

Bradley A. Hofmann

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November 05, 2015

Representative [NAME]  
[XXX] John L. O'Brien Building  
PO Box 40600  
Olympia, WA 98504

Dear Representative [NAME],

Subject: Religious Liberty in Washington State Schools

Thank you for your steadfast support of Bremerton High School football coach Joe Kennedy in his struggle with the Bremerton School District over his right to exercise his religious freedom. Thank you! I am aware that Representatives Caldier, Hunt, and Young are presently working on legislation to clarify the safeguards to free religious expression.

As this legislation is developed, please consider declaring the invalidity of the so-called "Lemon Test" as fabricated by the Supreme Court in "*Lemon v. Kurtzman*"<sup>1</sup>. Most school board religious liberty policies in Washington State, including the Bremerton School District<sup>2</sup>, base their policies from this three-prong test. In my opinion (and that of the Heritage Foundation<sup>3</sup>, the Liberty Counsel<sup>4</sup>, and Supreme Court justices Antonin Scalia & Clarence Thomas<sup>5</sup>), this test is neither an accurate representation of the 1st Amendment's "Establishment Clause", nor a required rule for creating policy in state and local governments. I offer the following reasons to justify my request to eliminate use of the "Lemon Test" in Washington State:

**1) It has been inconsistently applied (even by the same court that created it) and has waning legal support.** A guideline which even causes the Supreme Court to conflict within itself upon its usage and applicability can hardly be a reliable tool for creating policy in local governments. For example, in the following cases, the Supreme Court chose not to use *Lemon*: *Lynch v. Donnelly*<sup>6</sup>, *Larson v. Valente*<sup>7</sup>, and *Marsh v. Chambers*<sup>8</sup> among others. Justices Scalia and Thomas made a denouncement of *Lemon* on this point<sup>9</sup>. Additionally, lawyers are beginning to retreat from the "Lemon Test" as exemplified in the recent case *Town of Greece v. Galloway*<sup>10</sup>. Eric Rassbach of SCOTUS Blog<sup>11</sup> explains saying, "*Town of Greece is clearly a big win for the town and for a more restrained view of what the Establishment Clause prohibits ... the plaintiffs' full-scale retreat from Lemon and its corollary the endorsement test serves as further evidence that those tests are ineffective.*"

2) Related to point one above, **it unconstitutionally allows judges to legislate.** The Heritage Foundation writes<sup>12</sup>, "*The Lemon test ... allow[s] judges to inject their policy preferences*", a role never intended for the judiciary. Justices Scalia and Thomas mention the Lemon Test's flaw of permitting justices to insert personal opinion, not constitutional rationale, in stating, "*When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.'*"<sup>13</sup> It only stands upon a judge's whim.

**3) Supreme Court precedent and American history prove contrary to this test.** It is clear from early Supreme Court rulings on original intent<sup>14</sup>, the history of the expression of our Christian heritage, and the writings & actions of the Framers of the Constitution that today's repression of religion was never intended. Examples from history to justify this claim are too numerous to list (e.g. prayer in Congress, Article III of the Northwest Ordinance, and our national motto), but a few are mentioned within the referenced Supreme Court opinions<sup>15</sup>. In decisions outside *Lemon*, courts have established principles which act contrary to the strict scope of *Lemon*, yet one must wonder why only the test of *Lemon* is applied in our school boards. For example, decisions have limited the supposed "wall of separation"<sup>16</sup>, mandated accommodation to the spiritual needs of our people<sup>17</sup>, and have used American history as a substitute to the "Lemon Test" as a basis for court decisions<sup>18</sup>.

**4) States and individual school boards need to reserve the inherent right to represent the values of their constituents.** Are we a self-governing people of bottom-up power or do we elect representatives and local officials to merely serve to implement the decrees handed down from the personal opinions of a select few lawyers who over-rule the vote and will of millions of Americans? Do we take the 9th and 10th Amendments seriously and believe in our system of federalism to place a check on federal power? Article I, Section 11 of the Washington State Constitution<sup>19</sup> requires "*[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship ... to every individual, and no one shall be molested or disturbed in person or property on account of religion.*" Further, RCW 28a.405.030<sup>20</sup> directly requires teaching morality and other ideals grounded in the Christian worldview. The strict standards of the "Lemon Test" do not permit us to employ our Article I, Section 11 or RCW requirements, rather it forces molestation and disturbing of individuals on account of religion and eradicates the precepts of RCW 28a.405.030 (e.g. Bremerton School District's punishment of Coach Kennedy).

Using the above factors as a basis for the illegitimacy of the "Lemon Test", adding language to the proposed legislation similar to the following would be very beneficial in allowing local governments the flexibility to deviate from *Lemon*'s stringent bounds and truly protect religious liberty: "*Washington State does not recognize the validity of the 'Lemon Test' from Lemon v. Kurtzman as a mandatory requirement for creating legislation in state and local governments of Washington State.*"

Again, thank you for your continued defense of religious liberty in Washington State and thank you for your consideration of the case I have presented<sup>21</sup>. Please forward to colleagues as necessary.

