Public Prayer in Schools and Taxpayer Funded Religious Education: SCOTUS Loses Touch with the First Amendment

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The First Amendment of the U.S. Constitution guarantees that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1] The Supreme Court's latest interpretation of this amendment bolstered the importance of the Free Exercise Clause while almost entirely ignoring the Establishment Clause's essential limitations on the state. This year, the Court's majority legitimized public displays of prayer by school employees and likened a state's decision not to fund religious schools to discrimination based on the school's religious status.[2]

While disheartening, these changes do not come as a surprise. Jurisprudential acquiesce to Christian-based religiosity in our government and schools has developed into a new string of cases that seemingly attempt to further blur the already hazy lines between church and state. In a moment when the Supreme Court should uphold the separation between the two, the Court chooses to ignore decades of precedent by requiring a state to subsidize the teaching of religious principles with federal dollars and allowing school officials to encourage religious practice while acting in their official capacity.[3] School-age children will certainly feel the effects of the Court's sharp turn toward allowing the government to intertwine religiosity and education in fundamental ways.

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[1] U.S. CONST. amend. I.
[2] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022); Carson v. Makin, 142 S. Ct. 1987, 2013 (2022).
[3] *Id.*

This term's Supreme Court decisions did not single-handedly introduce the observance of Christian religiosity into the education of children; that connection has long been present. Today, each public-school student either says or hears the phrase "…one nation, under God…" at the beginning of each day, a phrase not added to the Pledge of Allegiance until 1954, the same year the motto of the nation became "In God We Trust." The Secretary of Education, the Cabinet member who advises the President on matters of educational programming, must swear an oath of office, as do all federal employees.[4] The oath sworn is also riddled with religiosity. "I… solemnly swear (or affirm) that I will uphold and defend the Constitution… so help me God." [5] Besides the obvious reference to a deity, the oath is commonly recited while the taker places their hand on a copy of the Bible. Considering the above context, the recent decisions in the cases *Carson v. Makin* and *Kennedy v. Bremerton School District* demonstrate a trend towards effectively ignoring the Establishment Clause in cases related to education. This by-passing of the Establishment Clause will likely open the door to further dissolution of the separation between church and state.[6]

Let's take a look at *Carson*. Maine requires that every school-age child "shall be provided an opportunity to receive the benefits of a free public education."[7] To achieve this goal in such a rural state where population density is variable, the legislature enacted legislation that approves private schools to receive public funds when they meet basic educational requirements and when the private school "is a nonsectarian school in accordance with the First Amendment of the United States Constitution." [8] The Maine law prohibits public funding of religious schools.

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[4] 5 U.S.C. § 3331.
[5] *Id.*
[6] *Kennedy*, 142 S. Ct. 2407; Carson, 142 S. Ct. 1987.
[7] ME. REV. STAT. ANN. tit. 20-A, § 2(1) (2022).
[8] ME. REV. STAT. ANN. tit. 20-A, § 2951(1-2) (2021).

The state, through this act, sought to provide rural students the same secular education that is available to students in more populous parts of the state.[9] Religious schools teach a curriculum that advances tenants of their religion, which, if subsidized by the state, leads to taxpayer funding of religious instruction. In 2004, the Supreme Court heard a nearly parallel case considering the constitutionality of a scholarship program that prohibited any recipient from utilizing the state funds to pursue a degree in devotional theology.[10] The court in *Loche v Davey* held that "an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause…", yet, this court demonstrated a substantial departure from that precedent in this year's decision in *Carson*.[11]

Upon review of this state statute, the Supreme Court held that Maine's statutory refusal to fund religious education is a violation of the Free Exercise Clause of the First Amendment.[12] Thus, the state may not make a decision and the state must blur the funding. Chief Justice Roberts's majority opinion circumvented previously settled First Amendment doctrine by relying heavily on two cases that he authored within the past five years.[13] Justice Sotomayor authored a dissent that provided a critical reminder that the Establishment Clause has been long interpreted by the Court to "prohibit government from funding religious exercise," and pointed out the majority's failure to adequately assess the Establishment Clause in its opinion.[14] As a result of this decision, should Maine continue to offer subsidies to support rural students' education, they now must fund religious education with taxpayer dollars.

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[9] *Id.*; *Carson*, 142 S. Ct. at 2008.
[10] Locke v Davey, 540 S. Ct. 712, 715, (2004).
[11] *Id.; Carson*, 142 S. Ct. at 1987.
[12] *Carson*, 142 S. Ct. at 2002.
[13] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[14] *Carson*, 142 S. Ct. at 2013.

Since 1962, the Supreme Court has acknowledged that school officials leading prayer in a public school is constitutionally impermissible under the First Amendment.[15] In 2022, the decision in *Kennedy v Bremerton School District* ignored that 60-year precedent, and, like the decision in the Maine case, the majority opinion placed inflated emphasis on the Free Exercise Clause while almost entirely ignoring the limitations imposed by the Establishment Clause.[16]

In *Kennedy*, a high school football coach habitually and openly prayed at the 50-yard line at the conclusion of games, and he regularly invited students to join him in prayer. His decision to publicly pray in that manner was explicitly in violation of school policy.[17] Not only did the Court effectively ignore the limitations of the Establishment Clause in its decision to allow a school official to publicly pray with students, it also stealthily overruled the test previously used to determine constitutionality of statutes that may, incidentally, infringe on religious liberty.[18]

The 1971 case, *Lemon v. Kurtzman*, articulated a test known as the "Lemon Test" that helped the court assess whether a statute is in violation of the First Amendment's religious protections.[19] Under *Lemon* a statute was upheld as constitutional when (1) the statute had a secular legislative purpose; (2) the purpose neither advanced nor inhibited religion; and (3) the statute did not foster "an excessive government entanglement with religion."[20] *Carson* effectively overturned this 50-year precedent by articulating a new standard—Establishment Clause questions are now to be interpreted in "reference to historical practices and understandings," an ambiguous standard, to say the least.[21] These sorts of historical tradition

[15] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022); Engle v Vitale, 370 U.S. 421 (1962).
[16] *Kennedy*, 142 S. Ct. at 2434.
[17] *Id*.
[18] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[19] *Id*.
[20] *Id*.
[21] *Id.* at 2428; *Lemon*, 403 U. S. 602 at 615.

doctrines have been proven extremely dangerous to the protection of individuals, and this case is yet another example of its detrimental results.[22] Standards like the standard of "history and tradition" are so subjective as to render the court's ability to follow its own precedent nearly impossible, which leaves only the personal biases of the justices themselves to guide First Amendment jurisprudence.

Every clause of the First Amendment has a fundamental purpose in protecting individual liberties. These recent decisions indicate a dangerous trend toward staunchly defending the right to free exercise of religion, while loosening the restrictions that prevent states from a detrimental establishment. To this point, Justice Sotomayor's final thoughts on *Carson* made a poignant and terrifying assertion: "Today, the Court leads us to a place where separation of church and state becomes a constitutional violation…"[23] We can only hope that those who are opposed to the dissolution of this fundamental pillar will continue to assert the limitations of the Establishment Clause and not allow it to become a forgotten clause of the First Amendment.

[22] *Id*. (*See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022)).
[23] Carson v. Makin, 142 S. Ct. 1987, 2014 (2022).