Lecture Notes

# Chapter 4: Religion: Exercise and Establishment

## Annotated Chapter Outline

1. Defining Religion
   1. Only a genuine religion enjoys the protection of the First Amendment’s free exercise clause.
      1. A unanimous Court in *Davis v. Beason* (1890), wrote, “The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”
      2. By the mid-twentieth century, America’s increasingly diverse religious culture required the justices once again to confront the task of defining religion.
   2. ***United States v. Ballard* (1944)**
      1. Guy Ballard started the I Am movement, claiming supernatural healing powers.
         1. He told his followers that he and his family needed money to continue his work.
         2. The Ballards used the U.S. Postal Service to collect these funds.
      2. The federal government accused the Ballards of using the mail to defraud people because the I Am sect was not a religion.
         1. The Supreme Court addressed the question of what a jury could consider in determining whether to convict the Ballards.
         2. The trial court judge had told the jury that it could not take into account the truth of the Ballards’ views; rather, it could consider only the sincerity with which the Ballards held their views.
         3. The Supreme Court agreed with this approach, which became known as the Ballard approach.
   3. ***United States v. Seeger* (1965)**
      1. The justices considered whether an individual who was not a member of an organized religion could obtain a military exemption on religious grounds.
      2. Daniel Seeger asserted that, although he opposed participation in the war on the basis of his religious belief, “he preferred to leave the question as to his belief in a Supreme Being open ‘rather than answer yes or no.’”
      3. The Court stressed the sincerity of one’s belief: “[T]he test of belief ‘in relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to ... the orthodox belief in God.”
   4. In *Welsh v. United States* (1970), the Court considered another section of the law, which excluded from exemption coverage individuals whose views were “essentially political, sociological, or philosophical.”
      1. Justice Black wrote that a draftee’s could obtain a religious exemption if his moral and ethical beliefs were sincerely held—as sincerely held as traditionally defined religious beliefs.
2. Free Exercise of Religion
   1. The First Amendment appears to erect a solid barrier against government regulation of religious practice.
      1. A literal approach to the free exercise clause would suggest that religious denominations can pursue any exercise of their religion they desire.
      2. However, writings and documents of the days of the Founders point to a universally accepted limit on “free exercise.”
      3. Thomas Jefferson wrote: “[I believe] that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinion.”
   2. Belief-Action Distinction and the Valid Secular Policy Test
      1. ***Reynolds v. United States* (1879)**
         1. The majority of the nation considered polygamy to be a moral and social evil.
         2. In 1862 the Morrill Anti-Bigamy Act prohibiting plural marriages was passed.
         3. George Reynolds, a devout Mormon official, married his second wife and was promptly arrested.
         4. Reynolds argued that he was following the dictates of his faith, a right reserved to him under the free exercise clause.
         5. The case reached to Supreme Court, which asserted: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of the good order.”
         6. The distinction between opinions (or beliefs) and actions (or practices) became the centerpiece for several future religion cases.
      2. ***Pierce v. Society of Sisters* (1925)**
         1. In 1922 Oregon had passed a compulsory public school education act, requiring children between the ages of eight and sixteen to attend public school.
         2. Attempting to avoid closure, The Society of Sisters chose to sue the state.
         3. The Society relied on a direct application of the Fourteenth Amendment, arguing that the law deprived parents of their fundamental liberty to determine how their children would be educated without due process of law.
         4. The Court took the view that the sisters (as opposed to the Mormons) “engaged in a kind of undertaking not inherently harmful but long regarded as useful and meritorious.”
      3. The Court did not return to the belief-action dichotomy until *Cantwell v. Connecticut* (1940).
         1. Newton Cantwell and his sons were soliciting contributions for the Witnesses in New Haven, Connecticut, playing recordings and distributing literature critical of the Roman Catholic faith.
         2. They were arrested for violating a law that required solicitors to obtain a license from the state.
         3. The Cantwells argued that, under the free exercise clause, they should be free to advocate for their faith without having to seek the government’s permission.
         4. The Court ruled that the states, through the due process clause of the Fourteenth Amendment, were obliged to comply with the free exercise clause, and that the Cantwells’ religious freedom had been violated, requiring a reversal of their convictions.
