The Fall of the Establishment Clause: Bias & Originalism in the Supreme Court

by Benjamin Longren

This paper addresses the biases that have appeared in the U.S. Supreme Court. Recent controversial cases such as *Carson v Makin, Dobbs v Jackson,* and *Kennedy v Bremerton* have shown a distinct divide in Supreme Court rulings. This divide, along party lines, has been influenced by the justices' political leanings, among other inherent biases. The rulings in the aforementioned cases have led to the fall of the establishment clause, a vital constitutional protection separating church from state. The potential ramifications of blurring the line between church and state are enormous and hurts the legitimacy of the U.S. Supreme Court.

Introduction

In the historical ruling of *Dobbs v Jackson*, the U.S. Supreme Court went under intense scrutiny due to the unprecedented leak of court documents before its public decision, propelling the call for a code of ethics in the Supreme Court.[1] The *Dobbs v Jackson* decision brought attention to problems in the Supreme Court: long-standing biases, changing views, and a packed conservative supermajority on the bench at a politically unprecedented time.

The phrase "separation of church and state" does not directly appear in the First Amendment. However, it is the most widely used interpretation of the establishment clause: "Congress shall make no law respecting an establishment of religion".[2] This clause states that the government will not declare an official religion or favor or disfavor one religion over another.[3]

Combined with the free exercise clause, it created a "wall of separation" between church and state.[4] A wall that Thomas Jefferson assured the Danbury Baptists with in 1802, whose purpose was to protect a religious minority from prosecution by a new government.[5] This wall serves as a barrier preventing the government from exercising undue influence over Americans' spiritual and religious beliefs, such as ending school-mandated prayer and prohibiting the government from forcing Americans to participate in religious activities.[6] The wall was further built upon by the Warren Court of the 1960s.[7]

In the 1950s and 60s, 98% of Americans believed in a God.[8] At the same time, rulings such as *Engel v Vitale* determined that public school-mandated prayer to God was state-sponsored religion, violating the establishment clause.[9] Furthermore, in *Abington School District v Schempp* it found that bible readings as part of a public-school curriculum was also in violation.[10] In another case, *Stone v Graham* denied the ability to post the Ten Commandments in public schools due to it being "plainly religious in nature," or in other words, a joining of church and state, thereby violating the establishment clause.[11] The

1 Mary Clare Jalonick, "Senate Committee Approves Legislation to Impose Stronger Ethics Standards on Supreme Court Justices," *Associated Press News*, July 20, 2023, retrieved December 27, 2023, https://apnews.com/article/supreme-court-ethics-senate-clarence-thomas-3e34958536ce4fa464b6ff8cc1d71260.

2 U.S. Const. amend. I

3 Id.

4 Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists," 1998.

5 Id.

6 David Callaway, "What Is Separation of Church and State?", *Freedom Forum,* https://www.freedomforum.org/separation-of-church-and-state/.

7 David Schultz, "The Roberts Court takes aim at the Establishment Clause," *The Hill,* May 31, 2023.

8 "How Many Americans Believe in God?", *Gallup*, June 24, 2022.

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

10 Abington School District v. Schempp, 374 U.S. 203 (1963).

11 Stone v. Graham, 449 U.S. 39 (1980).

Warren Court found that the establishment clause firmly kept religion from state institutions, which, in balance with the free exercise clause, supported religious freedom. In Frank Sorauf's *The Wall of Separation,* the cases above, as well as more than 60 court-ruled opinions by the Supreme Court and federal appellate courts, used the establishment clause to strike a clear line in the sand between church and state.[12] The precedent of the last 50 years has been a strong separation between religious freedom and its influence in the state.

However, the balance between the establishment clause and the free exercise clause may slowly be slipping. In recent prominent Supreme Court cases, such as *Carson v Makin, Dobbs v Jackson,* and *Kennedy v Bremerton*, today's Supreme Court (the Roberts Court) seems intent on scrapping precedent and tipping the balance between the establishment clause and free exercise clause in favor of the court's interpretation of the free exercise clause. This narrative began with former president Trump's appointment of Justice Gorsuch in 2017, Justice Kavanaugh in 2018, and Justice Barrett in 2020. Their appointment led to implications of a pro-religion bias in the U.S. Supreme Court after its rulings in the aforementioned cases.[13,14] This "conservative super-majority" has, and will further, move the law in a more politically conservative direction.[15] In the conservative party, 88% of individuals are of some religious faith, while only 2% are atheist or agnostic.[16] While there is no law stating political parties must be separate from state, the heavy bias of religion in the conservative parties means that when influencing policy and law, religion cannot remain entirely separate.

