the overwhelming persecution and intentional destruction of Native-American religious practices.²⁷⁰

261. This practice started very early on and was targeted at the fact that Catholics were forbidden from reading the King James Bible, which was openly anti-Catholic, or any Bible without commentary. Ravitch, *supra* note 184, at 5; Mary Ann Meyers, *The Children's Crusade: Philadelphia Catholics and the Public Schools, 1840–1844*, 75 RECORDS A. CATH. HIST. SOC'Y OF PHILA 103, 117 (1964).

262. See *supra* note 255 and accompanying text; Ravitch, *supra* note 184.

263. See Ravitch, *supra* note 184, at 5 (addressing the discriminatory targeting of Catholics in the common schools and then public schools); Kathleen Holscher, “A Decision That Spits in the Face of Our History”: Catholics and the Midcentury Fight over Public Prayer and Bible Reading, 102 CATH. HIST. REV. 340 (2016) (addressing the shift among some Catholic leaders from opposition to Bible reading in public schools due to its discriminatory origins to support for it in the 1950s).

264. See *infra* note 274 and accompanying text.

265. See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962).

266. See Corrigan & Neal, *supra* note 184, at 73–82; Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416–17 (1986).

267. See Corrigan & Neal, *supra* note 184, at 147; DAVID A. GERBER, *ANTI-SEMITISM IN AMERICAN HISTORY* (Univ. of Ill. Press 1996).

268. See Corrigan & Neal, *supra* note 184, at 247–48; Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RSCH. CTR. (Nov. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/> [https://perma.cc/EJE5-H5XT].

269. See Corrigan & Neal, *supra* note 184, at 100.

270. *Id.* at 105, 127; see Michael D. McNally, *DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT* (Princeton Univ. Press 2020).

If we are going to use “history and tradition,” what should we do about these clear historical and traditional practices? It is not enough to say that the laws were not neutral in these situations, both because the laws were sometimes framed neutrally, and given these historical and traditional practices, the concept of neutrality itself can be called into question as a historical matter.²⁷¹

Moreover, as discussed in Part V, Kennedy’s practices could easily be discriminatory to nonconforming players on his team or the other team.²⁷² As Caroline Mala Corbin has explained, the well-documented rise in Christian nationalism has facilitated practices that discriminate against religious outgroups and the nonreligious, and these practices are only likely to increase.²⁷³ The history and tradition test can be used by willing officials and judges to support these practices.

Importantly, to the extent that the Court’s free exercise antidiscrimination doctrine is based on history and tradition, the irony is obvious. History and tradition in the United States could be used to support religious discrimination more than to prohibit it. What is to keep a future Court from using this history and tradition to find that all protections for religions that discriminate on a variety of statuses are inconsistent with history and tradition, and therefore these religions should not be entitled to free exercise protection?

The Roman Catholic Church and churches that have today evolved into Evangelical churches were historically discriminated against,²⁷⁴ and they are often more likely to have views on LGBTQ rights and the role of women that diverge from more progressive views that are on the rise, especially among younger people.²⁷⁵ What is to keep a future Court from using the history and tradition of discrimination against Catholics and the predecessors of today’s

271. After all, these discriminatory practices were clearly not neutral, but they are clearly part of the religious history and traditions of the United States. Moreover, neutrality itself is an elusive concept. RAVITCH, *supra* note 186, at 13–14.

272. See *infra* notes 282–94 and accompanying text.

273. Caroline Mala Corbin, *The Supreme Court’s Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 852, 859 (2020).

274. Corrigan & Neal *supra* note 184, at 49–50, 100. Interestingly, and perhaps as a result of this persecution, the Southern Baptist Church was separationist throughout much of U.S. history. See generally Charles McDaniel, *The Decline of the Separation Principle in the Baptist Tradition of Religious Liberty*, 50 J. CHURCH & STATE 413 (2008).

275. Kim Parker et al., *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RSCH. CTR. REP. (Jan. 17, 2019), <https://www.pewresearch.org/social-trends/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/> [https://perma.cc/EJE5-H5XT].

evangelicals against the very social conservatives that benefit from history and tradition under the current Court? Simply arguing that this won't ever happen is circular because fifteen years ago, it is unlikely that many people would have predicted what the Court did in 2022 regarding the religion clauses, abortion, gun control, and federalism. The point is that once you make history and tradition "the" approach, you unleash the vagaries of that history and tradition and allow future Courts to reconceptualize that history and tradition just as the current Court has done.