         5. The Court also adopted a legal standing easy for the government to meet: if the policy served a legitimate governmental goal, not directed at any particular religion, the Court would uphold it, even if the legislation had the effect of conflicting with religious practices.
   3. Application of the Valid Secular Policy Test
      1. ***Minersville School District v. Gobitis* (1940)**
         1. Jehovah’s Witnesses, who exalt religious laws over all others, claim that a salute and the Pledge of Allegiance violate a biblical teaching from Exodus.
         2. At the time of this case, several states made the pledge and salute to the flag mandatory for all children attending public schools.
         3. When Walter Gobitas’ two children refused to salute the flag, they were expelled.
         4. Gobitas sued the school board, arguing that the expulsion violated his children’s free exercise of religion rights.
         5. The Court claimed that the state had a legitimate secular reason for requiring flag salutes–to foster patriotism–and that the law affected the religious practice of the Jehovah’s Witnesses did not detract from its constitutionality.
      2. ***Prince v. Massachusetts* (1944)**
         1. A Massachusetts statute declared it unlawful for minors “to sell, expose, or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description ... in any street or public place.”
         2. Sarah Prince, a Jehovah’s Witness, allowed her nine-year-old niece to help her distribute religious pamphlets and was arrested.
         3. When the case reached the Supreme Court, it dealt exclusively with this question: Did the state law violate First Amendment principles?
         4. The Court asserted that the state has an interest in fostering the development of its youth, and it mattered little “that religious scruples dictate contrary action.”
   4. The *Sherbert-Yoder* Compelling State Interest Test
      1. ***Braunfeld v. Brown* (1961)**
         1. A Pennsylvania “blue law” allowed only certain kinds of stores considered essential to remain open on Sundays.
         2. Abraham Braunfeld, an Orthodox Jew who owned a retail clothing and home furnishing store in Philadelphia, wanted to operate his retail store on Sundays.
         3. Braunfeld wanted the Court to issue a permanent injunction against the law, arguing that he needed his retail store to be open six days a week to compete economically with non-Jewish store owners who were free to operate on Saturdays.
         4. The Court upheld the constitutionality of blue laws and restated the belief-action dichotomy.
         5. However, it modified the valid secular policy test, explaining that “if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden*.”
      2. *Sherbert v. Verner* (1963)
         1. *Sherbert* added the requirement that the government demonstrate that its regulation was in pursuit of an overriding governmental goal.
         2. Under strict scrutiny, the state would have to demonstrate:
            1. That it was pursuing a compelling state interest test.
            2. That its method was the least restrictive alternative.
      3. *Wisconsin v. Yoder* (1972)
         1. A government restriction of religious exercise is compatible with the Constitution only if:
            1. The law advances a compelling government interest.
            2. The law employs the least restrictive means available to attain that interest.
      4. ***Thomas v. Review Board of Indiana Employment Security Division* (1981)**
         1. Because a new job required him to make tanks for use by the military, Eddie Thomas quit on religious grounds and filed for unemployment benefits, which the state denied.
         2. The Court acknowledged the parallels between *Sherbert* and this dispute: “Here, as in *Sherbert*, the employee was put to a choice between fidelity to his religious beliefs or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*.”
      5. ***Bob Jones University v. United States* (1983)**
         1. Forced by litigation to begin admitting unmarried Black people, Bob Jones University maintained strict rules; for example, interracial dating or marriage would lead to expulsion.
         2. After the IRS revoked Bob Jones’s tax-exempt status on the grounds that the school’s policies were racist, the university challenged the decision, arguing that the IRS action punished the practice of religious beliefs.
         3. The Court concluded that the government had met *Sherbert-Yoder*’s standard: “[T]he government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed ... for the first 165 years of this Nation’s constitutional history.”
   5. The Demise of *Sherbert-Yoder* and Adoption of the *Smith* Test
      1. ***Goldman v. Weinberger* (1986)**
         1. S. Simcha Goldman was a U.S. Air Force captain and an ordained Orthodox rabbi whose superior officers had prohibited him from wearing a yarmulke (skullcap) while in uniform.
         2. Goldman’s attorneys argued that because his wearing the religious skullcap in no way interfered with his performance or created any other problem of compelling interest to the Air Force, Goldman’s religious exercise should not be infringed.
