

Caselaw Roundup: Religion in the Courts

Making Lemonade and Hailing (St.) Mary

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Today's Roadmap: A Field in Motion

PART I

Making Lemonade Establishment Clause After Kennedy

- Lemon overruled (2022)
- Historical hallmarks test
- Ten Commandments litigation
- Fifth Circuit: Roake & Nathan
- Scholarship: McConnell, Barclay, Hall & Picciotti-Bayer

PART II

Hailing (St.) Mary Beyond Employment Division v. Smith

- Smith (1990): the mistake
 - Masterpiece Cakeshop
- Fulton v. Philadelphia: near miss
- St. Mary v. Roy: next chapter
- Carson, 303 Creative & the stakes

Animating principle across both: Religion is a right to be protected — not a problem to be managed.

The Lemon Era: 50 Years of Unstable Doctrine

PRONG 1

Secular Purpose

PRONG 2

Primary Effect

PRONG 3

**No Excessive
Entanglement**

Lemon v. Kurtzman, 403 U.S. 602 (1971) — governing Establishment Clause cases for 50 years

"Like a ghoul in a horror movie — it kept returning from the grave."

— Justice Scalia, *Lamb's Chapel v. Center Moriches Union Free School District* (1993)

Kennedy v. Bremerton School District

597 U.S. 507 (2022) · *The Definitive Break* · Gorsuch, J.

THE FACTS

Coach Joseph Kennedy — personal, brief post-game
prayer on the 50-yard line

Alone, silently visible to others — coercive toward no
one

Disciplined and lost his job

Sued for violation of First Amendment rights

THE HOLDING

Lemon and its progeny ABROGATED

New standard: historical practices and understandings

Religion Clauses protect religious exercise — they do
not suppress it

Government cannot be hostile to religion any more
than to speech

The New Standard: Historical Hallmarks

Shurtleff v. City of Boston, 596 U.S. 243 (2022) — Gorsuch, J., concurring · Drawing on scholarship of Prof. Michael McConnell (Stanford)

STATE CHURCH

Did the government create a formal, state-sponsored church?

SECTARIAN FAVORITISM

Did it favor one religious sect over others?

DOCTRINAL DIRECTION

Did it direct the content of religious doctrine?

COERCION

Did the government coerce religious practice?
[Most Dispositive]

Absent these hallmarks — and absent coercion above all else — government acknowledgment of religion does not offend the Constitution.



The Fifth Circuit Engages

ROAKE v. BRUMLEY (5th Cir. en banc)

Louisiana Ten Commandments display law

12-6 en banc decision

Majority lifts stay of injunction on ripeness grounds — declines to reach merits

Judge Ho concurring: historical hallmarks + coercion inquiry is dispositive

Passive display → no compulsion → no establishment

NATHAN v. ALAMO HEIGHTS ISD (5th Cir. en banc)

Texas SB 10 — Texas display law

Majority Opinion by Judge Kyle Duncan

Applying “Historical Hallmarks” analysis, found no Establishment Clause problem

Passive displays don’t trigger Free Exercise concerns

Sets the stage for Supreme Court review

Employment Division v. Smith (1990): The Problem

Two Native Americans fired for religious peyote use —
Oregon denied unemployment benefits

Scalia, J.: Free Exercise Clause does NOT require exemptions
from neutral, generally applicable laws

Rational basis review for incidental burdens on religion

Only laws targeting religion on their face trigger heightened
scrutiny

THE RESULT

Governments can exclude religious
institutions from programs, markets,
and civic life —

so long as laws are carefully drafted.

*The free exercise right, under
Smith, is paper-thin.*

Fulton v. City of Philadelphia

593 U.S. 522 (2021) · A Near Miss

THE CASE

Catholic Social Services — 200+ year history in Philadelphia foster care

Excluded for declining to certify same-sex couples, per Catholic teaching on marriage

6 of 9 Justices questioned *Smith* in concurrences

THE DECISION

Smith NOT overruled — resolved on narrow grounds

City's contract allowed individualized exemptions → not generally applicable

Sherbert strict scrutiny triggered → CSS wins

Thomas, Alito, Gorsuch: *Smith* wrongly decided, should be overruled

Barrett, Kavanaugh, Breyer: open to revisiting; no agreed standard yet

St. Mary v. Roy & The Anti-Discrimination Trajectory

St. Mary v. Roy — Certiorari Granted

Colorado universal preschool excludes religious schools following traditional teaching on marriage, sexuality & gender. Cert. granted. Court will decide: (1) when *Smith* doesn't apply — unfettered discretion or categorical secular exemptions? (2) does *Carson* reach subtle exclusions, not just explicit ones?

Carson v. Makin

596 U.S. 767 (2022)

Maine tuition program: religious schools cannot be excluded from generally available aid programs

303 Creative LLC v. Elenis

600 U.S. 570 (2023)

Compelled speech limit on nondiscrimination law — free speech & religious freedom connected

Masterpiece Cakeshop

584 U.S. 617 (2018)

Government hostility to religion triggers heightened scrutiny — vital protection even under *Smith*

A Moment of Genuine Consequence

The First Amendment is a guarantee that the government will neither establish religion nor penalize its free exercise. Getting both halves right — simultaneously — is the work the Court is now engaged in.



Thank You

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CASELAW ROUNDUP: RELIGION IN THE COURTS

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Alliance Defending Freedom

WHERE WE'VE BEEN

<i>Olivier</i>	<i>303 Creative</i>	<i>Carson</i>	<i>Uzuegbunam</i>	<i>Espinoza</i>	<i>Little Sisters I</i>	<i>Town of Greece</i>
<i>Mirabelli</i>	<i>Groff</i>	<i>Ramirez</i>	<i>Diocese of Brooklyn</i>	<i>American Legion</i>	<i>Holt</i>	<i>Hobby Lobby/ Conestoga</i>
<i>Mahmoud</i>	<i>Kennedy</i>	<i>Tandon</i>	<i>Little Sisters II</i>	<i>Masterpiece Cakeshop</i>	<i>Reed</i>	<i>Hosanna-Tabor</i>
<i>Catholic Charities</i>	<i>Shurtleff</i>	<i>Fulton</i>	<i>Our Lady of Guadalupe</i>	<i>Trinity Lutheran</i>	<i>Abercrombie</i>	<i>ACSTO v Winn</i>



FREE SPEECH

WHY ARE RELIGIOUS PARENTS

FIGHTING FOR OPT-OUTS AT THE SUPREME COURT?



CPRC & ADF FILE CERT PETITION
TO U.S. SUPREME COURT IN
FOOTE V. TOWN OF LUDLOW



PARENTAL RIGHTS



EMPLOYMENT/ ASSOCIATION



QUESTIONS?