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**The Supreme Court,
Religious Liberty, and
Public Education**

*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.*

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

—*West Virginia Board of Education v. Barnette*
Justice Robert H. Jackson
1943

Congress shall make
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exercise thereof

The Supreme Court and the lower courts are the final arbiters of the Constitution. They tell us what the Constitution and, more specifically, the First Amendment mean. Their interpretation of the First Amendment's Religious Liberty clauses is critical to our understanding of the role of religion in public education.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the religion clauses. This was due primarily to the fact that the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was passed. It reads in part that "no state shall ... deprive any person of life, liberty or property without due process of law" In the 1940 case of *Cantwell v. Connecticut*, the Supreme Court held that the free exercise of religion is one of the "liberties" protected by the due-process clause. Seven years later, the Court added the Establishment clause to the list. Together, these twin protections — free exercise and non-establishment — guarantee American religious liberty.

THE ESTABLISHMENT CLAUSE

The first of the two religion clauses reads: "Congress shall make no law respecting an establishment of religion" Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by the government. It forbids even laws *respecting* an establishment of religion.

The Establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the writing of the framers and prior judicial precedent, they

sometimes disagree. Some, including Chief Justice William Rehnquist, argue that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others, including a majority of the justices of the current Supreme Court, believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court's decision in *Everson v. Board of Education* (1947):

The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion ... Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."¹

To help interpret the Establishment clause, the Court developed a three-part test sometimes referred to as the "*Lemon* test." The test derives its name from the 1971 decision *Lemon v. Kurtzman*, in which the Court struck down a state program providing aid to religious elementary and secondary schools. Although the test has come under fire from several Supreme Court justices, many lower courts continue to use *Lemon* as a yardstick for deciding Establishment clause cases.

Let's look briefly at each prong of the test:

Does the law, or other government action, have a bona fide secular or civic purpose? As a general rule, the purpose of activities in the public schools should be educational. If, for example, a teacher is planning an activity associated with a religious holiday such as Christmas, she should ask herself, "What educational purpose am I trying to accomplish?" If the only purpose for the activity is to celebrate the religious holiday, it probably violates the first prong of the *Lemon* test.



¹ *Everson v. Board of Education*, 330 U.S. 1 (1947).

Accommodating a student's free exercise of religion is generally considered a legitimate civic purpose and, therefore, permissible under *Lemon* — assuming, of course, that the school is not promoting the student's faith. For example, a teacher could allow an art student to paint a picture with a religious theme. In fact, to prohibit such art would probably violate the free-speech and free-exercise rights of the student. On the other hand, a teacher should not make assignments requiring such religious art.

Returning to the issue of accommodation, the framers of the Constitution did not intend that the two religion clauses cancel each other out. Any interpretation of the Establishment clause must take into account the Free Exercise clause and vice versa. In the words of Justice O'Connor:

Government pursues free exercise values when it lifts a government-imposed burden on the free exercise of religion ... When the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden ... the religious purpose of such a statute is legitimated by the free exercise clause.²

Two years later in *Bishop v. Amos*, a unanimous Supreme Court echoed Justice O'Connor's sentiments: "Under *Lemon*, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions."

This does not mean the government can lift all burdens on religion. To the contrary, the justices struck down a Texas law that provided a sales-tax exemption for



The *Lemon* Test

The *Lemon* test asks three questions about the particular government action that is being challenged. (Remember, the Constitution limits the power of government, not of private citizens.) Each question must be answered in the affirmative if the government action is to be allowed under the Establishment clause. A negative answer to any of the questions means the act is unconstitutional. The questions are:

1. Does the law, or other government action, have a bona fide secular or civic purpose?
2. Does the primary effect neither advance nor inhibit religion? In other words, is it neutral?
3. Does the law avoid excessive governmental entanglement with religion?

If the answer to all three is "yes," the law passes the *Lemon* test.

² *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

religious periodicals only.³ The Court did not believe that having citizens pay a modest sales tax when purchasing a magazine constituted any significant burden on religious exercise. On the other hand, the justices have been willing to give religion some breathing room under the Establishment clause, if the government burden is significant. For example, there is little doubt the courts would uphold the exemptions many states give students who object for religious reasons to attending sex-education classes.

