FREEDOM OF (AND FROM) RELIGION



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I. GOALS OF THE COURSE

A. Review and understand the Establishment Clause and Free Exercise Clause of the 1st Amendment to the United States Constitution.

B. Put the Establishment Clause and Free Exercise Clause in historical context.

C. Look at the question of "what is a religion"?

D. Review and understand landmark United States Supreme Court cases pertaining to the Establishment Clause and Free Exercise Clause.

E. Discuss the interaction between Establishment Clause/Free Exercise Clause landmark cases and the Religious Freedom Restoration Act.

F. Be empowered as citizens (not just lawyers) to have informed views and opinions pertaining to the Establishment Clause and Free Exercise Clause.

II. OVERVIEW OF THE COURSE

A. Background of the Speaker.

B. Goals of the Course.

C. Establishment Clause.

D. Historical Context.

E. What Is A Religion?

F. United States Supreme Court Establishment Clause/Free Exercise Clause Cases.

G. Religious Freedom Restoration Act.

H. Conclusion

III. THE FIRST AMENDMENT AND RELIGION

A. The Constitution was ratified in 1788.

B. The First Amendment was ratified in 1791.

C. The text of the First Amendment is as follows:

> ***Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof****; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

D. The highlighted part of the First Amendment is known as the Establishment Clause and the Free Exercise Clause.

IV. THE PURPOSE OF THE CLAUSES

A. It is generally accepted that the Establishment Clause: (i) prohibits control of the government by religion; and (ii) prohibits control of religion by the government.

B. Looked at another way, the Establishment Clause prohibits the government from establishing or sponsoring religion.

C. The Establishment Clause is a limitation placed upon the United States Congress preventing it from passing legislation establishing an official religion and, by interpretation, makes it illegal for the government to promote theocracy (religious rule) or promote a specific religion with American tax dollars.

D. The Establishment Clause thus also prohibits the government from preferring one religion over another, and has also been generally interpreted (along with the Free Exercise Clause) of prohibiting the government from preventing religion over non-religion.

E. In other words, inherent in the Establishment Clause and the Free Exercise Clause is the right of an individual to be a non-believer, and non-practitioner, of any religion.

F. In general, the Free Exercise Clause prohibits government interference with religious beliefs ***and—within limits—religious practices***. It is this latter highlighted issue that often has challenged the courts.

- What if polygamy (a man being married to more than one woman at a time) is a religious practice?

- What if ingesting certain controlled substances that are otherwise illegal to manufacture, possess or use is a religious practice?

- What if proselytizing (attempting to convert or persuade someone to adopt a certain religion) is a religious practice? Does this allow a majority to inject religion into public schools, whether by teaching religious doctrines such as creationism" or trying to force prayer into public school?

V. THE NO RELIGIOUS TEST CLAUSE

A. The No Religious Test Clause is located in Article VI of the Constitution.

B. The No Religious Test Clause states:

Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; ***but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.***

C. The plain language of the No Religious Test Clause would seem to say that elected officials (or appointed officials such as federal judges) cannot be required to be a member or believer in any religion as a prerequisite to holding office.

D. Indeed, because of the placement of the No Religious Test Cause right after the requirement that elected and appointed government officials must swear an oath or affirmation to support the Constitution, there is an argument that the Founders intended the Constitution to be the supreme law of the land over the tenets of any religion, in other words, that the Founders intended to establish a secular government.

VI. THE DIVINE RIGHT OF KINGS

A. The divine right of kings was a political and religious doctrine that was at its height during what is known as the Age of Absolutism, generally considered to have spanned from 1610 to 1789.

B. The doctrine holds that a monarch is not accountable to any earthly authority (such as a parliament or the Pope) because the monarch's right to rule comes directly from divine authority.

C. This leads to the conclusion that the monarch is not subject to the will of the people.

D. It would follow, then, that any attempt to overthrow, resist or even criticize the monarch runs contrary to "God's will" and is a sacrilegious act.

