Chapter One: Overview

The United States Constitution primarily establishes a central federal government of bounded powers. Notwithstanding the many limitations written into the Constitution, the American founders remained troubled about the effect a strong federal government would have on basic liberties, including religious liberty. Concerned about protecting the individual rights of U.S. citizens, the founders amended the Constitution shortly after ratification to include the Bill of Rights—ten amendments that the founders believed were necessary to secure basic liberties for these U.S. citizens.

The first sixteen words of the First Amendment of the United States Constitution are known as the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." As the name suggests, those words form the basis of the religious liberties enjoyed by U.S. citizens. The First Amendment also protects religious liberties through the Free Speech Clause: "Congress shall make no law . . . abridging the freedom of speech." As this book shows, these clauses are often in tension—tensions that ultimately must be resolved by federal courts.

Although the Religion Clauses plainly limit *congressional* action, the United States Supreme Court has interpreted the First Amendment as applying to all governmental action—federal and state.[1] The Court here has cast a broad net that catches the conduct of public elementary and secondary schools and their officials.[2] In other words, the actions of public school officials such as board of education members, superintendents, principals, or teachers potentially implicate constitutionally protected religious liberties. When these public school officials act in ways that affect religious freedoms or endorse religion, the conduct of these "state" actors becomes subject to court scrutiny. It is the acts of public school officials in the area of religion that forms the subject of this book.

No one, especially the courts, doubts the conventional wisdom of maintaining the considerable discretion normally afforded to state and local school boards in operating public schools. Courts reviewing the actions of public school boards and public school officials demand only that this discre-

tion "be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[3]

But just what constitutes constitutionally bounded discretion is, of course, a messy question, the answer to which starts with understanding the contours of the Religion Clauses. The Religion Clauses really comprise two separate clauses—the Establishment Clause, which delineates the legitimate use of power by the government, including public schools, in the religious realm; and the Free Exercise Clause, which protects individuals' rights to practice their faith. The Establishment Clause—"Congress shall make no law respecting an establishment of religion"—obligates public schools to refrain from taking action that "establish[es] . . . religion." The Free Exercise Clause—"Congress shall make no law . . . prohibiting the free exercise [of religion]"—creates the basic liberty enjoyed by all U.S. citizens to exercise their sincere religious beliefs free from governmental coercion or interference.

The words of the Religion Clauses, like the words of any legal text, are subject to interpretation. The final arbiter of the meaning of those words is not a public school official but the United States Supreme Court. Litigants can also call upon intermediate courts (known as courts of appeals) and district courts to interpret the words of the Constitution. Accordingly, Supreme Court decisions interpreting those words create the rules by which all U.S. citizens must abide. In the absence of Supreme Court decisional law, we examine the decisions of the lower courts to determine those rules. Sometimes, lower court decisions will conflict with one another. Until the Supreme Court speaks to the specific issue, the rules governing the way public school officials may act in a specific area of religious controversy may be up in the air or may depend on where a school district is located.

To determine whether a state action, or more specifically in this context, to determine whether the action of a public school official runs afoul of the Establishment Clause, reviewing courts apply a three-part test developed by the Supreme Court in *Lemon v. Kurtzman*.[4] These three prongs are commonly called the purpose, effect, and entanglement prongs of the *Lemon* test and can be summarized as follows. First, to be constitutional, the public school action must have a primary secular purpose. Second, the primary or principal effect of the public school action must be one that neither advances nor inhibits religion. Third, the public school action must not result in an excessive entanglement of government with religion.[5]

To determine whether the conduct of a public school official runs afoul of the Free Exercise Clause, reviewing courts employ several tests. The Supreme Court has interpreted the Free Exercise Clause as meaning "first and foremost, the right to believe and profess whatever religious doctrine one desires."[6] This means that a state actor, such as a public school, "may not, for example, (1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma."[7]

Notwithstanding the strong constitutional protections afforded to sincere religious beliefs, the Supreme Court, in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, has also instructed that the Free Exercise Clause does not prohibit states from burdening religious practices through generally applicable laws.[8] In later explicating this rule, the Supreme Court stated: "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[9]

Applying those principles to the public school context, five potential consequences flow. First, public school officials may constitutionally regulate student conduct through religion-neutral, generally applicable rules even if those rules have an incidental effect on a student's religious practices.[10] For example, a public school does not run afoul of the Free Exercise Clause when it implements a policy prohibiting students from wearing message-bearing t-shirts, so long as the policy is a "neutral [regulation] of general applicability" and not motivated to suppress religious speech.[11] A recent Supreme Court case treats neutrality and general applicability as separate but closely related requirements.[12]

Second, courts will subject public school regulations that target religion to strict scrutiny. That means that public school officials generally may not constitutionally target and regulate *religious* practice unless the school can (1) justify the regulation with a compelling school interest and (2) show that the school's compelling interest is narrowly tailored to advance that interest.[13] For example, a court is likely to strike down a public school policy that prohibits students from wearing various Muslim head coverings such as hijabs, but is written in such a way as to allow students to wear baseball caps. Indeed, courts might view such a regulation as targeting religion even

if it did not specifically mention Muslim head coverings if it were crafted in such a way that in practice it applied only to Muslim head coverings. But, as discussed above, a broad rule prohibiting all head gear would likely be constitutionally permissible.