Does the primary effect neither advance nor inhibit religion? In other words, is it neutral? Looking at the second prong of the *Lemon* test, a law is not unconstitutional simply because it allows individuals or churches and synagogues to advance religion, which is their very purpose. For a law to have effects that are forbidden under *Lemon*, the government itself must have advanced religion through its own actions. Allowing students to be released from school to receive religious instruction at a nearby church, for example, does not violate the Establishment clause.⁴ It would violate the Establishment clause for the school to begin promoting, as opposed to merely announcing, such a meeting.



Not every government action that advances or inhibits religion is unconstitutional. Only government acts whose *primary* effect advances or inhibits religion are forbidden. Allowing a religious group to use a public school building after school hours would have an incidental or indirect effect of advancing religion. However, such a use would not violate the *Lemon* test. In fact, the Supreme Court in 1993 ruled unanimously that a public school is required to permit churches to use its facilities on the same basis as other community groups.⁵

Does the law avoid excessive governmental entanglement with religion?

The final prong of the *Lemon* test prohibits “excessive governmental entanglement with religion.” Rarely at issue in cases involving public education, the entanglement prong is most often associated with cases involving aid to religious schools.

³ *Bullock v. Texas Monthly*, 489 U.S. 1 (1989).

⁴ *Zorach v. Clausen*, 343 U.S. 306 (1952).

⁵ *Lamb’s Chapel v. Center Moriches School District*, 508 U.S. 385, 124 L.Ed.2d. 352 (1993).

Entanglement problems could arise if a public school was involving itself in religious matters, such as evaluating the content of student prayers or monitoring students' religious activities. Most often the legality of a public school's policies will be determined by their purpose and primary effect.

Alternatives to the *Lemon* Test

As noted, the *Lemon* test has come under sharp criticism from some scholars and from a majority of the justices of the Supreme Court. Several justices have proposed alternative tests. The most popular thus far was proposed by Justice Sandra Day O'Connor. This test asks whether a particular governmental action amounts to an *endorsement* of religion. According to Justice O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. In short, she believes the Establishment clause is designed to separate one's standing in the civil society from one's standing in a church. Her fundamental concern is whether the particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁶

Justice O'Connor's "endorsement test" has, on occasion, been subsumed into the *Lemon* test. The justices have simply incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion. Still, Justice O'Connor has reiterated her dissatisfaction with *Lemon*, suggesting that the slide away from the test "is well under way."⁷

Other Supreme Court justices have proposed tests that allow more government support for religion than either the *Lemon* or endorsement tests. These justices support the adoption of a test developed by Justice Anthony Kennedy and known as the "coercion test." Under this test the government does not violate the Establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will.⁸ Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas.⁹ But even the coercion test is subject to varying interpretations, as illustrated by the Rhode Island graduation prayer decision in which Justice Kennedy and Scalia, applying the same test, reached different results.¹⁰

In one of the Court's more recent Establishment clause cases, the justices again reverted to *Lemon*, albeit in a somewhat modified form. The Court identified three primary criteria

⁶ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

⁷ *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 114 S.Ct. 2481 (1994).

⁸ *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989) (Kennedy, J., dissenting).

⁹ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁰ See *Lee v. Weisman*, 505 U.S. 577 (1992).

for determining whether government action has a primary effect of advancing religion: 1) no government indoctrination, 2) no defining the recipients of government benefits based on religion, and 3) no excessive entanglement between government and religion.¹¹

Although the Court's interpretation of the Establishment clause is in flux, it is likely that for the foreseeable future a majority of the justices will continue to view government neutrality toward religion as the guiding principle. Neutrality means not favoring one religion over another, not favoring religion over non-religion, and vice versa.

THE FREE EXERCISE CLAUSE

The second of the Religious Liberty clauses of the First Amendment states that the government shall make no law prohibiting the free exercise of religion. Although the text is absolute, the courts have had to place some limits on the exercise of religion. To take an easy example, courts would not hold that the First Amendment protects human sacrifice even if some religion required it. While the freedom to believe is absolute, the freedom to act on those beliefs is not.