I. The Narrative

In the first of the three prominent religious cases, *Carson v Makin* addresses the issue of state-paid tuition at private religious institutions.[17] The rural state of Maine does not have the capacity to provide a local public secondary school in every school district. Thus, in those areas, it allows parents to designate a secondary school for their children to attend and supplements the cost of tuition. However, this assistance cannot be used towards a religious school, a restriction created to avoid a potential violation of the establishment clause, to respect the separation of church and state. This restriction was declared unconstitutional, violating the free exercise clause of the First Amendment with a 6-3 ruling by the Supreme Court.[18] Justice Roberts delivered the opinion in which Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined; Breyer, Sotomayor, and Kagan represented the minority.[19]

In Roberts' opinion, the court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits;" in this case, Maine was holding back tuition assistance to families enrolling in private religious institutions.[20] By restricting access to tuition assistance, the Supreme Court ruled that Maine was violating the free exercise clause; this Supreme Court ruling, however, still resulted in support for state-sponsored religion. Breyer's dissenting opinion states that the establishment clause cannot act to "aid one religion, aid all religions, or prefer one religion over another…[to] protect religious observers against unequal treatment" which is clearly violated in favor of the free exercise clause.[21] In addition, the Supreme Court has never previously stated that a state must, not may, use state funds to pay for a religious education. These decisions were unprecedented before this case was

12 Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State,* (Princeton University Press, 1976).

13 "Supreme Court Nominations," U.S. Senate: Supreme Court Nominations (1789-Present). (2023), https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited 2023).

14 KineBritt E. Johnson, "One Nation Under Bias: The Influence of Religion Upon Supreme Court Decisions: Published by Lincoln Memorial University Law Review," *Lincoln Memorial University Law Review,* Feb. 15, 2023, lmulawreview.scholasticahq.com/post/1807-one-nation-under-bias-the-influence-of-religion-upon-supreme-court-decisions.

15 Id.

16 "Religious Landscape Study." Pew Research Center's Religion & Public Life Project, Pew Research Center, 12 May 2015, www.pewresearch.org/religion/religious-landscape-study/political-ideology/conservative/.

17 Carson v. Makin, 596 U.S. (2022)

18 Id.

19 Id.

20 Id.

21 Id.

decided, but now in the Roberts Court it seems to have become the norm. The case of *Carson v Makin* was a clear step towards a different court, one that is fine with breaking precedent and nudging stare decisis to the side.

Recently, the landmark case *Dobbs v Jackson* overturned the 50-year precedent of *Roe v Wade* in a 5-4 decision, with Alito delivering the opinion along with Thomas, Gorsuch, Kavanaugh, Barrett and Roberts, a strikingly similar majority in the prior case.[22] This ended abortion as a constitutional right, which, when examining this court's interpretation of the constitution, is an obvious result.[23] The interpretation of the constitution 50 years ago found that in the 14th amendment under the due process clause, "no one shall be deprived of life, liberty, or property without due process of law," there was an idea of substantive due process, and it held protection under the constitution for rights to abortion, *Roe v Wade*, and contraception, *Griswold v Connecticut*.[24,25,26] This is, in Justice Barrett's words, "the court…identifying rights that the text [Constitution] does not make explicit" leading towards the conservative super majorities' interpretation of the constitution, originalism.[27] Setting the idea of originalism aside, as well as the case of substantive due process, the decision of the court to overturn the ruling has taken off another brick from the wall of separation that the establishment clause sought to build.

