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Keeping Faithful to the Facts

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— Note —

Keeping Faithful to the Facts

Contents

INTRODUCTION

On June 27, 2022, the Supreme Court released *Kennedy v. Bremerton School District*[1] and made the American public its jury. The majority and dissent in *Kennedy* presented conflicting factual narratives about the suspension of a public high school football coach for praying midfield after games. From the majority's perspective, Coach Kennedy's prayer was quiet and personal—well within his First Amendment rights. In the dissent's eyes, however, the majority twisted the facts to hide how disruptive and coercive Coach Kennedy's religious activities really were.[2] And the Court asked America to decide which narrative to believe.

The American public read the opinions. Based on each side, the reader saw *Kennedy* through a completely different factual lens. Through each factual lens, the reader could reach a completely different conclusion on how the Court should have decided *Kennedy*.[3]

Factual framing—highlighting facts that support your argument while downplaying facts that weigh against it—is a common legal writing technique.[4] So, one can expect contrasts in the factual framings of majority and dissenting opinions, even from the Supreme Court. But in *Kennedy*, the justices seem to address different facts altogether. This is concerning. And for the American public, it caused confusion and

1. 142 S. Ct. 2407 (2022).

2. *Compare id.* at 2415 (Majority) *with id.* at 2434 (Dissent).

3. Jeff Neal, *Supreme Court Preview: Kennedy v. Bremerton School District*, HARV. L. TODAY (Apr. 20, 2022), https://hls.harvard.edu/today/supreme-court-preview-kennedy-v-bremerton-school-district/ [https://perma.cc/K24K-4ASR].

4. Harold Anthony Lloyd, *Good Legal Thought: What Wordsworth Can Teach Langdell About Forms, Frames, Choices, and Aims*, 41 VT. L. REV. 1, 2, 7 (2016).

outrage.[5] By the time a case reaches the Supreme Court, one would hope and expect that the justices make their decision on the same set of facts. This is especially true when the Court grants summary judgment—which can only occur if a case contains no dispute of material fact.[6] Yet in *Kennedy*, the justices' main dispute did not involve legal standards and their application, but rather the facts themselves.

Kennedy has left legal scholars and the American public alike with the same question—how did such a large factual discrepancy occur at the Supreme Court level?[7] This Note provides an explanation. The factual dispute within *Kennedy* occurred because instead of remanding the case for a jury to sort out the material factual disputes, as required under Civil Rule of Procedure 56, the Supreme Court ignored this established procedure and the controlling precedents.[8] Instead, the majority and dissent kept the fact-finding power for themselves, resolving the factual dispute in a manner that supported the legal conclusion each side wanted to make.[9] The decision in *Kennedy* to ignore the Rule 56 summary judgment standard is yet another step in the shift of courts taking and handing factual-inference power from jurors to judges.[10] *Kennedy* is a symptom of the underlying changes within the American judiciary that have culminated over the last two decades.[11] To clarify, this Note does *not* address which justice's opinion in *Kennedy* is right, how the Court should resolve First Amendment challenges, or what actions of school officials violate the Establishment Clause. Rather, this Note only addresses *Kennedy*'s factual

5. Paul Blumenthal, *Neil Gorsuch 'Misconstrues the Facts' in School Prayer Case*, HUFFINGTON POST (June 27, 2022, 6:56 PM), https://www.huffpost.com/entry/bremerton-school-prayer-joseph-kennedy_n_62ba18c2e4b0326883a8a9b8 [https://perma.cc/L5VB-AWES].

6. *See infr*a note 114 and accompanying text ("Summary judgment is appropriate only if 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'").

7. Aaron Blake, *Gorsuch and Sotomayor's Extraordinary Factual Dispute*, WASH. POST (June 29, 2022, 9:39 AM), https://www.washingtonpost.com/politics/2022/06/29/gorsuch-sotomayor-praying-coach/ [https://perma.cc/JBD6-QRYE]; Neal, *supra* note 3.

8. FED. R. CIV. P. 56. *See infr*a Part III.A.

9. *See infra* Part III.B.

10. *Id.*

11. *See generally* Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?*, 82 ANTITRUST L.J. 81, 82 (2018) (arguing that *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* "emboldened" courts to grant summary judgment and accelerated dispositive rulings).

discrepancies, explains why they occurred, and discusses their consequences.

This Note unfolds in three parts. Part I uncovers the *Kennedy* decision—the undisputed facts, case history, and material factual disputes between the majority and dissent. Part II explores the different standards and procedures that govern appellate fact-finding, especially focusing on summary judgment review. Part III provides an explanation for what caused the factual discrepancies in *Kennedy*. Finally, Part IV concludes with the legal and societal consequences of *Kennedy*.

I. FACTUAL AND PROCEDURAL HISTORY IN *KENNEDY*

To understand whether the Court should have decided *Kennedy* on summary judgment, it is important to review the decision's background. Part I of this Note gives context to the *Kennedy* decision by providing (1) the undisputed facts in *Kennedy*, (2) *Kennedy*'s procedural history, and (3) an analysis of the material factual disputes between *Kennedy*'s majority and dissenting opinions.

A. The Undisputed Facts in Kennedy

First, it is necessary to understand the baseline, undisputed fact pattern within *Kennedy* to later evaluate the disputed facts.[12] In 2008, Joseph Kennedy started work as a football coach at Bremerton High School.[13] Coach Kennedy was a devout Christian. As part of his sincerely held religious beliefs, he always offered a postgame prayer of thanksgiving at the 50-yard line.[14] At first, he prayed alone. But the prayer evolved over the seasons. Eventually, a few players asked to join Kennedy in prayer, which he allowed.[15] But the handful of players soon increased to include most of the team. Kennedy eventually began accompanying the prayers with religious motivational speeches. Separately, he sometimes conducted team locker-room prayer before

12. I created an undisputed factual narrative found within *Kennedy* by examining the fact patterns presented by the district court, the Ninth Circuit, and the Supreme Court's majority and dissenting opinions. I considered a fact "undisputed" if the fact was cited by at least one of the lower courts and the Supreme Court's majority opinion—ensuring that the fact was cited by courts that reached contrary legal conclusions.

13. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020); Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1010 (9th Cir. 2021); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (Majority).

14. *Kennedy*, 443 F. Supp. 3d at 1228 (District); 991 F.3d at 1010 (Ninth Circuit); 142 S. Ct. at 2416 (Majority).

15. *Kennedy*, 443 F. Supp. 3d at 1228 (District); 991 F.3d at 1010 (Ninth Circuit); 142 S. Ct. at 2416 (Majority).

and after games.[16] For seven years, Kennedy coached without Bremerton raising any issue about his religious practices. This changed in 2015.[17]

That year, an opposing team's coach complimented BHS's principal for allowing Kennedy's postgame prayer. This apparently was the first time Bremerton learned of Kennedy's religious practices.[18] Bremerton investigated to ensure Kennedy's religious activities did not violate Bremerton's handbook policies, which sought to prevent Establishment Clause[19] violations by forbidding school employees from encouraging or discouraging religious activities. Some of the players' parents also reached out to Bremerton claiming their sons had felt forced to join Kennedy's prayers to avoid team separation.[20]

On September 17, 2015, Bremerton sent Coach Kennedy a letter explaining that his religiously inspired speeches and locker-room prayer likely violated Bremerton's handbook policies. The letter asked Kennedy to desist from encouraging, supervising, or partaking in any demonstrative religious activity with students.[21]

At first, Kennedy followed the directive. During the following September 18th game, he ceased all locker-room prayer, omitted religious references in his postgame speech, and originally left the field without conducting any postgame prayer. But on the drive home, Kennedy felt he was breaking his "commitment to God" by desisting from his postgame midfield prayer, so he returned to the stadium and prayed after everyone left.[22] On October 14th, Kennedy's counsel sent Bremerton a letter requesting a religious accommodation to allow Kennedy to silently pray postgame at the 50-yard line without having to flee if students were near. Bremerton did not approve this accommodation.[23]

16. *Kennedy*, 443 F. Supp. 3d at 1228 (District); 142 S. Ct. at 2416 (Majority).

17. *Kennedy*, 443 F. Supp. 3d at 1228–29 (District); 991 F.3d at 1010–11 (Ninth Circuit); 142 S. Ct. at 2416 (Majority); 142 S. Ct. at 2435–36 (Dissent).

18. *Kennedy*, 443 F. Supp. 3d at 1228–29 (District); 991 F.3d at 1011 (Ninth Circuit); 142 S. Ct. at 2416 (Majority).

19. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

20. *Kennedy*, 443 F. Supp. 3d at 1229 (District); 142 S. Ct. at 2429 (Majority); 142 S. Ct. at 2435–36, 2440 (Dissent).

21. *Kennedy*, 443 F. Supp. 3d at 1229 (District); 991 F.3d at 1011 (Ninth Circuit); 142 S. Ct. at 2416–17 (Majority); 142 S. Ct. at 2436–37 (Dissent).

22. *Kennedy*, 443 F. Supp. 3d at 1229 (District); 991 F.3d at 1011–12 (Ninth Circuit); 142 S. Ct. at 2417 (Majority); 142 S. Ct. at 2437 (Dissent).