It will be local and state officials, judges, and Justices deciding what the relevant history and traditions are and there are many to choose from. As the current Supreme Court has shown, and as those who have benefitted from it would argue about past Courts, the Justices are rarely good historians, and experts can be called by both sides to show conflicting history and traditions.²⁷⁶ Now that task will befall local officials and lower court judges on a regular basis. How can local officials and their lawyers predict what a given court will do other than by the judges' or Justices' preconceptions? Not exactly a stable jurisprudence.

Consider also that precedent using history and tradition is widely varied. From 1947 to at least 2000, a more separationist history and tradition was often cited, but the Court never held history and tradition was "the" test for Establishment Clause cases.²⁷⁷ From 2000 until 2021, the Court took a strongly contextual approach, applying the endorsement, *Lemon* and indirect coercion approaches in some contexts and something akin to the history and tradition approach in legislative prayer and limited symbolism contexts.²⁷⁸

Yet, the *Kennedy* Court never mentions, let alone addresses, the cases like *Everson* and *Engel* that looked to history and tradition and came to quite a different conclusion from the current

276. See *supra* notes 234–37 and accompanying text.

277. See, e.g., *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962).

278. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying the endorsement, *Lemon*, and indirect coercion tests to prayer at public school football games); *McCreary County v. ACLU*, 545 U.S. 844 (2005) (applying the *Lemon* and endorsement tests to Ten Commandment displays erected by two counties); *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (applying the history and tradition approach specifically to the practice of legislative prayer); *Am. Legion v. Am. Humanist Ass'n.*, 139 S. Ct. 2067 (2019) (applying the same for World War I memorials).

Court.²⁷⁹ This is part of the *Kennedy* majority's intellectual shell game that lower courts will have to grapple with. Luckily for lower courts, the current Justices in the majority wear their preconceptions on their sleeves, but what happens when the Court changes?

In the end, history and tradition is no more decisive in the Establishment Clause context than the tests the *Kennedy* Court overturns. In fact, history and tradition simply serves as a cover or justification for whatever a given Court majority's preconceptions are about the role of religion *vis a vis* government.²⁸⁰ The Court's history and tradition approach is void of any principle. It is, of course, possible that in some contexts, such as legislative prayer, there can be a clear enough history and tradition on a specific question that it could aid in deciding a case, assuming, of course, history and tradition should be relevant at all to these sorts of cases. To the extent that specific history and tradition is relevant to the *Kennedy* case, that history and tradition points against the outcome in the case.²⁸¹

V. THE NEGATIVE IMPACT OF *KENNEDY* AND *CARSON* ON RELIGIOUS MINORITIES AND NONBELIEVERS

The decisions in *Kennedy* and *Carson* are likely to have a negative impact on religious minorities and nonbelievers, albeit for different reasons. The potential negative impact of *Kennedy* on religious minorities and nonbelievers is a bit more obvious and will be addressed first. After all, parents complained to the Bremerton School District that their children felt compelled to participate in Kennedy's prayers because they were afraid of potential retaliation or worse treatment if they did not.²⁸² Whether *Kennedy* would have decreased playing time or given them worse treatment doesn't change the reasonableness of these concerns given the many situations where students have faced discrimination for not partaking in religion in public school settings.²⁸³

The prayers *Kennedy* engaged in and his behavior with the media would have certainly made players from different faith backgrounds or of no faith at all concerned about what he thought

279. Compare *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), with *Everson*, 330 U.S. at 17, and *Engel*, 370 U.S. at 436.

280. See *supra* Part III; *supra* notes 234–37 and accompanying text.

281. See *supra* notes 252–64 and accompanying text.

282. *Kennedy*, 142 S. Ct. at 2430; *id.* at 2443 (Sotomayor, J., dissenting).

283. See, e.g., Ravitch, *supra* note 184; Driver, *supra* note 177, at 256–58. See generally Edwards, *supra* note 256.

of them, especially if they did not participate.²⁸⁴ When your college scholarship might depend on your playing time or a recommendation from a coach, the stakes are not minor. Moreover, while the most vocal advocates of promoting religion—especially a particular brand of religion—in public life are protected by the Court in *Kennedy* those who may suffer from Coach Kennedy’s practices are completely ignored.

