

US Supreme Court Finally Buries the 'Ghoul' Six Feet Under

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In two cases decided by the U.S. Supreme Court on May 2 and June 27, the U.S. Supreme Court finally buried a terrible 51-year-old case that caused confusion and significant damage to the First Amendment Free Speech, Free Exercise and Establishment Clauses. Justice Antonin Scalia described the so-called "Lemon Test" (named after the case) as a "ghoul in a late-night horror movie."

The "Lemon Test" comes from the 1971 case, *Lemon v. Kurtzman*. The "Lemon Test" grew out of this case and became a judicial wrecking ball used to censor religious speech, symbols and displays.

In *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Antonin Scalia criticized the "Lemon Test" and described it as follows:

"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 of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed test but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The

secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."

On May 2, 2022, the Supreme Court signaled the death of the "Lemon Test" in *Liberty Counsel v. City of Boston*. The Justices ruled 9-0 that the City of Boston violated the Constitution by censoring a private flag in a public forum open to "all applicants" merely because the application referred to it as a "Christian flag." The High Court rejected Boston's argument that the city was justified in censoring religious viewpoints under the "Lemon Test."

Justice Gorsuch, joined in a concurrence with Justice Thomas, stated, "It's time to let Lemon lie in its grave."

Justice Gorsuch continued, "How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Issued during a 'bygone era' when this Court took a more freewheeling approach to interpreting legal texts, *Food Marketing Institute v. Argus Leader Media*, 588 U. S. ___, ___ (2019) (slip op., at 8), Lemon sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, Lemon produced only chaos. In time, this Court came to recognize these problems, abandoned Lemon and returned to a more humble jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to follow Lemon anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts. The only sure thing Lemon yielded was new business for lawyers and judges."

"Ultimately, Lemon devolved into a kind of children's game. Start with a Christmas scene, a menorah or a flag. Then pick your own 'reasonable observer' avatar. In this game, the avatar's default settings are lazy, uninformed about history and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he feel about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he feels it 'endorses' religion. If so, game over," wrote Gorsuch.

On June 27, 2022, the Supreme Court, citing to the Shurtleff case, ruled 6-3 in Kennedy v. Bremerton School District in favor of a high school football coach who was fired for silently praying on the field after games. Relying on both the First Amendment Free Speech and Free Exercise Clauses, the High Court ruled that the Bremerton School District violated both provisions when it fired Coach Joe Kennedy for having prayer on the 50-yard line of the football field after the game. In addition, the High Court also finally buried the "Lemon Test," citing Liberty Counsel's 9-0 decision handed down on May 2, 2022, in Shurtleff v. City of Boston involving the Christian flag.

The Shurtleff case set up the decision on the Coach Kennedy case authored by Justice Gorsuch. In Shurtleff, Boston relied upon the 1971 case of Lemon v. Kurtzman to argue that the Establishment Clause required the city to censor religious viewpoints. Like Boston, the Bremerton School District also relied on the so-called "Lemon Test" to argue it must censor the silent prayer of Coach Kennedy. In Shurtleff, the same flag could have flown IF Hal Shurtleff viewed it as secular. If he had referred to it as the Camp Constitution flag and not a Christian flag, Boston would have approved the application. In the Coach Kennedy case, IF Kennedy took a knee after to ponder secular thoughts, then his action would be permitted. But if his intention was a silent prayer, the district banned

him.

Liberty Counsel's Founder and Chairman Mat Staver said, "After decades of distorting the First Amendment and haunting government officials, the 'Lemon ghoul' is finally buried forever. Lemon has proven to be unworkable and has led to inconsistent and contradictory decisions on the constitutionality of religious displays, symbols, and words. Justice Scalia would be happy to see that the 'Lemon Test' is finally dead. Religious freedom and free speech lives."

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