         3. Lawyers for the military argued that strict uniform regulations help maintain discipline, morale, and esprit de corps.
         4. The Court ruled against Goldman, explaining: “In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”
      2. The Court issued another free exercise decision in *Bowen v. Roy* (1986).
         1. An otherwise eligible Native American couple was denied state welfare benefits for their two-year-old daughter for failing to provide her Social Security number.
         2. According to their religious beliefs, the use of a Social Security number would “rob the spirit” of their daughter.
         3. The Court, however, saw no restriction of religious exercise; the free exercise clause “does not afford an individual a right to dictate the conduct of the Government’s internal procedures.”
         4. In contrast, in the unemployment program at issue in *Sherbert*, applicants for benefits were ineligible if they failed to accept other work “without good cause.”
      3. *Employment Division, Department of Human Resources of Oregon v. Smith* (1990)
         1. The Court ruled that, in cases involving neutral laws of general applicability, the Court will rely upon the rational basis test.
      4. *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* (1993)
         1. Where the unemployment program in Sherbert allowed for idiosyncratic exemptions that could be used against religious liberty, Hialeah had simply written those exemptions into their regulations.
3. Religious Establishment
   1. Three alternative interpretations of the First Amendment’s religious establishment clause have been advanced over the years:
      1. Strict separation: A solid wall of separation between church and state, prohibiting most, if not all, public activities that intersect with religion.
      2. Neutrality: The state is barred from favoring one religion over another, nor can the state favor religion over secular interests.
      3. Accommodation: Only the establishment of an official religion is prohibited, coercing participation in religious activity, or favoring one religion over others.
   2. ***Bradfield v. Roberts* (1899)**
      1. The congressional appropriation of funds to a hospital was challenged because it was owned and operated by the Sisters of Charity, a religious order of Roman Catholic nuns.
      2. The Court unanimously rejected the challenge, finding little relevance in the fact that Catholic nuns administered the hospital.
   3. Establishment Clause Developments through the Warren Court Era
      1. ***Everson v. Board of Education* (1947)**
         1. The Court evaluated a New Jersey law that authorized local school boards to reimburse parents for the cost of transporting their children to and from private schools on public buses.
         2. Taxpayer Arch Everson claimed that this money supported religious schools in violation of the establishment clause of the First Amendment.
         3. The Court explained that the reimbursement program was not a religious establishment, and that, although government could not enact laws that favored religion—either one religion or religion in general—government could pass laws that extend a broad benefit that might incidentally advantage religion.
         4. The aid was secular in purpose—to provide safe transportation for students—and the beneficiaries of the aid were children and their parents, not religious schools.
      2. ***Board of Education v. Allen* (1968)**
         1. A New York State program required local school authorities to purchase textbooks and then lend them free of charge to all children attending accredited schools, both public and private.
         2. Based on the *Everson* precedent, the Court determined that the program had the legitimate public purpose of promoting learning among the young and that the recipients of the aid were children and their parents, not the parochial schools attended.
      3. ***Engel v. Vitale* (1962)**
         1. New York required that teachers each morning lead public school students in reciting a prayer written by the state’s board of regents: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.”
         2. New York representatives argued that the prayer was nondenominational and that student participation was voluntary.
         3. The New York Civil Liberties Union claimed that those considerations were irrelevant; what mattered was that the state had required reciting a prayer government officials had written, clearly a violation of the establishment clause.
         4. The Court struck down the New York prayer requirement, writing: “We think the constitutional prohibition against laws respecting the establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried out by the government.”
      4. *School District of Abington Township v. Schempp* (1963)
         1. The Schempp decision, following on the heels of *Engel v. Vitale*, confirmed the principle that state-sponsored prayer in public schools violates the establishment clause.
         2. The Court began to develop a test to be used in establishment clause cases: “What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”
   4. The *Lemon* Test: Adoption and Discontent
      1. ***Walz v. Tax Commission of the City of New York* (1970)**
         1. Frederick Walz bought a small, useless lot on Staten Island, New York, for the sole purpose of challenging the state’s laws that gave religious organizations exemptions from property taxes.