Respectfully,

Bradley A. Hofmann

## Endnotes:

<sup>1</sup> Lemon v. Kurtzman (1971): <https://www.law.cornell.edu/supremecourt/text/403/602>

<sup>2</sup> Bremerton School District Policy No. 2340, 1.a,b,c:

<http://www.bremertonschools.org/cms/lib/WA01001541/Centricity/Domain/121/2000%20Series/2340.pdf>

<sup>3</sup> "Rule of Law: Lemon v. Kurtzman": <http://www.heritage.org/initiatives/rule-of-law/judicial-activism/cases/lemon-v-kurtzman>

<sup>4</sup> "Court Should Make Lemonade from Wiccan Complaints" by Liberty Counsel (01/29/2015):

<https://www.lc.org/newsroom/details/court-should-make-lemonade-from-wiccan-complaints> ... "The Lemon test has meant that the Establishment Clause, designed to prevent federal establishments of religion, has morphed into a weapon aimed at eliminating all vestiges of public religious expression. It is past time to abandon that judge-made rule and return to the actual words and intent of the First Amendment."

<sup>5</sup> Lamb's Chapel v. Center Moriches (1993): [https://www.law.cornell.edu/supremecourt/text/508/384#writing-USSC\\_CR\\_0508\\_0384\\_ZC1](https://www.law.cornell.edu/supremecourt/text/508/384#writing-USSC_CR_0508_0384_ZC1)

<sup>6</sup> Lynch v. Donnelly (1984): <https://supreme.justia.com/cases/federal/us/465/668/case.html> ... "But this Court has been unwilling to be confined to any single test or criterion in this sensitive area."

<sup>7</sup> Larson v. Valente (1982): <https://www.law.cornell.edu/supremecourt/text/456/228>

<sup>8</sup> Marsh v. Chambers (1983): <https://www.law.cornell.edu/supremecourt/text/463/783> ... The Court of Appeals applied Lemon, but the Supreme Court reversed using American history as their basis rather than Lemon.

<sup>9</sup> Lamb's Chapel v. Center Moriches (1993): "I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."

<sup>10</sup> Town of Greece v. Galloway (2014):

[http://www2.bloomberglaw.com/public/desktop/document/Town\\_of\\_Greece\\_v\\_Galloway\\_No\\_12696\\_2014\\_BL\\_124245\\_US\\_May\\_05\\_2014\\_](http://www2.bloomberglaw.com/public/desktop/document/Town_of_Greece_v_Galloway_No_12696_2014_BL_124245_US_May_05_2014_)

<sup>11</sup> "Symposium: Lemon wins a reprieve, but the end is near": <http://www.scotusblog.com/2014/05/symposium-lemon-wins-a-reprieve-but-the-end-is-near/>

<sup>12</sup> "Rule of Law: Lemon v. Kurtzman" by Heritage Foundation

<sup>13</sup> Lamb's Chapel v. Center Moriches (1993)

<sup>14</sup> "Commentaries on the Constitution", Bk. III, Sect. 728, Para. 1871 by Joseph Story:

[http://www.constitution.org/js/js\\_344.htm](http://www.constitution.org/js/js_344.htm) ... "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."

<sup>15</sup> Zorach v. Clausen (1952): <https://www.law.cornell.edu/supremecourt/text/343/306/> ... "We are a religious people whose institutions presuppose a Supreme Being."

Lamb's Chapel v. Center Moriches (1993): "What a strange notion, that a Constitution which itself gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general ... those who adopted our Constitution [] believed that the public virtues inculcated by religion are a public good."

<sup>16</sup> Lemon v. Kurtzman (1971): "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable... Judicial caveats against entanglement (see Lemon Test prong) must recognize 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."

Lynch v. Donnelly (1984): "The concept of a "wall" of separation between church and state is a useful metaphor, but is not an accurate description of the practical aspects of the relationship that in fact exists. The Constitution does not require complete separation of church and state."

Zorach v. Clausen (1952): "The First Amendment, however, does not say that, in every and all respects there shall be a separation of Church and State."

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<sup>17</sup> Zorach v. Clausen (1952): "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. ... we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

Lynch v. Donnelly (1984): "That neither the draftsmen of the Constitution, who were Members of the First Congress, nor the First Congress itself saw any establishment problem in employing Chaplains to offer daily prayers in the Congress is a striking example of the accommodation of religious beliefs intended by the Framers ... Our history is pervaded by official acknowledgment of the role of religion in American life, and equally pervasive is evidence of accommodation of all faiths and all forms of religious expression and hostility toward none."

<sup>18</sup> "Lynch v. Donnelly: One Giant Step Over the Wall" by Naomi Katz of Pace Law Review  
<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1572&context=plr> ... "In Marsh, the Court applied neither the Lemon test nor the strict scrutiny approach of Larson. Rather, relying on an historical analysis, the Court approved the continuing use of a chaplain at legislative sessions in Nebraska. Citing the continued use for over two hundred years of prayer in congressional sessions and other public bodies, the Court noted that the practice 'has become part of the fabric of our society.' As such, it is not an establishment of religion, but rather an 'acknowledgement of beliefs widely held among the people of this country.'"

Marsh v. Chambers (1983): "[P]rayer has become part of the fabric of our society... Weighed against the historical background ... that the prayers are in the Judeo-Christian tradition do not serve to invalidate [state] practice."

<sup>19</sup> Washington State Constitution: <http://leg.wa.gov/LawsAndAgencyRules/Documents/12-2010-WAStateConstitution.PDF>

<sup>20</sup> RCW 28A.405.030: Must teach morality and patriotism:  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.405.030> ... "It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism; to teach them to avoid idleness, profanity and falsehood; to instruct them in the principles of free government, and to train them up to the true comprehension of the rights, duty and dignity of American citizenship."

<sup>21</sup> For more, see "Refuting Lemon Test is Key to Religious Liberty in Schools" by Bradley A. Hofmann (Oct 2015):  
<https://kitsappatriots.wordpress.com/2015/10/16/opinion-hofmann-refuting-lemon-test-is-key-to-religious-liberty-in-schools/>