The First Amendment's Establishment Clause Doesn't Suspend Free Speech and Free Exercise Rights, Supreme Court Rules

Opinion backs prayer by football coach, scraps Lemon *Test*

By JOSHUA DUNN

THE U.S. SUPREME COURT'S June 2022 decision in *Kennedy v. Bremerton* reinforces a significant shift in the court's posture toward religion and education. Following the pattern established in *Trinity Lutheran v. Comer, Espinoza v. Montana*, and the June 2022 *Carson v. Makin*, the court is placing far greater emphasis on the Free Exercise Clause and, in the process, substantially modifying its interpretation of the Establishment Clause. In this case, the court also buttressed the speech rights of public-school employees in ways that will likely extend far beyond the issue of religion.

Joseph Kennedy, an assistant football coach, was fired by the Bremerton, Washington, school district when he refused to stop praying after games. For seven years, Kennedy had prayed post-game at the middle of the field without incident. While he had originally done this by himself, some of the Bremerton players eventually asked to join him. Those players then invited players from opposing teams to join them. This led a coach from an opposing team to tell Kennedy's principal that he appreciated that the school let coaches and students pray. But school administrators, fearing a constitutional violation, investigated the practice and instructed Kennedy that if he wanted to keep praying he could only do so in a private space away from the players. He refused and told the school that he would continue to pray at midfield and that, if students wanted to join him, he would not forbid them. The school then fired him. Kennedy challenged his firing as a violation of his free

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Former Bremerton High School assistant football coach Joe Kennedy takes a knee in front of the U.S. Supreme Court after his legal case, Kennedy vs. Bremerton School District*, was argued before the court on April 25, 2022 in Washington, D.C. Kennedy was terminated from his job by Bremerton public school officials in 2015 after refusing to stop his on-field prayers after football games.*

speech and free exercise rights under the First Amendment, leading to the ruling in *Kennedy v. Bremerton.*

Most important, the majority opinion by Justice Neil Gorsuch, joined by justices John Roberts, Clarence Thomas, Samuel Alito, Amy Coney Barrett, and Brett Kavanaugh (who joined all but one section of the opinion), officially ruled that the *Lemon* Test should not guide judicial analysis of alleged Establishment Clause violations. This aptly named three-pronged test arose from 1971's *Lemon v. Kurtzman* and held that government policy 1) must have a secular legislative purpose, 2) must not primarily advance or inhibit religion, and 3) must not create an excessive entanglement with religion. The test proved unworkable and contradictory in practice. Most obviously, whatever steps government officials could take to ensure that a policy did not advance religion risked creating excessive entanglement. Over time, this flaw led a majority of justices to call for its burial—but never, until *Kennedy v. Bremerton,* at the same time.

In 2019, the court ruled in *American Legion v. American Humanist Association* that the test would no longer apply to evaluation of public monuments, but its status in other areas, including in education, where it was applied most often, remained unclear (see "Supreme Court Partially Junks a Lemon," *Legal Beat,* Winter 2020). The court's opinion in *Kennedy v. Bremerton* officially laid it to rest. Using language from prior cases, Gorsuch wrote that judicial inquiry into potential Establishment Clause violations should instead be based on "reference to historical practices and understandings" and must be consistent with the "understanding of the Founding Fathers." This would indicate that the court might take a more relaxed approach toward some forms of prayer in school or school-related activities such as graduation ceremonies, since those certainly were not considered Establishment Clause violations for most of American history.

The court also eliminated the Endorsement Test—sometimes considered an offshoot of *Lemon* and sometimes considered a replacement for the second prong—which held that government should not do anything that might signal to religious dissenters that they are outsiders. That test also proved unworkable because no one knows exactly when government might cross that line. That uncertainty led it to be ridiculed as the "Two Rudolphs and a Frosty Rule" or the "Plastic Reindeer Rule." Public schools had to be certain that any Christmas display also included symbols from either secular or religious celebrations of the winter solstice.

The court ruled not only that the *Lemon* Test must go but also that the Establishment Clause could not be used as a justification to violate free speech and free exercise rights. "Both the Free Exercise and Free Speech Clauses of the First Amendment," Gorsuch wrote, "protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." The court said that ruling against Kennedy would have also authorized firing a Muslim teacher for wearing a headscarf or a Christian teacher for praying over "her lunch in the cafeteria."

The decision is likely to expand the free-speech rights of public school teachers and other government employees because the court ruled that Kennedy's speech was private and on a matter of public concern. Under the standard established in 2005's *Garcetti v. Ceballos,* speech by government employees is not protected if it is made "pursuant" to their "official duties." Since the court rejected Bremerton's claim that Kennedy's speech was part of his official duties, other school districts will have to exercise caution in claiming that speech on matters of public concern—a much broader category than religious speech—is part of an employee's official duties and thus punishable, particularly when the speech occurs outside of the classroom. The majority clearly feared that the government could use "excessively broad job descriptions" (again quoting *Garcetti*) to undermine the rights of government employees.

In *Kennedy v. Bremerton*, the court buttressed the speech rights of public-school employees in ways that will likely extend far beyond the issue of religion.

The court's liberal bloc of Sonia Sotomayor, Stephen Breyer, and Elena Kagan dissented. Writing for the three, Sotomayor contended that Kennedy was acting in his official capacity and that "school officials leading prayers" is "constitutionally impermissible." Most important, though, she argued that the court should not have overruled *Lemon* and its three-pronged test in favor of a "'history and tradition' test." Public schools, she argued, offer unique challenges that might require limiting speech under the Establishment Clause that would otherwise be protected.

Moving forward, schools will certainly have far more flexibility in accommodating religious speech. In fact, considering the court's focus on the original understanding of and practices under the Establishment Clause, schools will be *required* to accommodate more religious speech. The majority did maintain that the government cannot coerce citizens to engage in religious practices. One suspects that future legal controversies will hinge on how the court defines coercion. If the court's analysis will truly focus on history and tradition, then that definition will likely be quite limited. Previously, the court has said that psychological coercion or essentially peer pressure could count as coercion under the Establishment Clause. One suspects that the majority in *Kennedy v. Bremerton* would have doubts that that would count as coercion and would lean toward the late Justice Antonin Scalia's definition, which was that coercion only occurs when the government punishes you for refusing to support a particular religion.

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