As with the Establishment clause, the Supreme Court developed a test to help judges interpret the Free Exercise clause. First used in the 1963 case of *Sherbert v. Verner*, this test is sometimes referred to as the *Sherbert* test. While the test's application was curtailed in the 1990 decision of *Employment Division v. Smith*, many state courts and legislatures continue to look to *Sherbert* when addressing free-exercise issues. The test has four parts: two that apply to any person who claims his free-exercise rights have been violated and two that apply to the government agency accused of violating those rights.

In order to claim the protections of the Free Exercise clause, a person (in this case a student) must show that his actions (1) are motivated by a sincere religious belief, and (2) have been substantially burdened by the government.

Sincere Religious Belief

Notice that the religious beliefs need not be logical, rational or even sensible. Certainly, they need not be popular. They need only be sincere. Thus, the fact that a student's objection to something in the curriculum may seem unreasonable to the teacher is irrelevant. If the objection is sincere, it *may* be protected under the Free Exercise clause. Also, the fact that a person does not believe in God or a divine being does not mean his beliefs fall outside the protection of the Free Exercise clause. Many religions, such as Buddhism or Taoism, may be non-theistic. Courts tend to take a *functional* as opposed to *creedal* approach to religion.

¹¹ *Agostini v. Felton*, 65 U.S. LW. 3505 (1997)

If the belief system functions like a religion in the life of the individual, it is likely to be protected for First Amendment purposes.

Substantial Burden

Sincere beliefs alone, however, do not make a free-exercise claim. In order to claim the protections of the Free Exercise clause, a student must also show that his religion has been substantially burdened by the government. Remote or incidental burdens will not suffice. Usually, coercion — direct or indirect — is required. If, for example, a school prohibited a



student from handing out religious tracts to her classmates, this would probably be a “substantial” burden on her religious exercise. Requiring her to conduct her proselytizing at a reasonable time and place during the school day would not. Although some experts criticize its decision, at least one federal appeals court has ruled that merely exposing students to ideas that may offend their religion does not amount to a substantial burden on their religious exercise.¹²

As noted, a burden on religious exercise need not be direct in order to be protected by the Constitution. Indirect burdens that penalize one for exercising his faith may also be illegal. For example, in the *Sherbert* case, the plaintiff was denied unemployment-compensation benefits because she refused to accept work on her Sabbath. The Supreme Court reversed, holding that Mrs. Sherbert could not be put to the “cruel choice” of having to give up either her government benefits or her religious convictions.¹³

Compelling State Interest

Even if a person has shown that her actions are motivated by a sincere religious belief and have been substantially burdened by the government, the inquiry is not over. Under the *Sherbert* test, the government will still prevail if it can show that (1) it is acting in furtherance of a “compelling state interest,” and (2) it has pursued that interest in the manner least restrictive, or least burdensome, to religion.

A “compelling state interest” has been described as “an interest of the highest order”¹⁴ and must involve such paramount concerns as public health and safety. Although public

¹² *Mozert v. Hawkins County Board of Education*, 827 F.2d. 1058 (6th Cir. 1987).

¹³ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1971).

schools clearly have a compelling interest in the education and welfare of children, a school must demonstrate that it has a compelling interest in applying a particular policy to a particular child. For example, the courts have recognized a compelling interest in compulsory-attendance laws, but in *Wisconsin v. Yoder*, the Supreme Court held that the state did not have a compelling reason to force Amish families to send their children to school beyond the eighth grade. The Court has also ruled that students may not be forced to salute the flag or recite the Pledge of Allegiance.¹⁵ Similarly, a school may have a compelling interest in teaching children how to prevent the spread of AIDS through sex-education classes, but the school may not have a compelling reason to teach this to a child whose parents object on religious grounds. As a result, many states provide exemptions from their sex-education programs.

Least Restrictive Means

Even if the school has a compelling interest, it may have to pursue that interest in the manner least restrictive of a complaining student's religion. In other words, the school should choose a course of action that does not violate the student's religion if such a course of action is available and feasible for the school.