23. *Kennedy*, 443 F. Supp. 3d at 1230 (District); 142 S. Ct. at 2417 (Majority); 142 S. Ct. at 2437–38 (Dissent).

During the following game on October 16th, Kennedy ignored Bremerton's directive, praying midfield postgame while BHS players were partaking in other activities. Kennedy began the prayer alone. But, soon after, players and coaches from the opposing team and members of the public came onto the field and joined the midfield prayer.[24] After this event, Bremerton increased security measures and issued a statement forbidding public access on its football field.[25]

On October 23rd, Bremerton issued Kennedy another letter. It warned Kennedy that his religious conduct during the October 16th game was inconsistent with Bremerton's coaching policies because the prayer created Establishment Clause concerns.[26] During that night's game on October 23rd, Kennedy once again ignored Bremerton's letter and prayed postgame at the 50-yard line—this time alone. During the following October 26th game, Kennedy repeated this act. Although he started the prayer alone, members of the public once again came onto the field and prayed with him.[27]

Based on Coach Kennedy's actions during the October 16th, 23rd, and 26th games, Bremerton placed Kennedy on paid administrative leave and barred him from coaching the rest of the season. On his 2015 coaching evaluation, Kennedy received low marks due to his lack of cooperation with Bremerton's policies and his failure to supervise students postgame. Kennedy did not coach the following season.[28]

B. The Procedural History

Second, examining the procedural history and reasoning behind the Court's decision is necessary to determine the materiality of the factual disputes in *Kennedy*.

1. The Lower Court Granted Bremerton's Motion for Summary Judgment

Coach Kennedy sued Bremerton in federal court for violating his First Amendment rights under the Free Speech and Free Exercise Clauses.[29] After the court denied Kennedy's motion for a preliminary

24. *Kennedy*, 991 F.3d at 1012–13 (Ninth Circuit); 142 S. Ct. at 2418 (Majority); 142 S. Ct. at 2438 (Dissent).

25. *Kennedy*, 443 F. Supp. 3d at 1230 (District); 142 S. Ct. at 2418 (Majority); 142 S. Ct. at 2438 (Dissent).

26. *Kennedy*, 443 F. Supp. 3d at 1230–31 (District); 991 F.3d at 1013 (Ninth Circuit); 142 S. Ct. at 2417–18 (Majority); 142 S. Ct. at 2438–39 (Dissent).

27. *Kennedy*, 443 F. Supp. 3d at 1231 (District); 142 S. Ct. at 2418 (Majority); 142 S. Ct. at 2439 (Dissent).

28. *Kennedy*, 443 F. Supp. 3d at 1231 (District); 142 S. Ct. at 2418–19 (Majority); 142 S. Ct. at 2439–40 (Dissent).

29. *Kennedy*, 142 S. Ct. at 2419 (Majority).

injunction,[30] both parties filed cross-motions for summary judgment. The district court granted Bremerton's motion, holding Bremerton did not violate Kennedy's First Amendment rights.[31] Assessing the free speech claim, the district court held that Kennedy spoke as a public government employee during his postgame prayer and not as a private citizen. Therefore, Bremerton could restrict his prayer and had sufficient reason to suspend Kennedy to avoid Establishment Clause liability.[32] The district court also rejected Kennedy's free exercise claim. The court found Bremerton's Establishment Clause concern was a compelling state interest and its decision to suspend Kennedy was a narrowly tailored response to protect this interest.[33] The Ninth Circuit affirmed the district court's decisions.[34]

2. The Supreme Court Completely Reversed the Lower Courts' Holdings

On appeal, the Supreme Court reversed the lower courts' holdings—denying Bremerton's motion for summary judgment while granting summary judgment for Kennedy.[35] The majority first analyzed Kennedy's free exercise claim. The Court found Bremerton's suspension failed the "general applicability requirement,"[36] because Bremerton treated Kennedy's prayer differently than it did its coaches' non-religious conduct.[37] For example, Kennedy received a negative performance review for his lack of postgame supervision during the time he conducted his postgame prayer, but Bremerton allowed other coaches "to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls."[38]

30. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 831 (9th Cir. 2017).

31. *Kennedy*, 443 F. Supp. 3d at 1245 (District).

32. *Id.* at 1233–37. Alternatively, the district court held that even if Coach Kennedy spoke as a private citizen, Bremerton could suppress the speech to avoid an Establishment Clause violation. *Id.* at 1235, 1237–40.

33. *Id.* at 1240.

34. Regarding Kennedy's free speech claim, the Ninth Circuit found Kennedy's prayer qualified as governmental speech because of its timing and location. *Kennedy*, 991 F.3d at 1015–16 (Ninth Circuit). For Kennedy's free exercise claim, the Ninth Circuit found that Bremerton had a compelling interest to suspend Kennedy and narrowly tailored its response. *Id.* at 1020–21.

35. *Kennedy*, 142 S. Ct. at 2433 (Majority).

36. A government action fails the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 2422 (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

37. *Id.* at 2422–23.

38. *Id.* at 2423.

Next, the Court analyzed Coach Kennedy's free speech claim. Under the *Pickering-Garcetti* framework,[39] the Court found Kennedy spoke as a private citizen when conducting his October postgame prayers because the prayers did not convey a government message, include BHS's players, or involve any speech that Bremerton paid Kennedy to conduct.[40]

The Court analyzed the second step of both the free exercise and free speech claims together. Although strict scrutiny could have applied, the Court found Bremerton's actions failed even intermediate scrutiny.[41] Bremerton justified suspending Kennedy due to Establishment Clause concerns. But the Court interpreted the Establishment Clause by a "reference to [its] historical practices and understandings."[42] Under this approach, the Court found that Bremerton failed to show how any Establishment Clause violation could have reasonably resulted from Kennedy's prayer.[43] First, Kennedy's prayer did not constitute governmental religious endorsement because during the October games Kennedy only sought to pray alone in his capacity as a private citizen.[44] Second, Kennedy's prayer did not

39. *Id.* at 2424. The *Pickering-Garcetti* framework is a two-part test. Under the first step, a court examines if a public employee's speech was a part of their official duties or if they spoke as a citizen addressing a public concern. If the speech was part of an employee's official duties, then the speech is under the employer's control. But if the employee spoke as a private citizen on a matter of public concern, then the court proceeds to step two—where the court determines if the interest of the government employer to effectively run its services outweighs the employee's speech interests. *Id.* at 2423.

40. *Id.* at 2424–25.

41. *Id.* at 2426. Strict scrutiny should have applied to Kennedy's free exercise claim since Bremerton failed the general-applicability requirement. But, for step two of the *Pickering-Garcetti* inquiry, Bremerton asked the Court to apply intermediate scrutiny. The Court found the distinction did not matter because Bremerton's actions failed even intermediate scrutiny. *Id.*

42. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)). The Court in *Kennedy* officially overruled the *Lemon* test for Establishment Clause review and instead implemented a history-and-tradition test. *Id.* at 2427–28.

43. *Id.* at 2428–31. The Court concluded, "[T]here is no conflict between [the Establishment Clause and the free exercise and free speech clauses] . . . . There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause." *Id.* at 2432 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

44. *Id.* at 2429–32. Under the Establishment Clause, state officials cannot direct "the performance of a formal religious exercise" as part of a school event or offer any endorsement of religious activities. Lee v. Weisman, 505 U.S. 577, 586–87, 599 (1992).

constitute "impermissible government coercion" because Kennedy never forced players to join his midfield prayer and Kennedy ended all locker-room prayer at Bremerton's request.[45] Without the possibility of an Establishment Clause violation, Bremerton did not have an important interest to suspend Kennedy. Therefore, Bremerton's actions violated Kennedy's free speech and free exercise rights, so the Court granted Kennedy's motion for summary judgment.[46]

3. The Dissent Affirmed the Lower Courts' Conclusions

The dissent completely contested the majority's reasoning. First, the dissent addressed the Establishment Clause. The dissent argued that Bremerton reasonably believed Kennedy's religious practices could have created Establishment Clause liability.[47] First, Kennedy's prayer could have constituted a governmental endorsement of religious activity.[48] During the October games, Kennedy coached and spoke as a *state official*, "the face and the voice" of Bremerton during football games.[49] So, Bremerton had reason to fear that Kennedy's prayer, which occurred while he was on duty, at a school event, and at a location only open to BHS students and employees—the center of BHS's football field—constituted governmental religious endorsement.[50] Second, Bremerton justifiably believed Kennedy's religious activities constituted impermissible religious coercion.[51] Kennedy's locker-room prayer and motivational religious speeches undoubtedly created coercive pressure.[52] And although Kennedy stopped some of these practices, the entirety of Kennedy's religious activities affected the coercion determination. Accordingly, the dissent found that Kennedy's decision to continue praying at the 50-yard line, where he previously conducted prayers and religious speeches with his players, was a continuation of his past coercive conduct.[53]

Next, examining the free speech claim, the dissent balanced Bremerton's desire to avoid Establishment Clause liability and Kennedy's free speech rights. The dissent asserted that Kennedy accepted limitations to his free speech rights when he accepted employment as a public-school football coach. So, whether one considers Kennedy's

45. *Kennedy*, 142 S. Ct. at 2429–31 (Majority).

46. *Id.* at 2432–33.

47. *See id.* at 2440–42 (Dissent).