         2. Walz contended that the tax exemptions in effect forced property owners to make involuntary contributions to churches in violation of the establishment clause.
         3. The Court ruled for the state while extended its examination of the primary purpose of the law: “Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not *an excessive government entanglement* with religion.”
      2. *Lemon v. Kurtzman and Earley v. DiCenso* (1971
      3. ***Tilton v. Richardson* (1971)**
         1. The Higher Education Facilities Act provided building grants to colleges and universities so long as the funded facility would not be “used for sectarian instruction or a place for religious worship” for twenty years.
         2. A group of taxpayers from Connecticut brought suit against the secretary of the U.S. Department of Health, Education, and Welfare and four church-run colleges, claiming that federal aid to these religious institutions violated the establishment clause.
         3. The schools countered that this point was irrelevant as they had used government funding exclusively for secular purposes.
         4. The Court held that establishment clause was not violated, and noted that the stated legislative purpose—expanding opportunities for college education—was “a legitimate secular objective entirely appropriate for governmental action.”
      4. Aid to Religious Schools
         1. Between the 1971 *Lemon* decision and the mid-1980s, the justices, although sharply divided, tended to take a more separationist approach to the school aid cases.
         2. In 1986, however, the Court began to change positions, a shift that coincided with the promotion of William Rehnquist to the position of chief justice and the appointment of Antonin Scalia as associate justice.
         3. *Zelman v. Simmons-Harris* (2002)
            1. *Zelman* illustrates the Court’s use of neutrality to allow public aid to reach religious schools.
            2. The dissenters emphasized that, for the first time, the Court permitted tax dollars to pay the tuition of primary and secondary students attending religious schools.
      5. Access to Public Facilities and Funds
         1. ***Zorach v. Clauson* (1952)**
            1. The Court held that a release time program would not violate the Constitution, provided that the instruction took place in off-campus locations.
            2. The Court noted that the prohibition against religious establishment “does not say that in every and all respects there shall be separation of Church and State.”
         2. ***Lamb’s Chapel v. Center Moriches Union Free School District* (1993)**
            1. The Court unanimously extended the equal access position to religious groups that seek after-hours access to public school classrooms.
            2. If a public school opens its facilities for noncurricular activities, it may not discriminate against religious groups.
            3. That some of the users of those facilities are religious does not constitute an establishment of religion.
         3. ***Rosenberger v. University of Virginia* (1995)**
            1. Ronald Rosenberger, a member of a recognized organization of Christian students at the University of Virginia, objected to a denial of student activity funds to support the printing of the group’s newspaper.
            2. The Court explained that “it does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups.”
            3. The Court found the university’s policies to be a form of “viewpoint discrimination,” something prohibited by the free speech clause of the First Amendment.
      6. Government Involvement in Religious Organizations
         1. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012)
            1. A Lutheran church in Michigan operated an elementary school in which some teachers were recognized as ministers by the church.
            2. One of those teachers, who had been on disability leave because of a health condition, was encouraged by the church to resign her position when she sought to return to work.
            3. When she threatened the church with legal action, she was fired; the church explained that, “[l]ike many Christian denominations, the [Lutheran church] has long taught that Christians should resolve religious disputes within the church rather than sue each other in the civil courts.”
            4. The EEOC, however, regarded her dismissal as a violation of the Americans with Disabilities Act, which forbids retaliation against the disabled who pursue their legal rights.
            5. The Court explained giving “the state the power to determine which individuals will minister to the faithful ... violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”
      7. Teaching Religious Principles in Public Schools
         1. ***Epperson v. Arkansas* (1968)**
            1. An Arkansas law made it a crime for any state university or public school instructor “to teach the theory or doctrine that mankind ascended or descended from a lower order of animals” or to “adopt or use ... a textbook that teaches” evolutionary theory.
            2. Susan Epperson, a biology teacher in a Little Rock high school, wanted to use a biology book that contained a chapter on evolutionary theory but was afraid that she could face criminal prosecution if she did so.
            3. She asked the Arkansas courts to nullify the law, and, when the Arkansas Supreme Court turned down her request, she appealed her case to the U.S. Supreme Court.
            4. The Court reversed the state supreme court’s ruling, saying: “The First Amendment mandates governmental neutrality between religion and religion, between religion and nonreligion.”
