Praying at the Fifty Yard Line: How the Lemon Test Finally Lost its Zest

Kennedy v. Bremerton School District, __U.S. __ (2022)

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Client Alert

The First Amendment to the U.S. Constitution includes the following: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*

These two phrases of the Amendment are commonly referred to as the Establishment Clause and the Free Exercise Clause, respectively. For many years, when read together, these clauses were interpreted as requiring *separation between church and state*, a term, that while familiar to most of us, does not appear in the Amendment itself, but was seen as a way to reconcile these two seemingly contradictory clauses.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a case dealing with public funding for private religious schools, the U.S. Supreme Court favored the separation of church and state, while acknowledging that, "total separation is not possible in an absolute sense..." and "that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id. at 615*. The Court nonetheless went on to identify three criteria a government action must meet to pass constitutional muster: (1) it must have a secular purpose; (2) it must not advance or inhibit religion; and (3) it cannot foster an excessive government entanglement with religion. *See Id*. These criteria, which became known as the *Lemon Test*, were then applied not only to cases involving funding for religious schools, but also to those involving prayer and other indicia of religion in public schools.

In order to follow the *Lemon Test* when dealing with religion in school, public school districts typically enacted policies that directed staff members to refrain from encouraging, leading or otherwise engaging in religious activity when acting within the scope of their duties, even when students were allowed to do so. The idea was that by remaining neutral – *i.e.,* by showing neither favoritism nor hostility toward religion, staff members would avoid any perception by students, parents or other observers that the school district, while not inhibiting any particular religion, also was not becoming excessively entangled with it.

However, in the 50 years since *Lemon* was decided, it has endured hostility from conservative members of the Court, who have consistently criticized and eroded the proverbial wall of separation between church and state, leading the late Justice Antonin Scalia to compare the *Lemon Test* to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried… stalk[ing] our Establishment Clause jurisprudence... [and] frightening... school attorneys …"*Lamb's Chapel v. Center Moriches Union School District,* 508 U.S. 384 (1993) (concurring opinion). This past June, in *Kennedy v. Bremerton School District*, Justice Gorsuch somewhat less colorfully confirmed that "this Court long ago abandoned *Lemon* and its endorsement test offshoots" in favor of reading the Establishment and Free

Exercise clauses as having complementary rather than warring purposes. ___ U.S. ____(2022), slip op. at 4.

Facts of the Bremerton Case

The plaintiff in *Bremerton* was a football coach whose self-described "sincerely-held" religious beliefs "compelled [him] to offer a post-game personal prayer of thanks at midfield" after every game. *Id.* at 4. For a period of time leading up to the specific events at issue in the case, he also had engaged in a tradition, which had pre-dated him, of offering locker-room prayers to his players, and had established a "practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field." *Id.*

After being instructed by the School District to refrain "from engaging in 'any overt actions' that could appear to a reasonable observer to endorse (…) prayer (...) while on duty as a District-paid coach," Coach Kennedy ended his practice of offering prayers to his players in the locker-room and on the field. However, he refused to discontinue his practice of kneeling at the 50-yard line, bowing his head and offering what the majority described as a "brief, quiet prayer" of thanks that he engaged in on his own, without inviting any students to join him. *Id.* at 6. The majority of the Court accepted Coach Kennedy's explanation that "he never told any students that it was important they participate in any religious activity," and "never pressured or encouraged any student to join his postgame midfield prayers." *Id.* at 2.

The Court noted that Coach Kennedy's religious actions had gone on for over seven years without complaint, and that it appeared the Superintendent of the school district had been unaware of these actions until an employee from another school district "commented positively on the school's practices." [1] *Id.* at 3. Upon investigating Coach Kennedy's practices, and finding "no evidence that students had been directly coerced to pray with[him,]" the school district nonetheless concluded that allowing Coach Kennedy to continue to engage in "public religious display" would "violate the Establishment Clause because reasonable students and attendees might perceive the district as endorsing religion." *Id.* at 7 (citations omitted).

Dispute Over the Facts

Justice Sotomayor's dissenting opinion bluntly states that, "[t]o the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts." The dissent then takes issue with the majority for ignoring Coach Kennedy's "longstanding practice of conducting demonstrative prayers on the 50-yard line," during which, "over time, a majority of the team came to join him," and of having delivered religious speeches," which Mr. Kennedy himself "described as prayers, while the players kneeled around him." Sotomayor, dissenting, slip op at 1-2, 4. The dissenting opinion includes photographs showing Coach Kennedy on the field at the center of a large group of players who appear to be praying, either kneeling or with heads bowed. *Id.* at 5, 9, 10.

The Court's Holding

The Court first held that "Mr. Kennedy's prayers represented his own private speech, which was protected by the right to freedom of speech and expression." *Id.* at 19. The Court rejected the lower court's finding that the school district's interest in avoiding an Establishment Clause violation "trumped Mr. Kennedy's rights to religious exercise and free speech." Instead, the Court cited to previous cases holding that the Establishment Clause "does not compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id*. at 22 (citations omitted).

When considering the issue of how students might have perceived and reacted to the coach's actions, the Court concluded that there was no evidence in the record that "students felt pressured to participate" in Coach Kennedy's prayer, which it

described as a "private religious exercise" that "did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion. " *Id.* at 25. In the end, the Court determined that the school district had wrongly sought "to punish an individual for engaging in a brief, quiet, personal religious observance," which was "doubly protected by the Free Exercise Clause and Free Speech Clauses of the first Amendment." *Id.* at 31-32. In so holding, the Court emphasized that "learning to tolerate speech or prayer of all kinds is part of learning to live in a pluralistic society, a trait of character essential to a tolerant citizenry." *Id.* (citations omitted).

Take-Away

In light of the Court's abandonment of the *Lemon Test's* emphasis on neutrality in order to avoid excessive entanglement with religion, as well as its emphasis on the critical importance of tolerating prayer of all kinds, school districts should anticipate situations in which staff members of all different religions assert their right to express their faith in school. In preparation for such possible activity, each school district should review any policy it has regarding religion in school in order to conform with the decision in *Kennedy v. Bremerton*.

Although this Client Alert has summarized the major issues and holdings of the decision, we emphasize the complexity of all Supreme Court decisions and advise consulting counsel prior to responding to any situations that arise in this context.

[1]According to the dissent, this employee informed the principal "that Kennedy had asked him and his team to join Kennedy in prayer, and expressed pleasant surprise that the Bremerton School District “would allow [its] coaches to go ahead and invite other teams' coaches and players to pray after a game.” Dissent, slip op. at 4 (citations omitted.)