48. *Id.* at 2443–44.

49. *Id.* at 2443.

50. *Id.*

51. *Id.* at 2442–44.

52. *Id.* at 2443.

53. *Id.* at 2444.

speech public or private, Bremerton had an adequate reason to restrict Kennedy's religious speech during his employment to avoid an Establishment Clause violation.[54]

For the free exercise claim, the dissent applied strict scrutiny. The dissent found (1) Bremerton had a compelling interest to avoid an Establishment Clause violation, and (2) Bremerton's suspension of Kennedy was narrowly tailored based on Kennedy's past religious conduct, attempts to attract media attention, and unwillingness to work with Bremerton to find a suitable accommodation.[55]

Overall, the dissent argued the majority ignored the conflict between the Establishment Clause and the First Amendment to reverse the lower courts' consistent and correct holdings that Bremerton did not violate Kennedy's First Amendment rights.[56]

C. The Factual Disputes Between the Majority and the Dissent

Now comes the heart of the *Kennedy* debate—the disputed facts. Comparing the majority's and dissent's factual narratives, a reader can find at least six points of factual contention. Each dispute has some level of materiality to the Court's decision, affecting the summary-judgment analysis in Part III.A.

1. Student Coercion

The first factual dispute concerns whether Kennedy's religious practices coerced students.

a. Majority

The majority stressed that Kennedy's private religious exercise did not constitute "impermissible government coercion" because Kennedy never "told any student that it was important they participate in any religious activity," "pressured or encouraged any student to join his midfield prayer," or "asked any student to pray."[57] The majority addressed how, following Kennedy's suspension, a few parents reached out to Bremerton stating that their sons "participated in the team prayers only because they did not wish to separate themselves from the team."[58] But the majority clarified that the alleged complaints concerned either

54. *Id.* at 2444–45.

55. *Id.*

56. *Id.* at 2445–53. The dissent also noted the majority used its flawed reasoning to overrule the previous Establishment Clause test found in *Lemon* and input a history-and-tradition test. *Id.* at 2449–50.

57. *Id.* at 2416, 2429 (Majority) (quoting J.A. at 170, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

58. *Id.* at 2430 (quoting J.A. at 356, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

Kennedy's locker-room prayers or postgame religious speeches—both of which Kennedy stopped at Bremerton's request.[59] The majority also pointed to a Q&A session hosted by Bremerton where it admitted it had "no evidence that students have been directly coerced to pray with Kennedy."[60]

b. Dissent

The dissent provided a different story about how Kennedy coerced his players. As a coach, Bremerton required Kennedy to serve as a "mentor and role model for the student athletes."[61] Accordingly, players looked up to Kennedy, wanted his approval, and sought the tangible benefits of play time and letters of recommendation. So, Kennedy's position of authority indirectly coerced players to partake in his religious activities.[62]

The dissent found clear evidence of the coercion. Kennedy's postgame prayer progressed from being performed alone to being shared with a few players, then with the whole team by 2015. Yet after Kennedy's suspension, players did not continue the prayer on their own.[63] Given this context, the dissent noted how "several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team."[64]

c. Factual Importance

Under the Establishment Clause, public school officials cannot *coerce* students to "support or participate in religion or its exercise."[65] The majority focused only on direct coercion. Accordingly, during the three October games, Kennedy did not directly coerce his players as none of them joined Kennedy's October postgame prayers, making Bremerton's suspension of Kennedy a First Amendment violation. But the dissent focused on indirect coercion, arguing that Kennedy indirectly coerced students when considering the totality and continuation of Kennedy's religious practices. So, this justified Bremerton's suspension

59. *Id.* at 2422, 2430.

60. *Id.* at 2419 (quoting J.A. at 105, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

61. *Id.* at 2435 (Dissent) (quoting J.A. at 56, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

62. *Id.* at 2443–44.

63. *Id.* at 2440.

64. *Id.*

65. Lee v. Weisman, 505 U.S. 577, 587 (1992).

of Kennedy. The factual differences in the coercion narratives critically affect the Establishment Clause analysis.

2. Media Outreach and Impact

A second difference between the narratives is the portrayal of the media coverage.

a. Majority

The majority acknowledged the media coverage of Kennedy's religious activities one time, when it addressed the October 16th game. The majority only stated that this game "spurred media coverage of Mr. Kennedy's dilemma."[66]

b. Dissent

Yet in the dissent's account, Kennedy created a media frenzy around his postgame prayers. On September 11, 2015, Kennedy first raised public awareness by posting on Facebook that Bremerton might fire him for praying.[67] Then, before the October 16th game, Kennedy "made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game."[68] The media coverage spurred an immediate public response. Bremerton received several "emails, letters and calls, many of them threatening," before the October 16th game.[69] At the game, news crews stormed the field and recorded the scene of opposing players, members of the public, and Kennedy praying together at the 50-yard line.[70]

c. Factual Importance

The differences in the two media accounts affect the free speech analysis of whether Kennedy spoke as a private citizen or a government employee during his postgame prayer. If Kennedy prayed alone postgame and the media independently picked up the story, this supports the majority's argument that Kennedy's prayer was personal, private speech. Conversely, if Kennedy set out to raise a media storm, wanting the world to witness his prayer, this supports the dissent's argument that Kennedy used his government position to engage in a public religious display.[71]

66. *Kennedy*, 142 S. Ct. at 2418 (Majority).

67. *Id.* at 2436 (Dissent).

68. *Id.* at 2437.

69. *Id.*

70. *Id.* at 2438.

71. *Compare id.* at 2425 (Majority), *with id.* at 2452–53 (Dissent).

3. Postgame Supervision Duties

Another factual contention is whether following the October football games—when Kennedy offered his postgame prayer—Kennedy violated his postgame supervision duties.

a. Majority

The majority asserted that, during the postgame period, coaches "were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands."[72] Therefore, Kennedy had a period of free time after games to engage in personal activities. So, he did not violate his postgame supervision duties during his midfield prayer.[73]

b. Dissent

The dissent, however, never acknowledged a postgame period where coaches were free to engage in personal activities. Instead, the dissent alleged Kennedy had a contractual duty that required supervision of "'student activities immediately following the completion of the game' until the students were released to their parents or otherwise allowed to leave."[74] Under this narrative, Kennedy violated his coaching duties by abandoning his supervision duties to pray midfield.[75]

c. Factual Importance

The factual determination about whether Kennedy neglected his postgame supervision duties during his prayer affects two parts of the Court's analysis. First, it affects whether Kennedy was on duty during his postgame prayer and spoke as a government employee or private citizen.[76] Second, it affects whether Bremerton narrowly tailored its response by suspending Kennedy—the abandonment of supervisory duties was one of the justifications Bremerton listed for Kennedy's suspension.[77]

72. *Id.* at 2425 (Majority).

73. *Id.*

74. *Id.* at 2435 (Dissent) (quoting J.A. at 133, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

75. *Id.* at 2437.

76. If Kennedy was not on duty during his postgame prayer, this supports the majority's argument that Kennedy prayed as a private citizen. If Kennedy was on duty, this supports the dissent's argument that Kennedy spoke as a government employee.

77. *See supra* note 28 and accompanying text.

4. Relevant Timeframes

Fourth, the opinions' factual narratives present different timeframes relevant for the constitutional analysis.

a. Majority

The majority made clear that only the October 16th, 23rd, and 26th football games, and those three games alone, are what mattered for the constitutional analysis. Bremerton's suspension of Kennedy was based only on the postgame prayer at those three games because Kennedy stopped all other religious practices, the locker-room prayers, and religious motivation speeches, at Bremerton's request.[78]

b. Dissent

The dissent argued for a far broader timeframe. The dissent declared that the Court could not separate the October games from Kennedy's years of prior religious displays—a history of team locker-room prayer, religious motivational speeches, and postgame prayer with opposing teams. The Court had to view everything together.[79]

The dissent also noted another relevant football game outside the October games. On September 11, 2015, Bremerton's athletic director told Kennedy not to conduct his midfield prayer while Bremerton's investigation was pending. Kennedy responded by leading an audible midfield prayer following that night's game as his players knelt around him.[80]

c. Factual Importance

Overall, the majority's narrow, three-game timeline versus the dissent's holistic factual portrayal changes the Court's coercion analysis. Without considering Kennedy's years of religious practices, the majority had more justification for finding that Kennedy's actions did not coerce students because Kennedy's players did not join his postgame prayer after the three October games.[81] But the dissent's holistic picture of Kennedy's religious practices gave a different context to the October games. When Bremerton requested that Kennedy stop praying midfield postgame, it was because the prayer "would appear to be an extension of Kennedy's 'prior, long-standing and well-known

78. *Kennedy*, 142 S. Ct. at 2419, 2422 (Majority) ("The District disciplined [Kennedy] *only* for his decision to persist in praying quietly without his players after three games in October 2015.").

79. *Id.* at 2438, 2444 (Dissent) (Kennedy's alteration in his religious practices did not "eras[e] years of prior actions by Kennedy" and create a completely "blank slate" for review).

80. *Id.* at 2436.