E. The Founding Fathers were certainly aware of this political and religious theory, along with the persecution of minority religious sects by European monarchs and/or more "established religions," including that such issues drove part of the emigration to the colonies.

VII. SEPARATION OF CHURCH AND STATE

A. Paraphrased from an 1802 letter written by Thomas Jefferson to the Danbury Baptist Association, which was later published in newspapers of the time.

B. Jefferson wrote:

> *Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions,* ***I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.*** *Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.*

C. In Reynolds v. U.S. (1879), the U.S. Supreme Court stated that Jefferson's words "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment."

D. In Everson v. Board of Education (1947), Justice Black of the U.S. Supreme Court wrote "[i]n the words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state."

VIII. INTERNAL REVENUE SERVICE (IRS) DEFINITION OF A CHURCH

A. How can we define a "church" or "religious institution"?

B. In *Publication 1828, Tax Guide for Churches and Religious Organizations*, the IRS lists guidelines for its agents to weigh in determining whether an organization is indeed a "church" or "religious institution" and, thus, can be considered as a tax exempt organization for federal tax purposes.

C. These guidelines are whether the organization in question has the following characteristics that would, in whole, in part or in combination demonstrate it is a "church" or "religious institution":

1. Distinct legal existence.
2. Recognized creed and form of worship.
3. Definite and distinct ecclesiastical government.
4. Formal code of doctrine and discipline.
5. Distinct religious history.
6. Membership not associated with any other church of denomination.
7. Organization of ordained ministers.
8. Ordained ministers selected after completing prescribed courses of study.
9. Literature of its own.
10. Established places of worship.
11. Regular congregations.
12. Regular religious services.
13. Sunday schools, etc. for the religious instruction of the young.
14. Schools for the preparation of its ministers.

IX. U.S. SUPREME COURT DEFINITION OF RELIGIOUS BELIEF OR PRACTICE FOR FIRST AMENDMENT PURPOSES

A. Thomas v. Review Board of the Indiana Employment Security Division (1981). "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task…However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; ***religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection***."

B. Thus, a broader definition is used for protection under the First Amendment as opposed to the narrower definition used when giving the benefit of tax exempt status.

X. LANDMARK U.S. SUPREME COURT FREEDOM OF RELIGION CASES

A. Reynolds v. U.S. (1879). The Court ruled that Mormons could be prosecuted for violating state anti-bigamy laws. Bigamy was not a protected activity under the First Amendment. The Court held that while people could believe whatever they wanted to as far as religion, they could not always be permitted to take action on those beliefs. The Court ruled that a religious practice could not be superior to the law of the land, as this would allow every citizen to become a law unto himself or herself. Reynolds demonstrates the difference between the Establishment Clause (no government action pertaining to belief or unbelief) and the Free Exercise Clause (limited government action to ensure that laws are not broken during the practice of a religion).

B. Everson v. Board of Education (1947). The Court made it clear that the First Amendment's Establishment Clause (*i.e.,* "Congress shall make no law respecting an establishment of religion") applied to the states as well as to the federal government. In Everson, the Court also reiterated the importance of Thomas Jefferson's notion of a "wall of separation between church and state." However, the Court did let stand a New Jersey state policy of allowing taxpayer money to fund transportation of students to religious schools as well as to public schools.

C. Torcaso v. Watkins (1961). The governor of Maryland appointed Torcaso to be a notary public. Torcaso was an atheist. To take office under the Maryland state constitution, Torcaso was required to declare that he had a belief in God. Torcaso sued, arguing that this violated his First Amendment right to freedom from religion, specifically, his right to serve as an appointed government official although he was an atheist. The Maryland Court of Appeals (the state supreme court) held that Torcaso was not being compelled to recite the oath and therefore his First Amendment rights were not violated; the fact that he could not serve in office unless he recited the oath was—according to the state court—irrelevant to the First Amendment issue. Torcaso appealed to the U.S. Supreme Court, which cited

Everson and held that neither the federal nor state government can compel an individual to hold a particular religious belief, or speak a religious oath, and struck down that part of the Maryland constitution requiring such an oath as unconstitutional (the Court did not opine as to whether this was a prohibited religious test for holding office, however). Thus, not all such provisions in state law were stricken or altered after Torcaso.

