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The Supreme Court keeps creeping closer to an official 'establishment of religion,' legal observers say

By Bob Egelko

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The Supreme Court recently required Maine to provide tuition funding for religious schools. It ordered Philadelphia to fund a Catholic agency that refused to place foster children with same-sex couples, and said Boston must allow a Christian flag to fly at City Hall.

Last year, the court exempted church services from California's restrictions on indoor gatherings during the pandemic. In 2019, the court allowed a Maryland town to keep a 40-foot cross on public land where it has stood since 1925, saying it was more of a historic monument than a religious symbol.

After ruling in the Hobby Lobby case in 2014 that many corporations could deny birth-control coverage to female employees for religious reasons, the court went further six years later by saying any employer had a right to withhold contraceptive coverage for religious or moral reasons. On the same day in 2020, the court ruled in a California case that religious schools could classify their teachers as ministers and fire them without regard to civil-rights laws.

So when the justices ruled 6-3 Monday that a high school football coach in Washington state had a constitutional right to engage in post-game prayers on the 50-yard line, where he was joined by students from both teams, it was only the latest in a series of decisions that appear to be shifting the First Amendment's boundary lines between free exercise of religion and the prohibition on an official "establishment of religion."

"They were already well on the path of limiting separation (of church and state), but this is a whole new level," said Frank Ravitch, a Michigan State University law professor and chair of his school's Law and Religion program. Referring to rulings starting in 1962 that prohibited organized prayer sessions in public schools, Ravitch said, "organized school prayer is probably still unconstitutional, but they have laid the groundwork for overturning those decisions too."

Steven Green, a law professor and director of the Center for Religion, Law and Democracy at Willamette University in Oregon, noted that the ruling expressly overturned standards for separation of church and state that the court had set in Lemon v. Kurtzman in 1971. Those

standards required official actions to have a primarily secular purpose and prohibited excessive "government entanglement with religion."

Instead, the court said Monday, conduct should be measured against "historical practices and understandings" of religiously related government acts. It did not define those criteria, but they are clearly meant to be more permissive than the Lemon standards.

Coming three days after the justices overturned the 1973 Roe v. Wade ruling, which established a constitutional right to abortion, Monday's ruling "was an indication of the radical nature of the court" and a sign of things to come, Green said.

But attorney Clark Neily of the libertarian Cato Institute said the court just seemed to be moving away from what some observers had regarded, "not unreasonably," as a period of hostility toward religion.

"I don't think we're going to see any sort of revolution in religious jurisprudence," Neily said. "Likely we'll see the line between establishment and free exercise move incrementally, allowing more government overlap with religion. Incremental steps add up after awhile."

The disagreements on the court extended to the facts of the case as well as the law. The majority, led by Justice Neil Gorsuch, said assistant coach Joseph Kennedy of Bremerton, Wash., had simply gone to midfield on his own after each game for years, starting in 2008, "to offer a quiet prayer of thanks." Even when players from both teams, and members of the public, flocked to the field to join him, Gorsuch said, Kennedy never tried to instruct them or do anything "within the scope of his duties as a coach."

Although the school district cited church-state separation when it fired Kennedy in 2015, "his speech was private speech, not government speech," Gorsuch said. He said the district "sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected" by the constitutional guarantees of freedom of speech and religion.

Upholding the district's decision, as lower courts had done, would mean "a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria," Gorsuch said.

But dissenting Justice Sonia Sotomayor said the district had reasonably concluded the coach was still at work while leading the prayers, noting statements from several football players that they had felt pressure to join Kennedy and their teammates on the field.

The ruling "elevates religious rights of a school official … over those of his students … who this court has long recognized are particularly vulnerable," said Sotomayor, joined by Justices Stephen Breyer and Elena Kagan.

"In doing so, the court sets us further down a perilous path in forcing states to entangle themselves with religion, with all of our rights hanging in the balance. ... Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents."

Prayer led by teachers was legal and common in American public schools until the court prohibited it in 1962 as a government endorsement of religion. After the Lemon v. Kurtzman ruling that required government actions to have a primarily secular purpose and avoid excessive "entanglement" with religion, the court prohibited schools from requiring a minute of silence for prayer or meditation in 1985, from allowing a minister to deliver a prayer at a high school graduation in 1992 and from allowing student-led prayer at high school football games in 2000.

At the same time, the justices were allowing other governmental bodies to open their meetings with prayers — a state legislature in 1985, a New York town council in 2014. In Monday's ruling, Gorsuch said the court had effectively "abandoned" the Lemon test as a precedent in the 2014 decision, even though Justice Anthony Kennedy's majority opinion in that case never mentioned Lemon v. Kurtzman.

Gorsuch, appointed by former President Donald Trump, has been an outspoken advocate of broad religious rights. In the court's stunning 2020 decision banning employment discrimination based on sexual orientation or gender identity, Gorsuch, author of the majority opinion, said the LBGT rights the court was declaring could be overridden by religious freedom in a future case.

The latest ruling represents a significant change in the court's approach to school prayer and related issues, said Joel Paul, a professor of constitutional law at UC Hastings in San Francisco.

"Previously, if a law of general application burdened someone's religious practice, you had to show the law was reasonable" and it would most likely be upheld, he said. "Here they're saying the mere fact that the school district wanted to avoid the appearance of endorsing religion by allowing this coach onto the field to pray with the team shows they were not being neutral.

"The logic of Justice Gorsuch's opinion suggests that if a school official were to say to a teacher, 'No, you can't pray in class,' that would violate free exercise" of religion, Paul said.

Green, of Willamette University, envisioned a schoolteacher telling the class to work on an assignment, then dropping down on one knee to pray, and later claiming, like the football coach, that it was a private action. "A football field is a classroom for the coach and the players are his students," he said.

Neal McCluskey, director of the Cato Institute's Center for Educational Freedom, said the ruling doesn't legalize teacher-led prayer, "but it does open the door for teachers and other school employees to go somewhere on school grounds, within sight of students, and pray, and in so doing passively encourage students to join them."

He suggested a solution in keeping with the libertarian group's philosophy — erasing the boundaries between public and private schools.

"The only way to end government establishment of religion or non-religion is by changing K-12 education so funding follows students to schools of any religious, including non-religious, persuasion," McCluskey said. "Then government no longer decides how much religion is incorporated into education and how religious people can act in school. Millions of individual families and educators would make those decisions for themselves."