81. *See supra* notes 24–28 and accompanying text.

history of leading students in prayer' on the 50-yard line after games."[82] The October postgame prayers were a continuation of Kennedy's prior coercive practices, justifying Bremerton's suspension of Kennedy.[83]

5. Bremerton's Accommodations

Fifth, the two narratives dispute the accommodations Bremerton offered to Kennedy and Kennedy's response.

a. Majority

According to the majority, after Bremerton's September 17th directive, Kennedy asked Bremerton for a religious accommodation to pray midfield postgame. Kennedy offered to wait until players left the field before conducting the prayer. But Bremerton responded with an ultimatum, forbidding the midfield prayer.[84] Later, in its October 23rd letter, Bremerton told Kennedy "the only option it would offer [him] was to allow him to pray after a game in a 'private location' behind closed doors" in a place "not observable to students or the public."[85] The majority stated that Bremerton "made clear" it was unwilling to accommodate Kennedy's request to pray midfield and did not leave him a viable alternative.[86]

b. Dissent

The dissent presented a contrary narrative. The dissent first noted that in Bremerton's October 16th letter, Bremerton stated it had "no objection . . . with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion."[87] Second, in its October 23rd letter, Bremerton stated it was "happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement."[88] Bremerton "invited Kennedy to reach out to discuss accommodations

82. *Kennedy*, 142 S. Ct. at 2438 (Dissent) (quoting J.A. at 81, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

83. *Id.* at 2444 ("Students at the three games . . . witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. They witnessed their peers from opposing teams joining Kennedy, just as they had when Kennedy was leading joint team prayers. . . . That students did not join Kennedy in these last three specific prayers did not make those events compliant with the Establishment Clause.").

84. *Id.* at 2417 (Majority).

85. *Id.* at 2418 (quoting J.A. at 94, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418)).

86. *Id.*

87. *Id.* at 2438 (Dissent).

88. *Id.* at 2438–39.

that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others," but Kennedy did not respond.[89] Last, even after Bremerton placed Kennedy on paid administrative leave, Bremerton "offered accommodations to, and offered to engage in further discussions with, Kennedy to permit his religious exercise." But again, Kennedy did not respond.[90]

c. Factual Importance

As part of its First Amendment analysis, the Court determined whether the means Bremerton used were substantially related to achieving an important government interest, to avoid an Establishment Clause violation.[91] The differences in the portrayal of the accommodations—Bremerton's willingness to find a suitable accommodation for Kennedy and Kennedy's response or lack thereof before Bremerton placed him on paid administrative leave—affect whether Bremerton's response was constitutional.

6. The October 16th Game

A last factual dispute occurs in the description of the events during and following the October 16th football game.

a. Majority

The majority stated that during Kennedy's October 16th postgame prayer, "[t]hough Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer."[92] The majority noted that, following the game, Bremerton issued robocalls reminding parents public access was forbidden on its fields, placed warning signs on the field, and increased security.[93]

b. Dissent

The dissent presented a much more alarming picture of the events surrounding the October 16th game. While the dissent acknowledged that Kennedy initially started his postgame prayer alone, it also noted that, soon after, coaches and players from the other team joined Kennedy. This quickly expanded as television crews and "[m]embers of

89. *Id.* at 2439.

90. *Id.* at 2439–40.

91. *See supra* Part I.B.

92. *Kennedy*, 142 S. Ct. at 2418 (Majority).

93. *Id.*

the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members."[94]

The factual gap continued after the game as well. The dissent noted that Bremerton not only had to increase security, message parents, and post signs—it also received many threatening calls, including from Satanist groups who wanted to conduct their own postgame rituals on the field.[95]

c. Factual Importance

The characterization of any of the three games from which the majority based its opinion is essential to the Court's decision. Factors surrounding the postgame prayers, including how the public reacted, who and how many people joined Kennedy on the field, and the game's aftermath, contribute to how the Court decides (1) whether Kennedy made his speech as a public employee or private citizen, and (2) whether Bremerton was justified in suspending Kennedy.[96]

Overall, these six different factual disputes determine in Part III.A whether the Court should have decided *Kennedy* on summary judgment or if the Court should have left the disputes for a factfinder to resolve.

II. APPELLATE REVIEW

When reading *Kennedy*, one cannot help but wonder how such large factual discrepancies could result from a Supreme Court case that received full briefing and oral argument. Are there not procedures in place to resolve these types of factual disputes? While established procedures govern the Supreme Court's review of a lower court's factual determinations, different standards apply based on the procedural posture that the Court reviews.[97] And although these procedures help resolve factual disputes, they have limitations, especially within the summary judgment standard. Part II of this Note examines (1) what standards govern the Supreme Court's appellate review in federal civil cases and (2) the complexities within appellate review of motions for summary judgment.[98]

94. *Id.* at 2438 (Dissent).

95. *Id.*

96. *See supra* Part I.B.

97. *See* Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 21–27 (2023).

98. Because this Note focuses on *Kennedy*, where the Supreme Court reviewed a summary judgment motion under Federal Rule of Civil Procedure 56 and applicable case law, this Note only addresses appellate review in *federal civil* cases. Other procedural rules govern other types of cases. For example, federal appellate review of criminal cases is governed by the

A. The Standards of Review

The Supreme Court receives its appellate power under Article III of the Constitution, which states: "[T]he [S]upreme Court shall have appellate jurisdiction, both as to Law and Fact [in all cases other than those within the Court's original jurisdiction] . . . ."[99] When the Supreme Court reviews lower court decisions, specific standards of review apply.[100] In federal court, the standard of review for civil cases are generally set forth in the Federal Rules of Civil Procedure and applicable case law.[101] These standards govern appellate review of a lower court's findings throughout different stages of litigation.

1. Levels of Scrutiny

Under the federal standards, appellate courts, such as the Supreme Court, review lower courts' findings under three levels of scrutiny—de novo, clearly erroneous, and abuse of discretion. Each level of scrutiny establishes a different amount of deference that the appellate court must grant to the lower court's findings.[102]

When an appellate court reviews a lower court's findings of fact in a bench trial, the clearly erroneous standard applies. Here, the reviewing court grants great deference to the trier of fact and reverses a judge's factual findings only if the findings are clearly erroneous.[103] Conversely, appellate courts review challenges to a lower court's conclusion of law de novo. In de novo review, the appellate court grants no deference to the lower court's findings, making its legal determinations with complete independence.[104] Last, when reviewing a challenge

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Federal Rules of Criminal Procedure and applicable case law. State law governs appellate review in most state cases.

99. U.S. CONST. art. III, § 2.

100. Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. BAR J. 279, 281–284 (2002).

101. *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010). *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Revie*w, 13 LEWIS & CLARK L. REV. 233, 236–238 (2009).

102. HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS ch. I, Westlaw (Updated 2018).

103. FED. R. CIV. P. 52(a)(6); EDWARDS & ELLIOTT, *supra* note 102, at ch. I.B. *See* United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (Under the clearly erroneous standard, the appellate court gives deference to the lower courts finding unless the reviewing court "is left with the definite and firm conviction that a mistake has been committed").

104. EDWARDS & ELLIOTT, *supra* note 102, at ch. I.B. *See, e.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947–48 (1995).

to a judge's discretionary decisions, such as procedural and evidentiary decisions, appellate courts apply the abuse of discretion standard.[105] In addition, the appellate court can review any case for plain error.[106] But these standards of review are not as clean-cut in their application as they appear on paper.[107]

2. Standards of Review for Preliminary Pleadings

Appellate courts review preliminary motions, such as motions to dismiss and motions for summary judgment, de novo.[108] Appellate courts, including the Supreme Court, review not only if the lower court reached the right legal conclusions, but also if the court properly applied the standard applicable to each type of motion.[109]

a. Motions to Dismiss

For motions to dismiss, federal courts follow Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss must be granted if the plaintiff "fail[s] to state a claim upon which relief can be granted."[110] In this inquiry the court must "take all of the factual allegations in the complaint as true."[111] And the court must apply a plausibility standard—the

105. *See* Regina Stone-Harris, *Using Standards of Review as a Guide to Filing Pretrial Motions in Federal Court*, FED. LAW., Aug. 2011, at 22, 22 ("When reviewing for abuse of discretion, the appellate court does not ask whether it would have made the same ruling as an original matter, but, instead, whether the district court abused its discretion under the applicable standards of determination of any motion.").

106. Nelson S. Ebaugh, *The Supreme Court Broadens the Scope of Plain-Error Review (a Little)*, HOUS. LAW., Mar./Apr. 2021, at 41, 41 ("If unpreserved error on appeal is plain, i.e., clear or obvious, a federal appellate court may correct the error if it affects the defendant's substantial rights and seriously affects the fairness, integrity, or public reputation of judicial proceedings.").

107. Appellate courts often review cases that are a mixed question of law and fact. This can create confusion about what type of scrutiny the reviewing court should apply. *See* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 101–03 (2005). Further, even if an appellate court finds an error on review, the court must still apply the harmless error doctrine. *See* EDWARDS & ELLIOTT, *supra* note 102, at ch. I.B ("[A]lthough an appellate court presented with a properly preserved issue may determine that a legal, factual, or discretionary error was committed, the error must be disregarded if it is harmless.").

108. Stone-Harris, *supra* note 105, at 23–24; EDWARDS & ELLIOTT, *supra* note 102, at ch. III.B.

109. Todd J. Bruno, *Say What?? Confusion in the Courts over What Is the Proper Standard of Review for Hearsay Rulings*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 1, 6–9 (2013).