If, for example, a student objects to a particular reading assignment on religious grounds, the school may be required to assign an alternate selection. If requests for exemption become too frequent or too burdensome for the school, a court might find the school's refusal to offer additional alternatives to be justified. For students in such a situation, the only reasonable alternative may be home schooling or a private religious school.

While courts may occasionally be willing to order alternative assignments for individual students, as a general rule they will not alter the curriculum for the entire class unless the assigned material amounts to an establishment of religion.¹⁶ The courts have also held that the mere fact that assigned material coincides with the doctrines of a particular religion — be it Catholicism or secular humanism — does not mean that the school has violated the Establishment clause. In fact, it is unconstitutional to allow a person's religion to determine the curriculum for all others.¹⁷

As noted, the application of the *Sherbert* test was sharply curtailed by the 1990 Supreme Court decision, *Employment Division v. Smith*. In *Smith*, a slim majority of the justices ruled that burdens on religious exercise no longer had to be justified if they were the unintended result of laws of general application. After *Smith*, only laws that (1) were intended to prohibit the free exercise of religion, or (2) violated other constitutional rights such as

¹⁵ *Barnette v. West Virginia State Board of Education*, 319 U.S. 624 (1943).

¹⁶ *Mozert v. Hawkins County Board of Education*, 827 F.2d. 1058 (6th Cir. 1986); *Smith v. Board of Commissioners*, 827 F.2d. 684 (11th Cir.1987).

¹⁷ *Epperson v. Arkansas*, 393 U.S. 97 (1968); See also *Edwards v. Aguillard* 482 U.S. 578 (1987).

freedom of speech were subject to the compelling-interest test. Thus, a state could not pass a law stating that Native Americans are prohibited from using peyote, but it could accomplish the same result by prohibiting the use of peyote by everyone. In each case, the central religious ritual for some American Indians would be illegal.

In the three years following *Smith*, more than 50 reported cases were decided against religious groups and individuals. As a result, more than 60 religious and civil-liberties groups, including the American Civil Liberties Union, Concerned Women for America, People for the American Way and the National Association of Evangelicals, joined to draft and support the passage of the Religious Freedom Restoration Act. The Act, which was signed by President Clinton on November 17, 1993, restored the compelling-interest test and ensured its application in all cases where religious exercise is substantially burdened.¹⁸

Although the Religious Freedom Restoration Act was applied to public schools, its tenure was short-lived.¹⁹ On June 25, 1997, the Supreme Court, by a vote of 6-3, struck the Act down as applied to state and local government. The case *City of Boerne v. Flores* holds that Congress overstepped its bounds by forcing states to provide more protection for religious liberty than the First Amendment, as interpreted by the Supreme Court in *Employment Division v. Smith*, requires.



¹⁸ Public Law 103-141 codified at 42 USC sections 2000bb through 2000bb-4 (1993).

¹⁹ *Cheema v. Thompson*, 67 F. 3d 883 (9th Cir. 1995).

Some states – such as Texas, Rhode Island and Connecticut – have passed their own Religious Freedom Restoration Acts which do apply to the public schools. In other states – such as Minnesota, Massachusetts, and Wisconsin – the courts have held that the compelling-interest test is applicable to religion claims by virtue of the state’s own constitution. In many states, however, we are uncertain about the level of protection that applies to free exercise claims.

Some argue that in virtually every case involving a public school, the religion claim can be linked with the parents’ constitutional right to control the upbringing of their children, thereby triggering the compelling interest test even under *Smith*. Others maintain that parents and students no longer can force schools to accommodate their religious concerns. Regardless of how this legal dispute is finally resolved, schools fulfill the *spirit* of the First Amendment when they accommodate the religious claims of students and parents where feasible.

CONCLUSION

The Establishment and Free Exercise clauses protect the liberty of conscience of every citizen by providing the legal basis for religious freedom in the United States. Though frequently criticized, the three-part *Lemon* test remains the principal yardstick for deciding cases under the Establishment clause. This test and its likely replacements require the government to be neutral among religions as well as between religion and non-religion. The standard for free-exercise claims is less certain, but schools are encouraged to accommodate religion when they can. Taken together, the two clauses are intended to ensure fairness and neutrality in the schools with respect to religion. Schools must at times accommodate students’ religious rights, but teachers and other school personnel may neither advance nor inhibit religious faith.