The case brought by Dobbs was based on religious beliefs. In an article from *The Washington Post,* a lead sponsor of the lawsuit, then-state Rep. Nick Schroer, said, "As a Catholic, I do believe life begins at conception and that is built into our legislative findings."[28] The lawmakers pushing the case forward were open about their beliefs and pushed those beliefs on the entire nation. In *Dobbs v Jackson*, there is no apparent violation of the establishment or free exercise clause. Instead, it struck down the question of deciding when someone is alive by determining that the entire extent of *Roe v Wade* was incorrectly decided; in this way, it avoided the religious and philosophically contentious question in the court, a question that if decided, would violate the establishment clause. However, this retreat by the court gave each state the ability to decide when, if at all, abortion is constitutional. This is an even more grievous mistake in violation of the establishment clause.[29] The question of when life starts is a profoundly religious belief, which every state will have to decide upon, each bringing their own beliefs, each favoring one religion over another. The decision by the Supreme Court further violated the establishment clause in favor of the free exercise clause. Each state may interpret, when if at all, abortion should be legal, allowing for further influence of religious beliefs in the state.

Finally, in the case of *Kennedy v Bremerton,* decided 3 days after *Dobbs v Jackson*, the Supreme Court ruled yet again in favor of the free exercise clause.[30] When the assistant football coach at a public high school in the Bremerton school district started to pray on the field after every football game, the district took steps to prevent the violation of the establishment clause. As the case made its way to the Supreme Court, Kennedy argued that it was within his rights, a claim that the court supported. In another 6-3 ruling, the Roberts Court had decided in favor of Kennedy and his free exercise claim. Along the same party lines, Justice Gorsuch delivered the court's opinion with Roberts, Thomas, Alito, and Barret joining and Sotomayor, Breyer and Kagan in the minority.[31] The decision reinstated Kennedy as a coach, a decision that was supported by Gorsuch's opinion stating that "the First Amendment doubly protects religious speech" through the right of freedom of speech and religion.[32] The First Amendment, however, also provides protection from the influence of state-sponsored religion. In Gorsuch's opinion, the establishment clause is

22 Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022)

23 Id.

24 U.S. Const. amend. XIV

25 Roe v. Wade, 410 U.S. (1972)

26 Griswold v. Connecticut, 381 U.S. (1965)

27 Amy Barrett, "The 2023 Stien Lecture: U.S. Supreme Court Justice Amy Coney Barrett," YouTube, 2023, video, https://www.youtube.com/watch?v=XCv6jwI-w4Q4&t=2770s

28 Ruth Marcus, "Does Dobbs Violate the Establishment Clause?", *The Washington Post,* January 20, 2023, https://www.washingtonpost.com/opinions/2023/01/20/abortion-dobbs-establishment-clause-sotomayor/

29 Id.

30 Kennedy v. Bremerton School District, 597 U.S. (2022)

31 Id.

32 Id.

overthrown due to this "double protection." In the battle between the establishment clause and the free exercise clause, the decision in *Kennedy v. Bremerton* has now shown where the Roberts Court is heading.

While the fact that three separate court rulings, with almost the exact same justices voting for each, is startling, the establishment clause has been diminished in each of these cases. The case for the separation of church and state seems to be lost on the current conservative court. Justice Sotomayor, in the dissent, comments on this trend:

> "[t]he Court now charts a different path, yet again paying almost exclusive attention to the free exercise clause's protection for individual religious exercise while giving short shrift to the establishment clause's prohibition on state establishment of religion."[33]

Through these past three cases, it is clear that the court is taking the opportunity to heavily influence the law in favor of religious ideals, giving up the tradition of respect to the establishment clause. Not one ruling went against those in the conservative majority.

II. Originalism

Before addressing the interpretations that the justices have of the constitution, it is important to first find the reasons behind their interpretations by examining the source of values and beliefs that would influence each of the justices toward such a view. One article by Gallup, a prominent analytics and advisory company, reported each justice's religious beliefs from their senate judiciary confirmation hearings.[34] To make the inherent biases in each of their political beliefs more apparent, first the conservative super majority will be listed. Justice Roberts, Thomas, Altio, Kavanaugh, and Barret are all currently Catholic, with Gorsuch raised as Catholic. The liberal justices, as they have a more liberal tendency, are Justice Sotomayor who is Catholic, and Kagan and Breyer are Jewish.[35] It is interesting that on the Supreme Court today, 7 justices are Catholic and 2 are Jewish. However, what cannot be ignored is that the conservative, Catholic, supermajority has ruled along party lines in quick succession; in less than a week *Carson v Makin, Dobbs v Jackson,* and *Kennedy v Bremerton* were all decided in favor of the free exercise clause.