110. FED. R. CIV. P. 12(b)(6).

111. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

complaint must "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[112] Appellate courts review motions to dismiss de novo because the relevant inquiry is a question of law based solely on the factual allegations set forth in the complaint.[113]

b. Motions for Summary Judgment

For summary judgment motions, federal courts follow Federal Rule of Civil Procedure 56. Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[114] In this determination, the "court must view the evidence 'in the light most favorable to the opposing party.'"[115] And the court examines the record as a whole, including "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."[116]

Appellate courts review motions for summary judgment de novo, applying the same Rule 56 standard as the lower court, but without deference to the lower court's decisions.[117] So, unlike the deference required when an appellate court reviews a trial court's fact pattern, for summary judgment review, the appellate court need not defer to the facts established by lower courts. The appellate court has a blank check to create its own factual narrative confined only by the record provided by the lower court.[118]

112. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

113. Stone-Harris, *supra* note 105, at 23. *See, e.g.*, Carroll v. Fort James Corp., 470 F.3d 1171, 1173–74 (5th Cir. 2006).

114. FED. R. CIV. P. 56(a). *See* EDWARDS & ELLIOTT, *supra* note 102, at ch. III.B ("Those standards are largely derived from Federal Rule of Civil Procedure 56 and the Supreme Court's seminal decisions in Anderson v. Liberty Lobby . . . and Celotex Corp. v. Catrett.").

115. Tolan v. Cotton, 572 U.S. 650, 657 (2014) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

116. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c) (2006) (amended 2007)).

117. EDWARDS & ELLIOTT, *supra* note 102102, at ch. III.B. *See, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 158 (1st Cir. 1998) ("We review grants of summary judgment de novo."); Birch v. Polaris Indus., Inc., 812 F.3d 1238, 1251 (10th Cir. 2015).

118. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1076 (2003) ("Rule 56 decisions are subject to de novo review, the appellate court is limited to the record before it.").

B. Understanding the Summary Judgment Standard

Summary judgment, as decided in *Kennedy*, is a complex standard to unpack both in understanding and application. Summary judgment exists to save public and private resources by allowing district judges to "pierce the pleadings" to determine "whether there is a genuine need for trial."[119] But courts must walk a fine line. When reviewing a summary judgment motion, the court can only determine whether triable issues exist, but it cannot act as a factfinder, try issues of fact, or make credibility determinations.[120]

A court can only grant summary judgment if the movant shows there is "no genuine dispute as to any material fact."[121] But it can be difficult to decide what constitutes a material factual dispute. This determination "turns on the burden of production."[122] The "mere existence of *some* alleged factual dispute between the parties" does not constitute a dispute of material fact.[123] For a court to consider a factual dispute material, it must affect the case's outcome.[124]

To put it another way, a dispute of material fact only exists if the "quantity" of evidence would "allow a rational finder of fact" to "return a verdict for the nonmoving party."[125] If after examining the record a factfinder could not "find for the nonmoving party, there is no 'genuine issue for trial.'"[126] But once a court finds a genuine issue of material fact that can reasonably be resolved in favor of either party, the court *must* deny the summary judgment motion.[127]

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119. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting FED. R. CIV. P. 56(e) advisory committee's note to 1963 amendment).

120. *See Anderson*, 477 U.S. at 249 (explaining that at summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774, 778–80 (1983).

121. FED. R. CIV. P. 56(a).

122. Cavanagh, *supra* note 11, at 84.

123. *Anderson*, 477 U.S. at 247–48. *See also* Cavanagh, *supra* note 11, at 89 ("[T]o withstand a motion for summary judgment, the plaintiff must do more than simply create 'metaphysical doubt'; it must come forward with facts showing a genuine issue for trial." (quoting *Matsushita*, 475 U.S. at 586)).

124. *Anderson*, 477 U.S. at 248.

125. *Id.* at 248, 254.

126. *Matsushita*, 475 U.S. at 587 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 (1968)).

127. *Anderson*, 477 U.S. at 250.

Because appellate courts review summary judgment motions de novo, the appellate court must independently determine (1) if there are facts in dispute, (2) if the disputed facts are material, and (3) if the factual dispute creates a genuine issue that a tier of fact can resolve.[128]

III. UNDERSTANDING *KENNEDY*

Part I of this Note explored the procedural history and disputed facts in *Kennedy*. Part II addressed the procedures and precedents governing the Supreme Court's review of summary judgment motions. But the ultimate question remains—what caused such an irreconcilable factual dispute between the majority and dissent in *Kennedy*? The answer comes from the *how* and *why* behind the factual dispute.

First, there is the how—how did this factual dispute occur at the Supreme Court level? One explanation is that the *Kennedy* record contained a genuine dispute of material fact. Yet, the Court failed to follow Rule 56, which requires the denial of summary judgment in the face of such a dispute.[129] Instead, the majority and the dissent kept the fact-finding power for themselves and resolved the factual disputes in the manner that best supported the legal conclusion each side wanted to reach—creating a factual discrepancy. In other words, the majority's and dissent's clashing interpretations of the record seemingly illustrate the genuine issues of fact at the heart of *Kennedy*.

Second, there is the why—why did the justices choose not to remand the case as appellate courts typically do when a district court grants summary judgement despite a genuine dispute of material fact? Following the rationale of Professor Andrew Pollis,[130] referred to in this Note as the *Trial Skeptics Theory*, the Court's decision to not deny summary judgment to allow a factfinder to resolve *Kennedy*'s factual disputes is yet another step of the Supreme Court's taking and handing traditional fact-finding power from jurors to judges.[131]

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128. Robert L. Arrington, *The Dirty Little Secret About Summary Judgment*, TENN. BAR. J., Sept./Oct. 1996, at 12, 13.

129. *See supra* note 114 and accompanying text.

130. Andrew S. Pollis is a Professor of Law at Case Western Reserve School of Law and author of *The Death of Inference*, a paper addressing the modern shift of fact-finding inference power from jurors to judges. Andrew Pollis's research and observations played a critical role in both the inspiration for and findings that I made in Part III of this Note.

131. Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 437–39 (2014). Coach Kennedy timely requested a jury trial in his complaint. His prayer for relief was not a model of clarity, but he sought various declarations of unlawful discrimination under the Declaratory Judgment Act in addition to "all other appropriate relief" and specifically included a request for pre- and post-judgment interest. Complaint at 16–17, Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223 (W.D. Wash.

A. The Court Ignores the Rule 56 Standard

The main dispute in *Kennedy* is the facts. In the very first line of *Kennedy*, the majority opens: "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."[132] The dissent counters: "To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts."[133] Over and over, the majority's and the dissent's factual narratives conflicted.[134]

As established in Part II, the Supreme Court reviewed Kennedy's summary judgment motion de novo.[135] The Court had to follow the summary judgment standard laid out under Rule 56 and applicable case law and use the record established by the district court. But the Court was not bound by any of the lower court's decisions or factual narratives.[136]

Reviewing de novo under Rule 56, the Court in *Kennedy* had to determine (1) if there were facts in dispute, (2) if the disputed facts were material, and (3) if the factual disputes created a genuine issue that a trier of fact could resolve.[137] Yet throughout the majority's opinion, not once did it acknowledge any factual dispute. And the dissent, although acknowledging a factual dispute, never addressed how the dispute potentially conflicted with the summary judgment standard.[138] So, this Note takes to that task.

First, there are undoubtedly disputed facts within *Kennedy*. Part I.C. lists at *least* six factual disputes between the majority and the dissent.[139] Second, the disputed facts in Kennedy are material. As explained in Part I.C., each of the six listed factual disputes had a material impact on *Kennedy*'s outcome. For example, regarding the relevant time frames, the majority claimed only Kennedy's postgame

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2020) (No. 3:16-cv-05694). *See also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (explaining that the Declaratory Judgment Act "specifically preserves the right to jury trial for both parties").

132. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022) (Majority).

133. *Id.* at 2434 (Dissent).

134. *See supra* Part I.C.

135. *See* Arrington, *supra* note 128 and accompanying text.

136. *See supra* notes 114–28 and accompanying text.

137. *See* Arrington, *supra* note 128 and accompanying text.

138. *Kennedy*, 142 S. Ct. at 2415–19 (Majority); 2434–40 (Dissent).

