RELIGIOUS FREEDOM INSTITUTE

Cornerstone Forum

A Conversation on Religious Freedom and Its Social Implications

No. 315. July 1, 2022

When the Court Takes Away Lemon: What the Praying Coach Ruling Means for Religious Americans

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This article was originally published by *RealClearReligion* on July 1, 2022.

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Joseph Kennedy, a high school football coach, merely wanted to kneel on the field and quietly express his gratitude to God for a few seconds after each game. Little did he know that his simple act of devotion—and his school's overreaction in punishing him—would lead to a profound change in American law. The Supreme Court's decision in Kennedy v. Bremerton School District provided two vitally important wins for religious Americans.

First, the Court ruled that Coach Kennedy had a constitutional right to publicly recite a quiet prayer, and in doing so, protected that right for all religious public school employees. Second, in a decision likely to have even broader impact, the Court took the important step of clearly overturning Lemon v. Kurtzman, a 1971 case that has served as a continuing source of harm for religious Americans.

Let us first look at the narrower holding: the vindication of public school teachers' right to exercise their faith in public. Coach Kennedy's school punished him for praying after games although he "offered his prayers quietly while his students were otherwise occupied" and "never pressured or encouraged any student to join" him. In the past, the Coach had given motivational speeches that incorporated religious content, and he had also led the students in prayer in the locker room. But he stopped both of those activities as soon as the school complained. From that point onward, he only engaged in short, quiet, personal prayer. Nonetheless, the school punished him because he refused to completely stop engaging in public religious display.

The Supreme Court found that the school violated the coach's right to freely exercise his religion. The Court explained that "respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head." The school's attempt to "punish an individual for engaging in a brief, quiet, personal religious observance" was unconstitutional.

This holding is of the utmost importance to religious minorities such as Jews and Muslims who are frequently called upon to engage in public acts of religious expression. Attempts by those in the media to paint this decision as somehow harmful to religious minorities are misguided at best and deliberately misleading at worst. Today, no Jewish public school teacher has to fear that his public school might fire him for saying a blessing before he takes a drink of water. No Jewish or Muslim public school teachers have to fear that they will be fired for wearing religious garb.

If that were the only holding of this case, it would be an important decision that would provide much needed protection for religious Americans. However, the Supreme Court went further, and it finally drove the last stake into the heart of Lemon v. Kurtzman, a case that has troubled religious Americans ever since it was decided. It is necessary to explore Lemon's long and sordid history in order to understand just how important this development will be.

In 1984, the Court, in a misguided attempt at making Lemon easier to understand, explained that it prohibited states from acting in a manner that seemed to "endorse" religion. Needless to say, this explanation did not actually provide additional clarity. If anything, it made matters worse.

In 1995, a plurality of the Supreme Court declared that Lemon "supplies no standard whatsoever." They explained that the test lacked any concrete direction and left it to every legislator and judge to decide for himself whether an observer would think that a governmental action seemed to "endorse religion." As Justice Gorsuch recently highlighted, Lemon did not even attempt to explain, "How much religion-promoting purpose is too much? .... How much of a religion-advancing effect is tolerable? What does 'excessive entanglement' even mean, and what (if anything) does it add to the analysis?"

One thing that is clear is that Lemon was bad for religious Americans. Before Lemon, the Supreme Court had never once found that a person's public display of religion violated the constitution. As Justice Gorsuch noted, "after Lemon, cases challenging public displays under the Establishment Clause came fast and furious."

Given Lemon's lack of guidance, it unsurprisingly led to unpredictable outcomes in the cases in which it was applied. Many cases with nearly identical facts—for example, concerning displays of menorahs on public property—came out differently. In some cases, Courts found such displays permissible, and in other cases, it deemed them unconstitutional.

Over the years, the Supreme Court continued to criticize Lemon and declined to apply it in case after case. Unfortunately, before today, the Court never formally and expressly declared that Lemon was no longer binding precedent. The Court's reluctance to overrule Lemon formally led Justice Scalia to write one of his most famous passages:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys ... Its most recent burial was, to be sure, not fully six feet under ... no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart.

Lemon's continued vitality (no matter how tenuous) had widespread negative impacts. Government officials often acted unduly harshly toward religious Americans because they simply had no way of knowing whether they would be dragged into a costly lawsuit if they took any action that seemed to benefit a religious person.

In fact, in just this year's Supreme Court term, there were at least three cases in which Lemon harmed religious Americans. In Carson v. Makin, the Court recognized that Maine initially decided to deny scholarship funds to parents who wanted to send their children to religious schools because it believed that providing such funding would violate the Establishment Clause. In Shurtleff v. Boston, the Supreme Court unanimously rejected Boston's argument that the Constitution required it to prevent religious organizations from participating in a program that allowed people to fly the flags of their choice in front of city hall. In their concurrence, Justices Gorsuch and Thomas concluded that the city was led into this error by Lemon's ambiguous test. Justice Kavanaugh described "misimpression of the Establishment Clause" as the "root cause" of the city's error. And, in Coach Kennedy's case, the school believed that it had to punish the coach, because if it failed to do so, "a reasonable observer could (mistakenly) infer" that the school had "endorsed" his religious message.

That unstable and ultimately unjust jurisprudential season has now come to an end. In the Kennedy case, the Supreme Court seems to have finally struck the decisive blow that will permanently keep Lemon in its grave. The Court adopted a new test "in place of Lemon" whereby "the Establishment Clause must be interpreted by reference to historical practices and understandings." While applying this test will require historical research and intellectual rigor, it is far less malleable than the Lemon test. It is safe to say that some of the most anti-religious understandings of Lemon are no longer tenable.

For example, a public school does not violate the Establishment Clause by merely failing to censor private religious speech. The Court went further and explained that under this test, it is clear that that the Establishment Clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses religion."

Under this new test, state actors no longer need to worry about unpredictable litigation brought by their most zealously anti-religious citizens. No city has any reason to fear allowing a rabbi to place a menorah in a park, and no school has a reason to fear allowing a Jewish, Muslim, Christian, or any other religious teacher to express her faith in front of her students.

Kennedy v. Bremerton School District represents a tremendous victory for religious minorities in America both because of its narrower holding—that acts of religious expression by public school teachers are constitutionally protected—and because of the broader implication that Lemon has been finally vanquished.

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