The Court seems to accept as fact the notion that socially conservative Christians are being persecuted²⁸⁵ while ignoring what the insertion of sectarian religion into a nonconforming student or student-athlete’s life might do to that student or student-athlete.²⁸⁶ The Court even invokes non-Christian religious minorities to support its point. It argues that if *Kennedy* is not allowed to engage in his prayers a “Muslim teacher [could be fired] for wearing a headscarf in the classroom.”²⁸⁷ Of course, these are very different situations and there are numerous reasons why the analysis of these issues under pre-*Kennedy* law would have led to protecting the teacher but not Coach Kennedy.²⁸⁸ Nor is the Court’s invocation of a Christian aide quietly praying before eating lunch an apt comparison.²⁸⁹ If Coach Kennedy had just quietly prayed by himself at the fifty-yard line after a game, there is little question that under pre-*Kennedy* law he would be able to

284. *Kennedy*, 142 S. Ct. at 2437, 2444 (Sotomayor, J., dissenting).

285. Driver, *supra* note 184, at 249–52, 254–55.

286. See *supra* note 284 and accompanying text.

287. *Kennedy*, 142 S. Ct. at 2425.

288. These reasons would range from protections under state constitutions or state RFRA’s in some jurisdictions to accommodations under federal and state employment discrimination laws. The fact that the teacher is wearing something rather than inducing and/or coercing students to wear something makes the situation quite different from Kennedy’s behavior. Moreover, lower courts have held that teachers can wear crosses, etc., without violating the Establishment Clause and a hijab would be part of that line of reasoning. See *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 543, 560–61 (W.D. Pa. 2003); *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1153, 1156–62 (E.D. Pa. 1991) (holding that a school impermissibly discriminated against a teacher when refusing to let her wear a hijab). *But see United States v. Bd. of Educ.*, 911 F.2d 882, 884, 890–91, 894 (3d Cir. 1990) (providing a Title VII case finding no duty to accommodate, or constitutional violation, when school district refused to keep teacher who wore long hijab and full-length loose garb due to Muslim faith). Today, the latter case would likely have come out differently if the school district had a possible exception to dress rules for any other reason. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878–79 (2021).

289. *Kennedy*, 142 S. Ct. at 2425.

pray,²⁹⁰ and the Bremerton School District directly recognized this possibility.²⁹¹

By contrast, an apt comparison to Kennedy's conduct would be a Muslim teacher loudly telling students in the hallway between classes why she is wearing a headscarf by quoting the Quran and then calling media attention to the situation when the school tells her she is welcome to wear the headscarf but should not be engaging students in the practice between classes every day. Or, a Christian aide standing up and praying with students before lunch and then calling the media's attention to the situation once the school says the aide is welcome to quietly say grace before meals or any other prayer but not to call attention to it.

In the latter situations, as in *Kennedy*, students would perceive a school employee—even if not on duty at that moment—as pushing a religious agenda on them. Students with differing religious perspectives might feel at risk if the teacher or aide found out. In fact, it might create a teacher/coach/aide-based heckler's veto of student beliefs that differ from the vocal school employees' beliefs because students might be afraid to be found out as being different or as not subscribing to the teacher, coach, or aide's beliefs. This is not hypothetical and has sadly been documented for many years.²⁹² However, the Court fails to recognize these concerns. Only Justices whose view of the world makes them blind to the realities of the experience of non-Christians (and some smaller Christian groups) could join an opinion that does not seriously address the issue but rather reads like a brief arguing for Kennedy when it even touches the issues of coercion or discrimination.²⁹³

Carson adds another layer to the potential discrimination against smaller religious minorities and dissenters. By minimizing Establishment Clause concerns while dramatically expanding the Free Exercise Clause without overturning *Employment Division v. Smith*, which would potentially help smaller religious minorities, the current Court creates the worst of both worlds for religious minorities and nonbelievers, while creating a nearly complete victory for many socially conservative

290. See *supra* notes 42–43, 106–07 and accompanying text.

291. *Kennedy*, 142 S. Ct. at 2436–37 (Sotomayor, J., dissenting).

292. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000); *Abington Twp. v. Schempp*, 374 U.S. 203, 208 n. 2 (1963); *Driver*, *supra* note 177, at 255–59, 255 n.324; *Ravitch*, *supra* note 184, at 7–18.