139. Additional factual disputes could also have been included in Part I.C. For example, the majority's and dissent's factual narratives regarding the impact Kennedy's religious activities had on the rest of Bremerton's coaching staff also conflict. *Compare id.* at 2419 (Majority), *with id.* at 2440 (Dissent).

prayers during the three October games were relevant for the constitutional analysis. Conversely, the dissent claimed that the Court should consider all of Kennedy's religious practices at Bremerton—his locker-room prayers, postgame religious speeches, and team prayers—in addition to the three October games.[140] This in turn affected the Court's coercion analysis under the Establishment Clause. During the three October games, none of Kennedy's players joined his midfield prayer. So, viewing those games in isolation, the majority had a stronger claim that Kennedy did not coerce players. But when considering Kennedy's years of religious practices together with the October games, the coercion analysis fell the opposite way.[141] And this is only one of the factual disputes. Even if one or two of the disputes separated from the rest are not outcome determinative, when viewing all six together, it is hard to contest their materiality.[142]

Third, the disputed facts, when combined, create a genuine issue a trier of fact could resolve. Constitutional scholar Professor Sanford Levinson noted:[143]

> Frankly, depending on which version of the facts you believe, it's an easy case either way. If you accept the district's description of what's going on, then I think it is clearly constitutional to prohibit the coach from doing that. . . . But if you accept the coach's version of events, then he ought to win, because he is a lone individual who just happens to be a coach and, when he goes to the 50-yard line to pray, he's doing so simply as a private individual, hoping nobody will notice.[144]

The quantity of evidence each opinion presented would allow a rational factfinder to return a verdict for either party.[145] If the factfinder believed the majority's narrative, she could reasonably decide in favor of Kennedy. But if the factfinder believed the dissent's narrative, she

140. *See supra* Part I.C.4.

141. *See supra* Part I.C.4.

142. Timeframe disputes can be outcome-determinative in jury trials. For example, in the Kyle Rittenhouse trial, one of the main arguments between the state and defense was how the jury should view the relevant timeframe for the self-defense determination. *See Expert at Rittenhouse Trial Zeroes in on Just a Few Minutes*, POLITICO (Nov. 11, 2021, 2:48 PM), https://www.politico.com/news/2021/11/11/kyle-rittenhouse-trial-kenosha-520901 [https://perma.cc/46FW-8SCS].

143. Sanford V. Levinson is a Professor of Law at The University of Texas School of Law.

144. Neal, *supra* note 3.

145. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

could reasonably determine the case should have turned out differently.[146]

Combining these three steps, it is easy to see how a material factual dispute existed for which the Supreme Court could have denied summary judgment under Rule 56 and remanded the case to a trier of fact. So why did neither the majority nor the dissent choose this option?

B. The Trial Skeptics Theory: Kennedy *as an Expansion of Judicial Fact-Finding*

One explanation for why the Court in *Kennedy* did not allow a factfinder to resolve the factual discrepancies under Rule 56 stems from the powershift within the court system to expand judicial fact-finding power on preliminary motion review—the *Trial Skeptics Theory*. As discussed in Part II, the Court follows established standards for reviewing pleadings, such as motions to dismiss and for summary judgment.[147] But case law has developed the application of these standards over time. Professor Pollis argues that over the last few decades the Court has developed the preliminary pleading standards to expand judges' power to make factual inferences and resolve factual disputes, limiting the traditional role of juries.[148] Professor Pollis argues, "[J]udges now enjoy ever-greater power to dispose of cases—and thus to draw their own inferences—instead of honoring the historic tradition of permitting juries to evaluate competing inferences. And they do so based on paper records instead of live-witness trials."[149]

1. The Shift of Fact-Finding Power

In the past, when factual disputes arose within cases, judges erred on the side of caution to avoid acting as a factfinder.[150] Judges willingly allowed cases to proceed to trial because courts respected "the importance of resolving cases through live testimony, rather than paper motions, precisely because of the role that demeanor evidence plays in credibility determinations."[151]

146. *Id.* at 250.

147. *See supra* Part II.A.2.

148. *See* Pollis, *supra* note 131, at 437–39, 450, 490.

149. *Id.* at 437.

150. *Id.* at 450 ("Historically, some judges were perhaps overly deferential to the jury's fact-finding role . . . .").

151. *Id.* at 442. *See also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases.").

But over the last few decades, this changed. Courts questioned "the practical abilities and limitations of juries" and their ability to decide complicated factual disputes.[152] Therefore, the Court expanded judges' gatekeeper function by allocating them more power to resolve cases at the pleading stage, limiting the scope of the Seventh Amendment by preventing cases from reaching the courtroom.[153] To do this, the Court gave judges a piece of jurors' traditional role—to make factual inferences and resolve factual discrepancies.[154]

a. Motions to Dismiss

For motions to dismiss, this shift of power became apparent in the 2000s when the Court adjusted the pleading standard by granting judges one of their ultimate gatekeeping functions—the plausibility standard.[155] Under Civil Rule of Federal Procedure 8(a)(2), a claimant only needs to allege in her complaint "a short and plain statement of the claim showing that the pleader is entitled to relief."[156] But in 2007 and 2008, in the landmark cases of *Bell Atlantic Corp. v. Twombly*[157] and *Ashcroft v. Iqbal,*[158] referenced together as *Twiqbal*, the Court heightened the complaint pleading standard.[159] No longer could plaintiffs provide a short, plain statement of facts *possible* to support their claim, rather they had to establish enough factual evidence to make their claim *plausible*.[160]

152. Pollis, *supra* note 131, at 444 (quoting Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)).

153. *Id.* at 446, 450–55; Clermont & Yeazell, *supra* note 101, at 824 ("Pleading serves as the gatekeeper for civil litigation.").

154. *See* Pollis, *supra* note 131, at 450–55.

155. *See* Clermont & Yeazell, *supra* note 101, at 824–29; Pollis, *supra* note 131, at 451.

156. FED. R. CIV. P. 8(a)(2).

157. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

158. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

159. *See* Clermont & Yeazell, *supra* note 101, at 826–30 (discussing the background and implication of these cases).

160. *Id.* at 829–30 ("[T]he plaintiff has the burden of establishing, by nonconclusory allegations, the complaint's plausibility as to liability on the merits."). The *Twiqbal* plausibility standard affects the approximately 300,000 civil cases filed per year in the federal court system, all bound "by the Supreme Court's interpretation of the Federal Rules of Civil Procedure." *Id.* at 831. *See also Federal Judicial Caseload Statistics 2022*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/YUB5-XDYF] (last visited Oct. 16, 2023) ("Civil case filings in the U.S. district courts dropped . . . to 309,102.").

Now, when federal court judges review motions to dismiss under Rule 12(b)(6), if the judge finds the facts alleged in the complaint are *implausible* to support a claim, the judge can dismiss the case.[161] This change undeniably grants judges a huge amount of power. Judges can resolve cases based on their interpretation of the plausibility of facts established in a single paper document in place of a jury's determination of the facts plausible to support a winning verdict at trial.[162] But this was "only one slice of a larger pattern of power reallocation that has diminished the jury's role in evaluating circumstantial evidence."[163]

b. Motions for Summary Judgment

The Court also expanded judges' fact-finding power under the summary judgment standard.[164] After the promulgation of the Federal Rules of Civil Procedure, the Court originally approached the Rule 56 standard cautiously. Courts seemingly followed a "slightest doubt" standard, finding that "summary judgment should not be granted when there was the 'slightest doubt as to the facts.'"[165] When factual disputes arose, courts favored allowing cases to proceed to trial rather than to conduct a "trial[] by affidavit."[166] But this changed. The Court gradually expanded judges' factual inference power under Rule 56, increasing judges' confidence in granting summary judgment motions in the process.[167]

First, the Court imputed a plausibility standard on summary judgment review. A judge who found an argument implausible could reject the argument to grant or deny summary judgment.[168] For

161. FED. R. CIV. P. 12(b)(6); Clermont & Yeazell, *supra* note 101, at 829–30.

162. Clermont & Yeazell, *supra* note 101, at 837–38.

163. Pollis, *supra* note 131, at 435.

164. Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005).

165. Miller, *supra* note 118, at 1020–22 (quoting Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946)).

166. Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 98 (2002) (quoting Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1020 (1992)). *See, e.g.*, Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (declaring courts should grant summary judgment sparingly in complex antitrust cases).

167. Miller, *supra* note 118, at 1132 ("By equating the plaintiff's rights to a day in court and jury trial with the defendant's opportunity under Rule 56 to establish that a trial is unnecessary, the *Celotex* Court did convey a pro-summary judgment message . . . .").

168. Cavanagh, *supra* note 11, at 82.

example, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[169] the Court held a judge could find a claim "implausible" if it did not make "economic sense."[170] Further, in *First National Bank of Arizona v. Cities Service Co.*[171] the Court rejected an antitrust claim at summary judgment because it found the "defendant's lawful explanation for its conduct was 'much more plausible' than the plaintiff's theory of liability."[172] These cases expanded a judge's ability to decide arguments based on their interpretations of what evidence made a claim plausible. And the Court made these inferences without acknowledging that jurors as "rational actors evaluate [evidence] differently" and draw separate inferences "based upon the demeanor of . . . witnesses at trial."[173]

Second, in 1986 the Court decided a trilogy of summary judgment cases that expanded the scope of Rule 56 and substantially increased judicial power to decide cases at summary judgment.[174] First, in *Celotex Corp. v. Catrett*,[175] the Court expanded judges' ability to decide summary judgment motions by reducing the evidentiary burden of movants without a burden of proof.[176] Then, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court extended judges' power to grant summary judgment by heightening the amount and type of evidence needed for a nonmovant to establish a material factual dispute that can overcome a motion for summary judgment.[177] The Court found that the nonmoving party must show more than a "metaphysical doubt as to the material facts" to create a "genuine issue for trial" under

169. 475 U.S. 574 (1986).

170. *Id.* at 587–88 (denying summary judgment because the court found an allegation about a defendant's motive for intentional misconduct was "implausible" since it required the factfinder to determine that the defendant corporation acted against their own economic interest, an "economically irrational" inference). *But see id.* at 604 ("I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.") (White, J., dissenting).