- Silverman v. Campbell (1997). The Court held that a provision in South Carolina's state constitution that provided "[n]o person who denies the existence of the Supreme Being shall hold any office under this Constitution" could not be enforced as it was in derogation of Article VI of the Constitution of the United States, which applied against the states, and prohibited religious tests for holding office.

D. Engel v. Vitale (1962). The Court held that government directed prayer in public schools violates the Establishment Clause. The Court ruled that it did not matter if the prayer was made voluntary or if the prayer was non-denominational. Engel has been upheld and reaffirmed time after time by the Court:

- Abington School District v. Schempp and Murray v. Curlett (both 1963). Public school-sponsored Bible readings and recitations of the Lord's Prayer are unconstitutional under the Establishment Clause.

- Wallace v. Jaffree (1985). A public school cannot require a time for students to engage in meditation or silent prayer.

- Lee v. Weisman (1992). Clergy cannot lead prayers at public high school graduation ceremonies.

- Santa Fe Independent School Dist. v. Doe (2000). Student-led prayer at public school football games violates the Establishment Clause.

- *The question the Court is concerned with is not one of banning all prayer from public school but, rather, striking down public school policies that require, coerce or encourage prayer. Such policies give the impression that government is* ***officially favoring religion versus non-religion****. Also, most school prayer cases involve Christian groups attempting to assert their particular religious beliefs into the public schools. Such policies give the impression that the government is* ***officially favoring one religion over others****. Also, there is the element of such policies* ***coercing students to pray, including through peer pressure****.*

E. Epperson v. Arkansas (1968). In 1925, in a trial that was referred to in the media as the "Scopes Monkey Trial," a Tennessee teacher was found guilty of educating students about human evolution in a public school. At the time, creationism was required to be taught and some states banned the teaching of evolution, or even criminalized such teaching. It actually took until 1968, in the Epperson case, for the U.S. Supreme Court to hold that teaching evolution is not a crime, and also to

prohibit states from requiring that public schools teach "creationism" or any other theory in conformity with any particular religious dogma in public schools.

- Edwards v. Aguillard (1987). Teaching creationism as science or fact in any public school is unconstitutional. Since the 1968 Epperson case, some schools taught creationism alongside evolution, presenting them as alternate theories. Edwards ended this practice.

- Kitzmiller v. Dover Area School District (M.D. Pa. 2005). ***This was not a U.S. Supreme court case, it was a federal trial court case originating in the Middle District of Pennsylvania.*** In Kitzmiller, a school board voted to teach Intelligent Design theory as science or fact, and as an alternative to evolution, and to purchase a textbook that espoused Intelligent Design. Intelligent Design is a theory that there is some "ultimate designer" of the universe and everything in it, but (supposedly) the theory is not religious. The analogy often used by proponents of Intelligent Design is that of a watchmaker, in that you can put all of the parts to create a watch in a bag, and shake it up, and pour it out, but they will not spontaneously form themselves into a watch—to create the watch, you need a watchmaker (a "Creator," *i.e.*, "God"). Some facts revealed in the record of the case that tended to undercut the argument that Intelligent Design theory was not based on religious belief were: (i) religious groups were behind the creation of the theory; (ii) the movement to teach Intelligent Design in public schools as an alternative to the Big Bang theory and the theory of evolution was supported by many of the same groups that advocated teaching creationism **(*leading to a reasonable inference that Intelligent Design was merely a repackaging of creationism*)**; (iii) the legal fees for the proponents of Intelligent Design were being paid by religious groups; and (iv) the slate of school board members who supported teaching Intelligent Design had run on the platform of being pro-prayer in public schools and other such principles **(*leading to a reasonable inference that their actions were motivated by religious belief*)**. The Kitzmiller opinion is lengthy, but can be summarized as finding that Intelligent Design is just a repackaged form of creationism, and that teaching Intelligent Design in public school as science or fact or as an alternative to evolution violated the Establishment Clause.