This brings us to the Roberts Court's interpretation of the constitution. Focusing on the conservative supermajority, the idea of originalism is at the forefront. As Justice Barrett succinctly described in the Stein lecture at the University of Minnesota's law school, originalism, or adhering exactly to what the Constitution says, is the interpretation that many of the conservative justices subscribe to. This view looks at the Constitution for what it says directly and what the founders would have thought of the Constitution at the time.[36] Consequently, this view also aligns with the conservative Catholic justices' personal religious beliefs and belief in deeply rooted tradition.

In a modern era that has had more change, technologically and socially, than any other era in history, interpretations of the Constitution must serve as support for the justices in determining the rules of the nation. Without an interpretation of the constitution in the Supreme Court that can keep up with the rapid change of our society, then the laws set upon every American will represent only some of those Americans, not all.

In the Roberts Court, the wall of separation is quickly fading into memory. The 50 years of precedent have had little influence on today's major rulings. The court has ruled in favor of religious beliefs in each of these cases, with the conservative super majority flexing its muscles as it pushes through pro-religion rulings in *Carson v Makin, Dobbs v Jackson,* and finally *Kennedy v Bremerton.* The ruling and subsequent rulings in each of these cases broke down the wall of separation created by the establishment and free exercise clause. The balancing act that Justice Breyer supported between the establishment and free exercise clause has not

33 Id.

34 Frank Newport, "The Religion of the Supreme Court Justices," *Gallup*, April 2022, https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx

35 Id.

36 Amy Barrett, "The 2023 Stien Lecture: U.S. Supreme Court Justice Amy Coney Barrett," YouTube, 2023, video, https://www.youtube.com/watch?v=XCv6jwIw4Q4&t=2770s

just shifted due to the recent rulings, it has become entirely unbalanced, leaning toward religious views from the court and now in the law. In her dissenting opinion, Justice Sotomayor reflected that "[t]oday, the Court leads us to a place where separation of church and state becomes a constitutional violation" exemplifying that the line between church and state has become erroneously blurred.[37]

The Supreme Court has slowly but surely been moving towards a pro-religion stance. This can be seen from the recent rulings in *Carson v Makin, Dobbs v Jackson,* and *Kennedy v Bremerton*, all of which support the pro-religion court. In each of these cases, rulings were divided along party lines, where the majority was made up of the conservative party in every case. Since the nomination and confirmation of the three recent conservative justices, the Roberts Court has willingly started down the path of pushing the establishment clause to the side. The wall of separation (stated by Jefferson) has and will further start to crumble if nothing is done to correct this path. However, a recent publishment by the justices of their once unofficial code of ethics shows effort towards nonpartisan rulings.[38]

In future cases, the Roberts Court will have the opportunity to show that politics does not control the Supreme Court. These chances are already coming, as a lawsuit has been filed in Oklahoma over the state's funding of a private religious charter school, a case that, if brought to the Supreme Court, will define the separation of church and state for the foreseeable future.[39] In addition, the fight over abortion pill access which affects millions of people is already on the docket.[40] The pillar that the Supreme Court stands on is one that is not influenced by outside forces, but one that interprets the law faithfully. The opinions of the justices have shaped the court into what it is today which has seen to the fall of the establishment clause.

37 Kennedy v. Bremerton School District, 597 U.S. (2022)

38 Statement of the Court (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf (last visited 2024).

39 Moriah Balingit, "Okla. board moves forward with nation's first religious charter school," *The Washington Post,* October 9, 2023, https://www.washingtonpost.com/education/2023/10/09/oklahoma-religious-charter-school-contract-approved/

40 Abbie VanSickle, "Supreme Court Will Hear Challenge to Abortion Pill Access," *The New York Times,* December 13, 2023, https://www.nytimes.com/2023/12/13/us/supreme-court-abortion-pill.html.

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