Third, in cases where the student claims that the school's conduct burdens both free exercise and other constitutional rights, some courts will subject public school, religion-neutral, generally applicable regulations to heightened scrutiny.[14] For example, a student may claim heightened scrutiny where the school's regulation compels students to salute the flag, thereby interfering with a particular student's free speech and free exercise rights.[15]

Fourth, some courts have questioned the breadth of *Employment Div., Dept. of Human Resources of Ore. v. Smith*[16]—which held that when governmental entities, such as public school districts, act in ways that are facially neutral and applicable to everyone regardless of religion, these actions are constitutionally lawful, even if they happen to burden members of some faiths more than others. In particular, some courts have questioned whether *Smith*'s holding—which denied unemployment benefit to employees discharged for ingesting an illegal drug during a religious ceremony—is limited to circumstances in which the person claiming to be religiously burdened is attempting to engage in conduct otherwise prohibited by state law or regulation.[17] Applying that interpretation of *Smith* to the public school context, if a student or a parent claims that the school's conduct burdens his or her religious beliefs or practices and that the school's conduct is not the result of enforcing a religion-neutral, generally applicable regulation, the court would "ask[] whether [the public school] has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling [school] interest justifies the burden."[18]

Fifth, states can provide greater free exercise rights to their citizens, either through state statutes[19] or by interpretation of their state constitutions, so long as those free exercise rights do not violate the Establishment Clause. While some states require free exercise claims to undergo strict scrutiny,[20] the majority of state supreme courts have not addressed the issue.[21]

As it would appear, the constitutional analysis under the Free Exercise Clause is more complicated to articulate. But both often prove difficult to apply in practice. As the Supreme Court recently observed, "Establishment Clause doctrine lacks the comfort of categorical absolutes,"[22] thereby

making *Lemon* a highly fact-intensive inquiry into the purposes and effects of the public school's conduct.

No discussion of religious liberties in public schools would be complete without an examination of the Free Speech Clause and its interaction with the Religion Clause. The text of the Free Speech Clause, like the Religion Clause, is deceptively simple: "Congress shall make no law . . . abridging the freedom of speech."[23] The Supreme Court, interpreting this clause in the public school context, famously remarked that the "fundamental"[24] right of free speech is not "shed . . . at the schoolhouse gate."[25] Accordingly, public schools may restrict private student expression only if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[26] Notwithstanding that seemingly broad endorsement of free speech rights, the Court has been willing to regulate speech, even religious speech, in the public school context. For example, public schools may regulate "offensively lewd and indecent speech,"[27] or "speech that can reasonably be regarded as encouraging illegal drug use."[28] Moreover, whereas courts are skeptical of public school suppression of private student expression, such as wearing black arm bands in protest of the Vietnam War, courts have given broad latitude to public schools to "exercise[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[29] Given the relatively broad free speech rights of students and teachers, conflicts between free religious expression—a form of speech—and the Establishment Clause are inevitable. For example, the question whether teachers have a free-speech right to discuss their religious views opposing evolution is one of the many conflicts between the Religion and Free Speech Clauses that this book explores.

This book, then, examines five areas in which public schools and their officials may run afoul of the Religion and Free Speech Clauses: school prayer; school property access to student-organized religious clubs; curriculum issues, such as teaching evolution, creationism, or intelligent design in science class or criteria for selecting or removing books from the classroom or school libraries; student religious expression; and school activities implicating religious practices.

This book examines those five areas of public school interaction with religion because they pose the most likely conflicts with and among the

Establishment, Free Exercise, and Free Speech Clauses, which often prove to be in tension. While the Supreme Court has held that "the free exercise of religion is a fundamental constitutional right,"[30] it has also instructed that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."[31] As explained above, the Supreme Court has also repeatedly instructed that the "fundamental" right of free speech is not "shed . . . at the schoolhouse gate."[32] Those constitutional mandates on public school officials—to remain neutral among religious/secular beliefs and to refrain from restraining the free exercise of religion or abridging the freedom of speech—are bound to collide where students wish to engage in school prayer or religious expression, where student religious clubs seek access to school property, where teachers wish to present secular ideas that conflict with religious beliefs or infuse religious ideology in covering secular subjects, and where school activities conflict with religious holidays and other practices. Coupling those mandates with free speech rights makes conflict all the more inevitable.

The purpose of this book, then, is to try to clarify how school officials should act when confronted with situations presenting seeming conflicts among the Establishment, Free Exercise and Free Speech Clauses.

End Notes

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1 The Supreme Court held that the Religion Clauses apply to state actors through the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2 Edwards v. Aguillard, 482 U.S. 578, 582-83 (1987).