            5. Under this standard, the law was a clear violation of the establishment clause: “Arkansas did not seek to excise from the curricula of its schools ... all discussion of the origin of man. The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.”
         2. *Edwards v. Aguillard* (1987)
            1. The Court found that the law lacked a secular purpose; rather, its purpose was to “endorse a particular religious view.”
   5. The *Lemon* Test Falls
      1. Religious Displays
         1. ***Lynch v. Donnelly* (1984)**
            1. A crèche—a nativity scene that is a physical representation of the biblical account of the birth of Jesus—displayed by the city of Pawtucket, Rhode Island was challenged.
            2. The Court found that the display was not an impermissible breach of the establishment clause, explaining that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”
         2. ***County of Allegheny v. ACLU* (1989)**
            1. A crèche in the county courthouse in Pittsburgh, Pennsylvania was challenged.
            2. In this context, the nativity scene violated the establishment clause by expressing a denominational preference.
            3. The state, the Court explained, could recognize the importance of Christmas, but “it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.”
         3. *Van Orden v. Perry* (2005)
            1. Disregarding the *Lemon* test, Chief Justice Rehnquist underlined the Court’s longstanding ambivalence toward the case.
            2. In place of *Lemon*, he turned to “the strong role played by religion and religious traditions throughout our Nation’s history.”
            3. The dissenters focused on the religious nature of the Ten Commandments, saying neutrality means not only that one denomination cannot be favored over another but also that believers cannot be favored over nonbelievers.
         4. *American Legion v. American Humanist Association and Maryland-National Capital Park and Planning Commission v. American Humanist Association* (2019)
            1. The opinions in *American Legion* can be divided between those justices who believed that the meaning of religious monuments could evolve over time and those who did not.
            2. Just as the justices disagreed about the outcome of this case, they were splintered over which rule to apply.
      2. Government-sponsored Prayer
         1. ***Wallace v. Jaffree* (1985)**
            1. The justices saw a clear religious purpose in an Alabama law that mandated a daily period of silence in all public schools “for meditation or voluntary prayer.”
            2. The sponsor of the law had candidly stated that it was an “effort to return voluntary prayer to our public schools,” and “[i]t is a beginning and a step in the right direction.”
         2. ***Santa Fe Independent School District v. Doe* (2000)**
            1. A Texas school district defended its practice of student-led invocations before football games by arguing that the decision to have prayers was determined by student vote, not school officials.
            2. Prior to the litigation, the student council had a designated student chaplain who led pre-game prayers over a public address system.
            3. After that practice was challenged, the school modified its policy, allowing students to vote on whether to have the prayer and who would deliver it.
            4. The Court concluded, however, that despite the change the school’s underlying purpose remained the same—to encourage prayer at a school-sponsored event.
         3. ***Lee v. Weisman* (1992)**
            1. A Rhode Island school district arranged to have a member of the local clergy offer a prayer at the beginning and end of commencement ceremonies.
            2. Daniel Weisman, a social work professor and father of two daughters attending the local schools, objected to this practice and ultimately took legal action to stop it.
            3. The Court agreed, explaining: “The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”
         4. *Kennedy v. Bremerton School District* (2022)
            1. This case presented a conflict between the free exercise clause and the establishment clause, and the decision seemed to turn on which of those values a justice gave greater weight.
            2. Justice Gorsuch’s opinion clearly favored the free exercise claim; Coach Kennedy, he argued, was engaged in private prayer, not acting in his official capacity as a coach, and was expressing his sincere religious beliefs.
            3. Justice Sotomayor contented it was precisely the facts in the case that made Coach Kennedy’s prayers an obvious establishment clause violation, and that Coach Kennedy actively led organized prayers with his team and other attendees.
4. The Future of the Establishment Clause
   1. Among its current membership, the Court probably has a majority of justices who can be classified as strongly accommodationist in orientation.
   2. With *Lemon* gone, they can look to such authorities as the views of the framers, early American practices, and the nation’s longstanding religious customs and values as a basis for delineating the meaning of the establishment clause.
   3. At the same time, it is probably wrong to assume that the Court will abandon the large body of law it has produced over the last sixty years.