- *It should be noted that these cases do not stand for the proposition that matters pertaining to religion cannot be taught in public school at all. The question is how the subject matter is presented. For example, matters pertaining to religion can be taught in history, social studies and literature classes.*

- *One key problem with teaching Intelligent Design or creationism as science and fact is this tends to* ***endorse Christian or Judeo-Christian beliefs over non-belief or other religious belief systems.***

F. Lemon v. Kurtzman (1971). In Lemon, the Court was faced with state laws in Pennsylvania and Rhode Island that allowed the government to reimburse private schools for the salaries of their teachers. The record showed that, at the time, most of the private schools and teachers who would have benefited from these laws were Roman Catholic (about 95%). The state laws in question provided that to be eligible for government reimbursement, private school teachers must teach only the courses taught in public school, using the same materials used by public schools and must not teach any religion courses. The Court created the Lemon test to determine whether such laws, that had the effect of assisting a religion or religious group, were constitutional under the Establishment Clause. In Lemon, the Court found that the Pennsylvania and Rhode Island laws allowing reimbursement of private school teacher salaries were unconstitutional because they failed this test:

i. The law must have a secular (non-religious) purpose.

ii. The principal or primary effect of the law must not advance or inhibit religion.

iii. The law must not involve an excessive entanglement between the government and religion.

The Lemon test has been restated in subsequent cases as requiring a court to determine: (i) if the law or act appears to be government indoctrination or endorsement of religion or a certain religious belief; (ii) whether the law defines recipients of government benefits or funding based on religion; and (iii) whether the law creates excessive entanglement between government and religion. Some of the current justices are unhappy with the Lemon test, so its viability is in question. Lemon was cited in connection with the Kitzmiller case holding that teaching of intelligent design in public schools violates the Establishment Clause.

G. Wisconsin v. Yoder (1972). The Court recognized that parents could remove their children from public school for legitimate religious reasons. The Yoder case involved an Amish youth. Under Amish church standards, "higher education" meant "beyond the 8th grade," and this was deemed unnecessary for the simple way of Amish life, and was also believed to endanger the salvation of the Amish, as it would expose them to "worldly knowledge" that could corrupt them. The Court held that the Amish had a sincerely held religious belief that the values their children would learn at home would surpass the "worldly knowledge" taught in school. The Yoder case is still cited for the proposition that parents can "homeschool" their children for religious reasons without running afoul of truancy laws.

H. Larkin v. Grendel's Den (1982). At issue in Larkin was a state law that gave any religious school or church veto power over whether or not any business located within 500 feet of them could get a license to serve alcohol. The Court held that such laws failed two out of the three prongs of the Lemon test. The law had a secular purpose, namely, regulating the sale of alcohol. But giving a church

unquestioned veto power over the issuance of a liquor licenses unduly favored or advanced religion and also created unwarranted entanglements between government and religion by giving a church a "vote" in the government decision-making process.

- *It should be noted that these issues still come up in zoning law disputes.*

I. Employment Division v. Smith (1990). The Court held that a state (Oregon) could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote even though the use of the drug was part of a religious ritual. The Court further held that while states have the power to accommodate otherwise illegal acts performed in pursuit of religious beliefs, they are not required to do so. Smith was a member of the Native American Church, which was a recognized religion, and was fired from his job at a drug rehabilitation clinic after he ingested peyote as part of a religious ceremony. Possession of peyote was a crime under state law and use for religious purposes was not a recognized defense. Smith has been cited for the rule that laws of general applicability—such as a criminal drug laws that equally apply to every citizen—did not violate the Establishment Clause, as they were facially neutral towards religion.

- This led Congress to pass the Religious Freedom Restoration Act of 1993. The Act required all federal and state courts to use a "strict scrutiny" standard of review when determining the constitutionality of laws that may restrict religious freedom. The Act has been held unconstitutional as applied to state courts, but is still followed on the federal level.

