Turning a Lemon into Lemonade

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August 1, 2022

- A case of a praying high-school coach has put another nail in the coffin of a terrible precedent known as the "Lemon Test".
- What does it take for a government actor to establish a religion?
- What are the limits of government employers controlling the speech and actions of their employees?

A high-school coach was denied his freedom of religion and speech based on a nothing more than 50 year old lemon of a court opinion. In the case Lemon v. Kurtzman, the Supreme Court claimed that your right to freely speak and exercise your religion must yield to the government's "interest" in avoiding a violation of the establishment clause. But the "Lemon Test" puts the government's interest above your rights protected by the Constitution. In this years case, Kennedy v. Bremerton School District, the court took this Lemon and turned it into lemonade.

Joseph Kennedy lost his job as a high school football coach because he repeatedly knelt at midfield after games to offer a quiet prayer. He then sued in federal district court claiming the Bremerton School District violated his free speech and free exercise rights protected under the First Amendment. He also asked the court to issue a preliminary injunction to get his job back. Both the District and Circuit courts denied the motion. The District Court found that the sole reason for the

school district's decision was the risk of constitutional liability under the Establishment Clause. Both the District and Circuit Courts found in favor of the school district. Several of those who dissented at the Circuit Court level agreed that the court had applied a flawed understanding of the Establishment Clause based on the 1971 Supreme Court cases Lemon v. Kurtzman.

The Lemon Test

The District, like the Ninth Circuit below, insists Mr. Kennedy's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation under Lemon and its progeny. The Lemon approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. … In time, that approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. … But—given the apparent "shortcomings" associated with Lemon's "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned Lemon and its endorsement test offshoot. …

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How do you determine when a government entity is establishing a religion? Noah Webster defined "establish" as:

To enact or decree by authority and for permanence; to ordain; to appoint; as, to establish laws, regulations, institutions, rules, ordinances, etc.

Establish – Webster's 1828 Dictionary

According to the Supreme Court in 1971, the only way to determine if an act establishes a religion was to determine if the purpose or effect of the law had potential entanglement with religion. Over time this morphed into a question of what

a “reasonable observer” would consider the government action was an endorsement of religion. But what defines a reasonable observer? What one reasonable person thinks is an endorsement of religion another thinks is the free exercise of such. This effectively turned into a “heckler’s veto”, where all it would take is one reasonable person making the case that the law or action entangled government with some religious action, and a person’s rights, protected under the First Amendment, became meaningless.

In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “‘reference to historical practices and understandings.’ ” … A natural reading of the First Amendment suggests that the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail over the others. … An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “‘exception’” within the “Court’s Establishment Clause jurisprudence.” … The District and the Ninth Circuit erred by failing to heed this guidance.

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The Supreme Court had previously instructed the lower courts to drop the Lemon test and instead to look at historical practices and understandings of the question of establishment. The court also noted that the establishment and exercise clauses were not meant to be either/or, where if one clause won then the other must lose. The Supreme Court found that the District and Circuit Courts were wrong by applying the Lemon test to this case.

Coercion

The District next attempts to justify its suppression of Mr. Kennedy’s religious activity by arguing that doing otherwise would coerce students to pray. The Ninth Circuit did not adopt

this theory in proceedings below and evidence of coercion in this record is absent. The District suggests that any visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—im- permissibly coercive on students. A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." … No historically sound understanding of the Establishment Clause begins to "mak[e] it necessary for government to be hostile to religion" in this way.

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The District Court suggested that merely seeing religious acts by a coach or teacher would coerce students to join in. While the court found nothing that required government to be hostile to religion, isn't the hostility itself an attempt to enact or decree that only a secular view of religion was allowed?

There is no conflict between the constitutional commands of the First Amendment in this case. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. … A government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights.

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In other words, a government actor cannot use its concerns about a violation of the Constitution to actually violate someone's rights protected by that Constitution.

Proof of Infringement

The next question is, did Mr. Kennedy demonstrate that his

rights were infringed?

A plaintiff must demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries his or her burden, the defendant must show that its actions were nonetheless justified and appropriately tailored. …

Mr. Kennedy discharged his burden under the Free Exercise Clause. The Court's precedents permit a plaintiff to demonstrate a free exercise violation multiple ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." … Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny, under which the government must demonstrate its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.

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All Mr. Kennedy had to show was that the school district burdened his sincere religious practice in a way that was not neutral or generally applicable. Then the school district would have to show their actions were justified by a compelling government interest (a standard not supported by the Constitution of the United States). The school district's policy was obviously neither neutral nor generally applicable, since it was applied solely to Mr. Kennedy's praying.

Here, no one questions that Mr. Kennedy seeks to engage in a sincerely motivated religious exercise involving giving "thanks through prayer" briefly "on the playing field" at the conclusion of each game he coaches. … The contested exercise here does not involve leading prayers with the team; the District disciplined Mr. Kennedy only for his decision to persist in praying quietly without his students after three games in October 2015. In forbidding Mr. Kennedy's brief

prayer, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned "object." The District explained that it could not allow an on-duty employee to engage in religious conduct even though it allowed other on-duty employees to engage in personal secular conduct. The District's performance evaluation after the 2015 football season also advised against rehiring Mr. Kennedy on the ground that he failed to supervise student-athletes after games, but any sort of postgame supervisory requirement was not applied in an evenhanded way. … The District thus conceded that its policies were neither neutral nor generally applicable.

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When Mr. Kennedy offered his prayers, was he acting as a private citizen or a government official?

When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. … He did not speak pursuant to government policy and was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. … The timing and circumstances of Mr. Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirms that Mr. Kennedy did not offer his prayers while acting within the scope of his duties as a coach. It is not dispositive that Coach Kennedy served as a role model and remained on duty after games. To hold otherwise is to posit an "excessively broad job descriptio[n]"

by treating everything teachers and coaches say in the work-place as government speech subject to government control. … That Mr. Kennedy used available time to pray does not transform his speech into government speech. Acknowledging that Mr. Kennedy's prayers represented his own private speech means he has carried his threshold burden.

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For these reasons, the court came to the following conclusion.

Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.

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Conclusion

What can we conclude from this case? First, while this case was brought under the First Amendment, this cannot be a First Amendment case.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

U.S. Constitution, Amendment I

I found nothing in the opinion that claimed the Bremerton School District was acting under the authority of Congress. This was a violation of Mr. Kennedy's Freedoms of Speech and and Religion under the Article I of the Constitution of the State of Washington. The only violation of the United States Constitution is the Equal Protection Clause of the Fourteenth Amendment.

No State shall make … deny to any person within its

jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

Second, while the court has set aside the "Lemon Test", they still adhere to the standards of scrutiny. The Constitution, as the supreme law of the land, does not say your rights exist unless the government has a compelling interest. It says your right shall not be abridged or infringed, making the scrutiny standard unconstitutional and illegal. While the school districts case fell apart before the need for scrutiny came about, the court still brought it up as part of their Establishment Clause jurisprudence.

As a free country, we must respect the religious expressions of others, especially those we disagree with.

Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his religious exercise and free speech claims.

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Since 2014 the court replaced the flawed "Lemon Test" with a more constitutionally sound methodology. While, the District and Circuit Courts didn't recognize this fact, the Supreme Court did. Will this new opinion help the lower courts recognize that a person's right to freedom of religion isn't subject to the government's fear that someone may see it and think it's an endorsement? Only time will tell. Is this a case of turning the Lemon Test into lemonade? While it may not be my favorite drink, it certainly improves on what we had before.

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