171. 391 U.S. 253 (1968).

172. Pollis, *supra* note 131, at 465 (quoting *First Nat'l Bank of Ariz.*, 391 U.S. at 285).

173. *Id.* at 453, 465.

174. Friedenthal & Gardner, *supra* note 166, at 101. These cases overruled the "slightest doubt" standard. *See supra* note 165 and accompanying text.

175. 477 U.S. 317 (1986).

176. *Id.* at 331–33 (Brennan, J., dissenting); Friedenthal & Gardner, *supra* note 166, at 101–02 (After *Celotex*, movants only have the burden at summary judgment to "demonstrat[e] that the opponent, who bears the burden of proof at trial, will be unable to present any evidence to satisfy that burden."); Redish, *supra* note 164, at 1333.

177. *Id.* at 586–87; *see also supra* Part II.B.

Rule 56.[178] Rather, the nonmovant has to produce sufficient evidence of a material factual dispute that could "lead a rational trier of fact to find for the non-moving party."[179] Last, in *Anderson v. Liberty Lobby Inc.*,[180] the Court reaffirmed this standard. The Court held that a party opposing summary judgment could not "defeat a defendant's properly supported motion" by "merely asserting that the jury might, and legally could, disbelieve" the movant's claim.[181] Rather the nonmovant must "set forth specific facts showing that there is a genuine issue for trial" which could lead a jury to return a verdict in the nonmovant's favor.[182]

Judge Patricia Wald notes that the 1986 trilogy sent a message to lower courts to "go forth, and grant summary judgment."[183] These cases expanded the plausibility standard in summary judgment review—allowing judges to determine how a jury could *rationally* view the evidence based on a paper record.[184] And the more that the Court heightened the amount of evidence needed for a nonmovant to establish a material factual dispute, the more the Court enabled judges to weigh evidence and make credibility determinations in order to find a party's argument implausible or a dispute immaterial.[185] And the effect of these decisions was an increase in judges' granting summary judgment motions and a steep drop in jury trials.[186]

178. *Matsushita*, 475 U.S. at 586–87 ((quoting FED. R. CIV. P. 56(e) (2009) (amended 2010)).

179. *Id.* at 587.

180. 477 U.S. 242 (1986).

181. *Id.* at 256. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252.

182. *Id.* at 256; *see also supra* Part II.B.

183. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1926 (1998).

184. *See* Cavanagh, *supra* note 11, at 91–93.

185. Clermont & Yeazell, *supra* note 101, at 833–34 (In summary judgment a judge determines "whether a factual assertion is reasonably possible."); Pollis, *supra* note 131, at 453 ("These conceptions of implausibility necessarily employ individual value judgments.").

186. Miller, *supra* note 118, at 1049 ("[T]he percentage of cases in which one or more Rule 56 motions were granted increased from six percent in 1975 to twelve percent in 2000."); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) ("[T]here was an increase in trials, peaking in 1985, when there were 12,529. From then to now, the number of trials in federal court has dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent.").

2. The Shift Continues Through *Scott v. Harris*

In *Scott v. Harris*,[187] the Court took yet another step to expand judges' inferential power to resolve factual disputes at summary judgment. In *Scott v. Harris*, the Supreme Court affirmed a lower court's grant of summary judgment, examining whether a driver in a police chase drove in such a dangerous fashion as to justify an officer's use of deadly force.[188]

a. The Factual Dispute in Harris

In *Harris*, a major factual dispute existed between the majority's and the dissent's portrayal of the bodycam video from the police chase. In the majority's portrayal of the video, after an officer caught a driver going 73 miles per hour on a 55-mile-per-hour road, a "Hollywood-style car chase" ensued.[189] The driver went speeds over 85 miles per hour on a mostly two-lane road, swerved around cars, ran red lights, and drove in the wrong lane. At one point, officers trapped the driver in a parking lot, but the driver crashed into an officer's car and managed to get away.[190] After all of this, an officer used a Precision Intervention Technique by colliding into the back of the driver's car. This forced the car off the road but resulted in a nearly fatal crash.[191]

Justice Breyer's dissent completely contradicted the majority's interpretation of the video. Breyer depicted that on "a lightly traveled road in Georgia" officers caught a driver going 73 miles per hour on a four-lane highway.[192] A chase ensued. But, because of the police sirens, almost all other cars were pulled over during the chase, making driving between cars "not especially dangerous."[193] The driver only went through two intersections with stoplights. At both lights, all vehicles were stationary. The driver slowed and waited for cars to pass before driving into opposite lanes, only changed lanes five times, and used turn signals. And during the parking lot incident, no other drivers were around.[194] Justice Breyer concluded that the driver did not create any "close calls" where other drivers could have gotten hurt. So, Justice Breyer argued that a factfinder could find the officer was not justified

187. 550 U.S. 372 (2007).

188. *Id.* at 374, 385–86.

189. *Id.* at 374–75, 380.

190. *Id.* at 375.

191. *Id.*

192. *Id.* at 389–90 (Stevens, J., dissenting).

193. *Id.* at 391–92.

194. *Id.*

to use a deadly pull-over technique that rendered the driver a quadriplegic.[195]

b. Summary Judgment Analysis

In the majority's determination of whether there existed a material factual dispute, the Court endorsed a new summary judgment standard. Typically, on summary judgment, courts view the facts in the light most favorable to the non-moving party.[196] But in *Harris*, because the officer provided a bodycam video, the majority decided that the video did not need to be viewed in the light most favorable to the nonmoving party.[197] The Court stated, "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party *only if there is a 'genuine' dispute as to those facts.*"[198]

With this new standard, it appears that the Court created a plausibility standard even in its review of a summary judgment record. Courts must view the evidence in favor of the nonmovant only if a judge finds it plausible that factfinders could genuinely dispute how to view the evidence.[199] In *Harris*, the majority determined that because they had tangible evidence (a video) the way to view that video was undisputable—the majority's interpretation was the only *reasonable* way. Under this view, the majority determined that "no reasonable jury could have believed" the police officer used excessive force.[200]

But people can view tangible evidence, such as a video, photo, or sound recording, in different ways.[201] People's life experiences and beliefs shape how they see the world around them and the facts within a case. And this can occur when reviewing a written record, video, photograph, or any other type of evidence.[202] So Justice Breyer's dissent exposed this inherent flaw in the majority's reasoning. He ended his dissent by stating that reasonable citizens could view the bodycam video in different ways; therefore, the Court should have denied summary judgment and allowed the "jurors in Georgia . . . to evaluate the reasonableness of the decision to ram respondent's speeding vehicle

195. *Id.* at 392, 396–97.

196. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

197. *Harris*, 550 U.S. at 379–80.

198. *Id.* at 380 (emphasis added); Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1359 (2015).

199. Wolff, *supra* note 198, at 1359.

200. *Harris*, 550 U.S. at 380.

201. EDWARD BRUNET, JOHN PARRY & MARTIN REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 6:5 (Westlaw) (Updated Dec. 2022).

202. Pollis, *supra* note 131, at 474.

in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of nineteen."[203]

3. Explaining *Kennedy*

The shift of the fact-finding power from jurors to judges in the pleading stage has progressed step by step from *Anderson* to *Twiqbal* to *Harris* and now to *Kennedy.* The Court has continuously imputed and increased a plausibility standard at the pleading stage when potential factual disputes arise. This allows judges to resolve cases that once would have gone to a factfinder to decide at trial.[204] Under the *Trial Skeptics Theory*, the factual dispute in *Kennedy* is a result of this trend.

In *Kennedy*, an irreconcilable factual dispute existed between the majority and the dissent. The Court could have chosen to leave the dispute for a jury to resolve. Yet the majority took matters into their own hands, resolved the dispute in the way they felt any "reasonable" jury would view the evidence, and granted summary judgment.[205] This closely parallels the Court's approach in *Harris*. It appears the *Kennedy* majority, like the *Harris* majority, believed that their way of viewing the evidence was the only plausible way that a jury could decide the case. And the *Kennedy* majority found this although their decision and fact pattern completely differed from that of the lower courts.[206]

The *Kennedy* dissent is guilty of a similar vice. Unlike the dissent in *Harris*, the *Kennedy* dissent never demanded the Court leave the factual disputes for a factfinder to decide. Instead, the dissent dug in its heels, published pictures of Kennedy's religious activities to support its factual narrative, and resolved the disputed facts in the manner that best supported its legal conclusions. Then the dissent argued that was the true factual perspective to view the record.[207] Just as the *Harris* majority viewed the bodycam video as indisputable, the *Kennedy* dissent appears to think its use of pictures—a form of visual, tangible evidence—resolved any possible factual disputes. Apparently, if the Court uses a picture or video to support its summary judgment conclusion, this defeats the need for a trial.[208]

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203. *Harris*, 550 U.S. at 397 (Stevens, J., dissenting).

204. *See supra* Part III.B.

205. *See supra* Part I.C.

206. *See supra* Part I.B.

207. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Dissent). *See also supra* Part I.B.3, I.C.

208. *See generally* Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997) (explaining problems with the Court's use of tangible evidence in its opinions).