293. See *supra* Part III; see also *Kennedy*, 142 S. Ct. at 2430.

Christians.²⁹⁴ To understand this a bit better, we need to go back to the Court's 2002 decision in *Zelman v. Simmons-Harris*.²⁹⁵

In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause, even when 96.6% of voucher recipients under the program went to religious schools that were free to proselytize.²⁹⁶ After *Carson*, which, as explained below, turned the “may fund” from *Zelman* into “must fund,” and in light of *Zelman*, parents living in states or school districts that provide vouchers for private school attendance, but who do not want their children to be proselytized, may have few options.²⁹⁷ In many parts of the country, most private schools, especially those that can afford to take students under voucher programs, are religious and often highly subsidized by their parent churches.²⁹⁸ The amount included in voucher subsidies often preclude smaller religious schools and nonreligious schools from participating.²⁹⁹

In *Zelman*, the Court upheld the program despite the fact that more than 96% of voucher students attended religious schools of only one or two denominations, ironically, because that attendance was deemed to be based on “true private choice.”³⁰⁰ Meanwhile, parents who had religious objections to sending their kids to these religious schools could do little as funds were sucked out of their children's already failing schools leaving their children further behind.³⁰¹ Their only hope would be to “win a lottery [for spots] at a community school” or for one of the few decent magnet schools available (assuming their child qualified).³⁰² *Zelman* deviated from a long line of precedent to hold that school vouchers for

294. See *supra* Section II.B; Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 540–41 (2004); *Carson v. Makin*, 142 S. Ct. 1987, 1997, 2001 (2022).

295. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

296. *Id.* at 658; *id.* at 703–04 (Souter, J., dissenting).

297. *Id.* at 652–53 (majority opinion); *id.* 704–05 (Souter, J., dissenting); *Carson*, 142 S. Ct. at 2010 (Breyer, J., dissenting).

298. *Zelman*, 536 U.S. at 704, 705 n.15 (Souter, J., dissenting); RAVITCH, *supra* note 186, at 27–28; Ravitch, *supra* note 294, at 521 n.174.

299. See *Zelman*, 536 U.S. at 697, 705 & n.15. (Souter, J., dissenting).

300. See *id.* at 653, 658 (majority opinion); *id.* at 704 n.11, 705 n.15 (Souter, J., dissenting).

301. *Id.* at 644; *id.* at 684–85 (Stevens, J., dissenting); *id.* at 687 (Souter, J., dissenting).

302. *Id.* at 674 (O'Connor, J., concurring); see Ravitch, *supra* note 294, at 521 & n.15.

sectarian religious schools are constitutional,³⁰³ but the *Zelman* Court never hinted at, let alone held, that a state or school district must fund tuition vouchers anytime it provides private funding.³⁰⁴

After *Carson*, the inclusion of religious schools is now mandated if a state or school district provides any funding to private entities.³⁰⁵ This funding may have to include schools that proselytize or even have discriminatory admissions policies based on religious commitments.³⁰⁶ This is regardless of a state's interest in not funding programs that proselytize or discriminate,³⁰⁷ and regardless of the negative impact funding religious school vouchers in areas quite different from Maine may have on religious minorities and nonbelievers.³⁰⁸

The practical result of voucher programs in many areas is that religious minorities and dissenters must choose between sending their children to a school at which they may be proselytized or leaving them in public schools that will be further drained of funding and children because of the voucher program.³⁰⁹ In this way, voucher programs may give religious minorities a stark choice between protecting their children's material interests and protecting their children's religious interests.

As mentioned above, in most districts, religious schools that can afford to take voucher students represent only a few larger denominations or churches that can highly subsidize religious education. Moreover, in most places, the majority of private schools are religious and vouchers strip money from public education—every voucher going to a private school means a loss of per-student funding for public schools.³¹⁰

The *Zelman* Court attempted to whitewash the impact of vouchers by including public options to make it seem like vouchers didn't favor religious schools, but, as this Author has written, this was just an illusion.³¹¹ In the end, many parents in the Cleveland School District were stuck with the choice of sending their children to failing public schools that would be losing more funds and

303. *Zelman*, 536 U.S. at 686–87 (Souter, J., dissenting); see also Ravitch, *supra* note 294, at 494–95, 513–23.

304. See generally *Zelman*, 536 U.S. 639.

305. See generally *Carson v. Makin*, 142 S. Ct. 1987 (2022).

306. *Id.* at 2008 (Breyer, J., dissenting); *id.* at 2014 (Sotomayor, J., dissenting).

307. *Id.* at 2007–08 (Breyer, J., dissenting); *id.* at 2014 (Sotomayor, J., dissenting).