- Strict scrutiny is the highest level of judicial scrutiny over a law, and is applied where a law affects or restricts a fundamental constitutional right. To uphold the law as constitutional, the government must demonstrate that: (i) the law or regulation is necessary to achieve a "compelling state interest"; (ii) the law is narrowly tailored" to achieve that purpose; and (iii) the law uses the "least restrictive means."

- Burwell v. Hobby Lobby (2014). The Court struck down a federal mandate that employers must provide contraceptive coverage in their health insurance plans. The case was not decided on First Amendment grounds, but was decided under the Religious Freedom Restoration Act. It must be noted that Hobby Lobby is not publicly traded, but was a closely held corporation. In such circumstances, the government could not mandate its owners to act against their religious beliefs as to funding or subsidizing their employees' ability to obtain certain methods of contraceptive that the owners disagreed with (like the "day after pill"). The Court thought that the government could use less restrictive means to ensure that employees of private companies had access to such contraceptives rather than mandating such coverage against the religious beliefs of their employers.

- There is also a federal law titled the Religious Land Use and Institutionalized Persons Act of 2000. This law prohibits the imposition of burdens on the ability of prisoners to worship as they please and gives churches and other religious institutions a way to avoid zoning law restrictions on their property use, in that such laws are subject to ***strict scrutiny*** review (ordinarily, zoning laws would be subject to the much lower ***rational basis scrutiny***). This Act applies to both the states and the federal government.

J. Zelman v. Simmons-Harris (2002). In Zelman, the Court held that an Ohio school voucher program that allowed students to enroll in religiously affiliated schools did not violate the Establishment Clause. Under Lemon, the program had a ***valid secular purpose*** (to allow school choice); was ***religiously neutral*** (because there were numerous non-religious private schools in existence at which parents could use vouchers); and there was ***no excessive entanglement between government and religion*** (the parents were able to choose where to use the voucher, and the beneficiaries of the voucher program were the parents rather than the schools themselves).

- *Compare Zelman to the 1947 Everson case (taxpayer paid bus transportation for religious school students upheld as constitutional) and the 1971 Lemon case (under the Establishment Clause, a state cannot subsidize private school teacher salaries where the subsidy would virtually entirely benefit Catholic schools).*

XI. THE END OF THE LEMON TEST?

A. Kennedy v. Bremerton School District (2022).

B. Kennedy was another prayer in public school case. In Kennedy, a high school football coach kneeled and prayed before and after games. The school district feared that his actions would violate the Establishment Clause, so they asked him to stop. When he did not, they fired him. The coach claimed his First Amendment rights were violated and sued.

C. The Court ultimately ruled in the coach's favor, holding that he prayed before and after the game, where he was free to do as he pleased. Before the case had been decided by the Court, the coach had moved to a new state and taken another job (there was some argument that because of this fact, Kennedy is moot, in that there was not case or controversy for the Court to decide).

D. But most notable is that in Kennedy, the Court seemed to abandon the Lemon test, stating in the opinion that in future disputes over the Establishment Clause, the Court would decide cases in accordance with what historically and faithfully reflects the *"**understanding of the Founding Fathers**."*

E. At this point, nobody really knows what that standard means. It would also seem to be a much vaguer standard than the Lemon test. Most scholars believe that this new standard, if instituted, indicates that the Court will be more "pro-religion" than it has been in previous cases.

XII. CONCLUSION

A. Generally, courts have honored the plain language of the Establishment Clause and Free Exercise Clause to the First Amendment.

B. Generally, courts have honored Jefferson's concept of there being a "wall of separation between Church and State."

C. Generally, courts have ruled in a manner that would not favor religious belief over non-belief, and that would not favor one particular religion over another.

D. However, with the most recent U.S. Supreme Court's dissatisfaction with the Lemon test, it would not be surprising if the courts' rulings in Establishment Clause and Free Exercise Clause cases will swing more towards favoring of religion over non-religion.