But *Kennedy* also goes a step beyond *Anderson, Twiqbal*, and even *Harris*. In those cases, the Court at least acknowledged the Rule 56 standard and how they interpreted the factual disputes considering this standard.[209] The *Kennedy* majority never acknowledged the Rule 56 standard or that there even existed disputed facts in the record.[210] And the *Kennedy* dissent, although acknowledging some disputed facts, never acknowledged how the factual disputes related to or should have been interpreted under Rule 56.[211]

After *Kennedy*, it appears Rule 56 is becoming empty words on paper. If *Kennedy* is the controlling precedent on how to review factual disputes on summary judgment, the new plausibility standard is that courts can resolve disputes in any way that most plausibly supports their desired legal conclusions. Summary judgment is a "trial on affidavits"—exactly what the Court once warned against in *Anderson*.[212]

In conclusion, the factual dispute in *Kennedy* occurred because a material dispute of fact existed in the record, but the majority and dissent ignored the Rule 56 standard and resolved the dispute in a manner that best supported their legal conclusions. And this explains why the majority and dissent published such different factual narratives. Reasonable people with different experiences viewed the facts in different ways. The majority in *Kennedy*, made up of six Republican-appointed justices, saw the facts in a way that promoted religious liberties. The dissent, made up of three Democrat-appointed justices, saw the facts differently based on their own political beliefs. This is the essence of a material factual dispute under Rule 56 that a jury could have, and should have, resolved.

IV. THE CONSEQUENCES OF *KENNEDY*

The shift in fact-finding power from jurors to judges has changed the structure of the court system. The United States centers on the right and control of the people at each branch of government.[213] The U.S. legal system has prided itself in allowing jurors—"ordinary citizens

209. *See supra* Part III.B.

210. *Kennedy*, 142 S. Ct. at 2415–33 (Majority).

211. *Id.* at 2434 (Dissent).

212. *See* Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) ("Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. *It by no means authorizes trial on affidavits.*" (emphasis added)).

213. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (noting that the jury's function in "both civil and criminal proceedings . . . was to protect ordinary individuals against governmental overreaching.").

with a diversity of human experiences"—to decide factual disputes.[214] The right to a jury trial in civil cases is so fundamental that it was written into the Seventh Amendment.[215] But today, the shift of fact-finding power exhibits how the Court has departed from this traditional view. The Court no longer trusts ordinary citizens to decide factual inferences. And in some ways, citizens have willingly handed over this power, favoring the efficiency and cost of avoiding trial.[216] But the shift in fact-finding power comes at a price.

First, increasing judges' ability to decide cases at the pleading stage means courts decide more cases based on paper motions instead of live trials.[217] At summary judgment, judges have a selective record from which they must decide the case. At trial, factfinders have a fully developed record in which they can evaluate witnesses' credibility and demeanor, and witnesses are subject to cross-examination.[218] Live testimony and evidence present nuances and inferences that might never come forth from "unwieldy paper records."[219]

Second, the shift in fact-finding power limits the unique perspective jurors bring to the legal system. Evidence shows that judges and jurors view information differently. Most jurors are "primarily affective ('right brain')" oriented.[220] This means that they are usually "more interested in people than problems" and more likely to make decisions considering their own life experiences.[221] Judges, however, see information differently. Judges have undergone years of law school and legal practice where they are trained to use linear reasoning to follow a

214. Pollis, *supra* note 131, at 436; Miller, *supra* note 118, at 1082 ("[T]he accepted wisdom about the law-fact spectrum is that judges determine the law and juries the facts.").

215. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.").

216. Cavanagh, *supra* note 11, at 122 ("Summary judgment is here to stay and will continue to be an important managerial tool as dockets expand and litigation costs soar.").

217. *See supra* note 186 and accompanying text.

218. Cavanagh, *supra* note 11, at 115–16; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77–78 (1990).

219. Cavanagh, *supra* note 11, at 116 ("Paper records created on summary judgment, not subject to the discipline and rigors of trial presentation, may prove unwieldy for judges.").

220. *See* THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 43–45 (10th ed. 2017).

221. *Id.* Research also shows jurors are more likely to "assess the whole body of evidence and decide the most probable narrative that can be drawn from it." Pollis, *supra* note 131, at 475.

pattern of information considering the relevant law.[222] Judges are trained to see the problem rather than the people involved and make decisions based on logic rather than emotion or life experience.[223] The different ways in which judges and juries view evidence is why in most civil cases plaintiffs prefer a jury trial.[224] This is because jurors are more perceptive to the people in front of them rather than applying the law to a fact pattern.[225]

Third, handing fact-finding power from a group of jurors to a single judge can have dangerous consequences. Both jurors and judges have biases, implicit or explicit, when viewing the facts of cases—whether in a paper motion or in person.[226] But most juries are composed of eight to twelve people, coming with diverse backgrounds, experiences, perspectives, and varying levels of education.[227] The number and composition of civil juries provide a check against an individual juror's biases affecting a case's outcome. Juries are more likely to decide cases based on a variety of different perspectives and factual inferences.[228] Conversely, when a case is decided on a preliminary pleading, a single federal judge usually makes this decision.[229] Judges have their own biases that factor into their decisions based on their beliefs and life experiences. Biases that can easily go unchecked.[230]

Last, jurors act as a "safeguard against tyranny."[231] They input into the legal system societies' "tolerance or intolerance for certain kinds of conduct."[232] They draw lines on what is a "reasonable speed" or "ordinary care" in disputes.[233] Jury verdicts reflect societal norms and values. When judges take this power and input their "own values and norms"

222. Pollis, *supra* note 131, at 475.

223. *Id.* Although that is not to say judges' implicit and personal biases do not factor into their decisions. *Id.* at 449.

224. Cavanagh, *supra* note 11, at 84.

225. *See* MAUET, *supra* note 220, 43–45.

226. Pollis, *supra* note 131, at 449.

227. *Id.* at 472 (quoting Maher v. People, 10 Mich. 212, 222 (1862)) ("Jurors historically . . . come from 'the various classes and occupations of society.'").

228. *Id. But see* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 6 (2012) (discussing the limitations of jurors).

229. Redish, *supra* note 164, at 1357.

230. Pollis, *supra* note 131, at 449.

231. *Id.* at 477 (quoting William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1697 (2001)).

232. *Id.*

233. *Id.* (quoting Richard D. Friedman, *Generalized Inference, Individual Merits, and Jury Discretion*, 66 B.U. L. REV. 509, 511 (1986)).

in place of juries', they "undermine[] the jury's political function and skew[] the way in which we shape and perceive community standards."[234]

So, the decision comes down to who should hold more fact-finding power in the American legal system. Do we want to hand more power to a "relatively homogenous" judicial bench made of individuals that Justice Antonin Scalia even admitted are part of an "elite class"?[235] A class whose lived experiences might be unlike those of normal American citizens. A class that might implicitly favor "societal elites such as government officials, large corporations, or employers."[236] Or, do we want factual decisions made by eight to twelve ordinary citizens who view the facts of everyday life under their common experiences? The citizens to whom the Seventh Amendment traditionally granted fact-finding power.[237]

As Chief Justice Roberts once admitted, a judge's job is to "call balls and strikes, and not to pitch or bat."[238] But in *Kennedy,* it appears the majority and dissent decided to take a swing at the plate. And the consequence was another step toward the destruction of the jury trial. Continuously, people note that jury trials are dying.[239] And the increase of judges' power to resolve cases at the pleading stage is a notable reason why.[240] If the American legal system wants to save the jury trial, one step it must take is to stop expanding judges' fact-finding role, especially on summary judgment. Under Rule 56, in the face of material factual disputes, courts must favor leaving factual disputes and inferences for a factfinder.

234. *Id.*

235. Pollis, *supra* note 131, at 473; Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

236. Spencer, *supra* note 109, at 187.

237. *See supra* note 215 and accompanying text.

238. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J. D.C. Cir.).

239. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004) ("[I]t would seem that trial rates are not just low, they are vanishing: according to these statistics, the percentage of civil cases terminated by either a bench or jury trial fell over the past several decades, from 11.5 percent in 1962 to 1.8 percent in 2002.").

240. *See generally* Pollis, *supra* note 131; Miller, *supra* note 118.

Conclusion

No matter whose factual narrative one believes is the correct way to view *Kennedy*, an overarching theme governs—*Kennedy* is the result of the shift of fact-finding power within the judiciary. The Court lacked trust in the American citizenry. And so, the Court stepped in and took matters into its own hands by making itself a factfinder. In *Kennedy*, that came at a cost. And that cost, at a minimum, is overstepping the Rule 56 summary judgment standard. So, this Note can offer a solution to help prevent future factual discrepancies in Supreme Court opinions. The Supreme Court should stay faithful. Faithful to the precedent. Faithful to the established procedures. Faithful to the facts.[241]

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† 2024 J.D. Candidate, Case Western Reserve University School of Law; B.A. History, 2021, Franciscan University of Steubenville. I would like to thank Professor Jonathan Entin for meeting with me ten more times after I promised, "This is the last time we need to meet about my Note." I would also like to thank Professor Cassandra Robertson for her guidance and Professor Jennifer Cupar for teaching me the power of the em-dash. Last, thank you to my Babbo, Mother, Breanna, and Joe for helping me *keep faithful* to who I am and hope to become.