308. Ravitch, *supra* note 294, at 521.

309. *Id.*

310. *Id.*; *Carson*, 142 S. Ct. at 2010 (Breyer, J., dissenting); RAVITCH, MASTERS OF ILLUSION, *supra* note 186, at 28.

311. RAVITCH, MASTERS OF ILLUSION, *supra* note 186.

students or sending their children to religious schools of different faiths that were free to proselytize directly or by long-term exposure,³¹² in some cases risking the children's eternal souls from the parents' faith perspective, or risking the children's denial of their faith (or lack of faith).

Of course, states can simply not have voucher or tax credit programs for private schools—the *Carson* decision makes it clear that this is acceptable.³¹³ Some states already do this. For example, Michigan explicitly prevents taxpayer money from going to private schools regardless of whether those schools are religious or not.³¹⁴ But even these bans on taxpayer funding for private education are increasingly being challenged by school voucher enthusiasts and religious groups.³¹⁵

The key is that, whether one focuses on the privileging of sectarian prayer by a government employee in *Kennedy* or the privileging of religious schools large enough or with enough financial support from their denominations to take voucher students, the Court has moved the religion clauses further toward being a panacea for religions and religious people that most want to use government to promote their religion. However, this is at the expense of non-Christian religious minorities, many other Christian groups that do not share the view that government should be a vehicle for supporting and promoting religion, and nonbelievers. This has been a consistent pattern for the current Court since at least 2019, and there are few signs this trend will end anytime soon.³¹⁶ This is especially true given that the Justices in the current Court majority seem utterly unaware of, and unreflective about, their preconceptions on these issues.

312. *Id.*

313. *Carson*, 142 S. Ct. at 2000.

314. MICH. CONST. art. VIII, § 2.

315. Complaint at 6–7, 27, *Hile v. Michigan*, No. 1:21-cv-00829 (W.D. Mich. Sept. 23, 2021), *dismissed*, No. 1:21-cv-00829-RJJ-SJB (Sept. 30, 2022). The plaintiffs, who are represented by a group which supports vouchers, will likely appeal the decision.

316. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 2425 (2022); *Carson*, 142 S. Ct. 1987, 2013–14 (Sotomayor, J., dissenting); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2279–80 (Ginsburg, J., dissenting); Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 529–55; see *Zelman v. Simmons-Harris*, 536 U.S. 639, 705 (2002) (Souter, J., dissenting).

VI. CONCLUSION

The Court's June 2022 religion clause decisions—especially *Kennedy v. Bremerton School District*—are remarkably unprincipled. From the *Kennedy* Court's extreme mischaracterization of the facts to its failure to cite relevant precedent and mischaracterization of much of the precedent it does cite,³¹⁷ *Kennedy* fails to adequately support its rendering the Establishment Clause subservient to the Free Exercise and Free Speech clauses, its overturning of more than fifty years of precedent, and its imposition of a history and tradition test in Establishment Clause cases. *Carson v. Makin* also subsumes establishment concerns into free exercise concerns. In doing so, it abandons the status-use distinction the Roberts Court itself created in 2017 to justify the line of cases of which *Carson* is the latest example.³¹⁸

Some have asserted that the current Court is acting intentionally to impose its will on religion clause interpretation, but the reality may be even scarier. This Article asserts that the Justices have fallen into a trap of their own making. The majority in the recent religion clause cases have become so blind to their own preconceptions that they have ignored the many lessons warning against unreflective judicial hubris. As a result, they have imposed their preconceived views of history and tradition on the religion clauses—preconceived views that essentially render the Establishment Clause empty and impose a pollyannish understanding of history and tradition on the religion clauses. This is far scarier than intentionality because if the Justices are so blinded by their preconceptions that they fail to reflect on the weaknesses in their analysis, they are unlikely to stop imposing their will on the religion clauses.

Perhaps unsurprisingly, the most likely impact of these decisions, aside from favoring more dominant religious groups and their members, is a pattern of harm against non-Christian religious minorities, smaller or less politically engaged Christian groups, and nonbelievers. Both *Kennedy* and *Carson* pose a threat to these groups and their members. Sadly, that harm may ultimately be the biggest legacy of the June 2022 religion clause cases because future Courts can simply use a different view of history and tradition to abandon *Kennedy* and *Carson* just as the current Court majority did to earlier cases. The Court uses shadow

317. See *supra* Section II.A.

318. *Carson*, 142 S. Ct. at 2001.

justifications to impose its preconceptions on law and religion issues, but it has left local and state government officials and lower court judges to box with those shadows.