3 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982).

4 403 U.S. 602 (1971).

5 *Id.* at 612-13. As discussed in chapter 2, section 4, Justice O'Connor's endorsement test is just a gloss on *Lemon*.

6 Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990).

7 Parker v. Hurley, 514 F.3d 87, 103 (1st Cir 2008) (citing *Smith*, 494 U.S. at 877).

8 *Smith*, 494 U.S. at 878-80.

9 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

10 Congress overturned *Smith* as it applies to federal conduct and therefore federal actors may no longer incidentally burden religion through generally applicable laws. *See* Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*. But the Supreme Court has held that RFRA does not apply to state action. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). Therefore, RFRA's mandates have no effect on public schools.

11 *See, e.g.*, Jacobs v. Clark County Sch. Dist. 526 F.3d 419, 439 (9th Cir. 2008) (finding that school uniform policy does not violate students free exercise rights and quoting *Smith*, 494 U.S. at 879). Of course, such a policy might violate the free speech clause if schools selectively prohibit religious-message-bearing T-shirts, such as "Jesus Loves You."

12 *See Lukumi*, 508 U.S. at 531 ("failure to satisfy one requirement is a likely indication that the other has not been satisfied").

13 *Lukumi*, 508 U.S. at 533. For example, in *Lukumi*, the Supreme Court struck down city ordinances targeting the ritual slaughter of animals because the city had not demonstrated "that, in the context of these ordinances, its governmental interests [were] compelling," or that "the ordinances [were] drawn in narrow terms to accomplish those interests." *Id.* at 546.

14 *Smith*, 494 U.S. at 881-82.

15 For example, the controversy set forth in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where the state of West Virginia compelled students to salute the flag during the Pledge of Allegiance violated both the free speech and free exercise rights of Jehovah's Witnesses. In such a case, a reviewing court would employ strict scrutiny.

16 494 U.S. 872, 877 (1990) (upholding Oregon's denial of unemployment compensation for work-related misconduct to two employees discharged for ingesting an illegal drug during a sacramental ceremony at the employees' Native American Church).

17 Several courts have at least acknowledged that *Smith* is not limited to criminal prohibitions. *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997); Parker v. Hurley, 514 F.3d 87, 96 n.6 (1st Cir. 2008) (collecting cases).

18 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).

19 *See, e.g.*, 71 Pa. Stat. Ann. §§ 2401-2407 (2009) (Pennsylvania's Religious Freedom Protection Act). These statutes are popularly known as state RFRAs, named for the Religious Freedom Restoration Act of 1993, by which Congress attempted to reinstate pre-*Smith* law under the Supreme Court's *Sherbert* test. *Sherbert v. Verner*, 374 U.S. 398 (1963). RFRA 1993 essentially invalided government action that substantially burdened religious exercise unless that action used the least restrictive means of furthering a compelling state interest. But in *City of Boerne v. Flores*, the Supreme Court invalidated RFRA 1993 as exceeding Congress's power under Section 5 of the Fourteenth Amendment. *See* Religious Freedom Restoration Act of 1993, codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2008), *invalidated in part* by City of Boerne v. Flores, 521 U.S. 507 (1997). The Supreme Court's decision did not extend to state RFRAs, which remain viable. Those states that have state RFRA statutes are Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, Oklahoma, New Mexico, Pennsylvania, Rhode Island, South Carolina, and Texas. Eugene Volokh, The Religion Clauses and Related Statutes: Problems, Cases and Policy Arguments 341 (Foundation Press 2005). Additionally, Alabama has also adopted a state RFRA constitutional amendment. *Id.*

20 For example, the State Supreme Courts of Alaska, Indiana, Massachusetts, Maine, Michigan, Minnesota, Montana, North Carolina, Ohio, Vermont, Washington, and Wisconsin have interpreted their state constitutions to require strict scrutiny of free exercise claims. Eugene Volokh, The Religion Clauses and Related Statutes: Problems, Cases and Policy Arguments 341 (2005). *See, e.g.*, State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996) (rejecting *Smith* and determining that the "compelling interest/least restrictive alternative" should be used to evaluate religious liberty claims under the Wisconsin constitution). By contrast, the state supreme courts of Maryland, New Jersey, Oregon, and Tennessee have interpreted their state constitutions as not providing for strict scrutiny of religious liberty claims. Eugene Volokh, The Religion Clauses and Related Statutes: Problems, Cases and Policy Arguments 341 (Foundation Press 2005).

21 The remaining states do not have state RFRAs and their supreme courts have not addressed whether their state constitution provides greater free exercise rights than those available under *Smith*. *Id.*

22 McCreary County v. ACLU, 545 U.S. 844, 860 n. 10 (2005).

23 U.S. Const. amend. I.

24 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

25 *Id.* at 506.

26 *Id.* at 513.

27 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

28 Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618, 2622 (2007).

29 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

30 Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974).

31 Epperson v. Ark., 393 U.S. 97, 104 (1968).

32 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 & n.2, 507 (1969).