# The End of Separation Between Church and State?


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# The Changing Landscape of the Separation Between Church and State

- From 1947-2020 the U.S. Supreme Court applied some level of “separation between church state” in its application of the Establishment Clause, albeit to varying degrees.

- Since 2020, however, in a string of decisions the Court weakened even moderate separation.

- This culminated in the nearly complete abandonment of the concept of separation in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and *Carson v. Makin*, 596 U.S. 767 (2022).

- The current U.S. Supreme Court has mischaracterized prior Courts’ understandings of the Establishment Clause and rendered that clause almost subordinate to the Free Exercise Clause.

# The facts in *Kennedy v. Bremerton School District.*

- It is important to differentiate between the facts in the case based on evidence in the record and the facts as the majority states them.
- Kennedy was an Assistant Football Coach for Bremerton High School.
- After games he went to the 50-yard line and prayed, but the prayer was not quiet. Players and opposing team's players gathered around him and he also gave religious speeches.
- The School Board was worried that his prayer would be attributed to the school in violation of the Establishment Clause, so they warned him several times to stop. He was informed he could pray on the field after his coaching duties ended for the day.
- Kennedy brought the situation to the media, and the school board began receiving threats. After one game, members of the public trampled student bandmembers and cheerleaders to pray with Kennedy.

# The facts in *Kennedy v. Bremerton School District Continued.*

- Some parents and players complained to the school and to the media about the prayer.

- The school board warned Kennedy again, but he continued to disregard the school's warnings, so the board did not rehire him for the following season.

- According to the Court majority, however, the facts are that, "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."

Photograph of J. Kennedy in prayer circle (Oct. 26, 2015)

# Free Speech and Free Exercise Claims

- The Court decided the case based on the Free Speech and Free Exercise Clauses of the First Amendment, claiming that Coach Kennedy's speech was private religious speech, so it was not attributable to the government.

- If this was the case, there would have been no reason to spend much time on the Establishment Clause question under prior law.

- If it was truly private speech Kennedy would have won under settled law because the school board's Establishment Clause concerns would have been inadequate to meet the relevant legal test.

- Yet, the Court used this situation to abandon over 50 years of precedent, and two of the three main tests used in Establishment Clause cases.

# From Legal Tests to History and Tradition

- Prior to June 2022 there were several legal tests applied in cases involving government promotion or endorsement of religion.
- The *Kennedy* case abandoned the main tests that had been used for more than 50 years in favor of a “history and tradition” test.
- Yet, the *Kennedy* Court never defined the “history and tradition” it is referring too.
- U.S. history and tradition on religion in public life can support both sides in most cases. So, it simply becomes a façade that covers up Justices’ preconceptions.
- In fact, Coach Kennedy’s conduct would likely not be supported by history and tradition.

# Carson v. Makin

- Kennedy abandoned separation in the context of religious activities that could be attributed to government.
- Carson v. Makin abandoned what was left of separation in the context of government financial aid to religion.
- Carson involved a program in the state of Maine that provided tuition to private schools in remote areas of the state where there were not enough students for public school systems.
- The program did not support religious schools that proselytize or require students to engage in religious activity.

# Carson v. Makin Continued

- The state did not want to use taxpayer dollars to support schools that might try to convert children or that teach religious doctrines.
- Some parents sued and the state won in all the lower courts based on well established precedent.
- The Supreme Court reversed the lower courts and held that if Maine includes nonreligious private schools, it must include religious schools because to not do so would be to discriminate against religion in violation of the Free Exercise Clause.
- In so holding the Court abandoned the "status-use" distinction the Court itself had created in 2017 in *Trinity Lutheran v. Comer*.
- Some socially conservative legal advocacy groups have begun testing whether *Carson v. Makin*'s reasoning might expand to charter schools, but this is unlikely under Carson itself which distinguished public schools from programs focused on funding that goes to private schools.

# Mahmoud v. Taylor

- Review of the facts of the case.
- Court's use of *Yoder* and application of strict scrutiny.
- Court's minimization of schools' administrative burdens.
- Potential impact of decision on public school curricula.

# Separation and Religious Minorities

- The U.S. Supreme Court's move away from separation and towards history and tradition will harm religious minorities.

- How might Coach Kennedy's behavior have impacted non-Christian players (or Christian players who viewed his prayers and the related publicity as sacrilegious), and who were concerned about playing time and/or college scholarships?

- As I have documented in books and articled there is a history of violence and threats against religious minorities connected to school prayer and other religious activities in public schools.