The Religious Liberty clauses should not be thought of as at odds with one another — one favoring freedom of religion and the other opposed to an establishment of it. The framers wrote the provision forbidding establishment in order to safeguard the principle of religious liberty. Both clauses secure the rights of believers and nonbelievers alike to be free from government involvement in matters of conscience. Together, they secure religious freedom. In the words of the Williamsburg Charter, the two Religious Liberty clauses are “mutually reinforcing provisions [that] act as a double guarantee of religious liberty.” It declared that the two clauses were:

[E]ssentially one provision for preserving religious liberty. Both parts, No Establishment and Free Exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment clause is the prohibition of state sponsorship of religion and at the heart of Free Exercise clause is the prohibition of state interference with religious liberty.

HOW DOES THIS LEGAL FRAMEWORK APPLY TO THE SCHOOLS?

Is it legal to pray in public schools?

It depends. What it depends on is the kind of prayer we are talking about, and more importantly, who is doing the praying. Because people who ask this question are usually referring to organized classroom prayer, often led by a teacher, we will begin our discussion there.

The Supreme Court has made clear that prayers organized or sponsored by a public school violate the First Amendment, whether in the classroom, over the public-address system, at a graduation exercise or even at a high school football game.²⁰ The same rule applies whether the activity is prayer or devotional Bible reading.

What about moments of silence?

Even moments of silence, if used to promote prayer, will be struck down by the courts.²¹ A “neutral” moment of silence that does not encourage prayer over any other quiet, contemplative activity will not be struck down, even though many students choose to use the time for prayer.²²



Why is the Court so strict in its application of the First Amendment to public schools?

The Court has emphasized that it is none of the business of government to promote or sponsor religious exercises — especially among impressionable young students who are at school as a result of compulsory-attendance laws. This combination of children and a captive audience distinguishes the school prayer cases from other situations such as legislative sessions or college graduations, where courts may be more lax in applying the Establishment Clause.

As the caretaker for all the children in the community, a public school has the responsibility to protect the conscience of every student. This will include children of various religious faiths, as well as those of no religious faith. Only by maintaining a posture of neutrality can the school be fair to all.

²⁰ *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Lee v. Weisman*, 505 U.S. 577 (1992); *Doe v. Santa Fe* 120 S.Ct. 2266 (2000).

²¹ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

²² See *Bown v. Gwinnett County School District* 112 F.3d 1464 (11th Cir., 1997).

Does this mean that students shed their religious liberty rights when they enter the public schools?

No school should be disrespectful of the important role religion plays for many students. To the contrary, the courts have made clear that students retain the right to exercise their religion, subject to some limitations, even in a public school.

What sorts of religious rights do the students have?

Generally, individual students are free to pray, read their Bibles, express religious viewpoints and even invite others to join their particular religious group as long as they are not disruptive of the school or disrespectful of the rights of other students. A student should not be allowed to pressure or coerce others in a public school setting, but within these broad parameters a student has wide latitude to exercise his faith. For example, a student may wish to pray before meals, read her Bible during study hall, create an art project with a religious theme or invite other students to attend church. All of these activities would appear permissible. In fact, the school might be guilty of violating the student's free-speech and free-exercise rights if it tried to prohibit such nondisruptive religious activities. Under most circumstances, however, students may not use the captive audience of the classroom or other school-sponsored events to deliver a proselytizing sermon.²³

Do the religious rights of students extend to group activities?

Yes. Students have the right to gather with their fellow students for prayer and other religious activities within the limits described above. For example, students are permitted to gather around the flagpole for prayer before school begins, as many evangelical students do annually, as long as the event is not sponsored or endorsed by the school and other students are not pressured to attend. A school is not required, however, to allow adults to come on campus to lead such an event. It is the rights of students, not outside adults, that are protected.

May teachers participate in such activities?

Teachers, like outside adults, generally have no right to pray with students in a public school.²⁴ As representatives of the state, teachers are under an obligation to protect the rights of all students, including non-believers. A teacher who abuses this position of trust may be terminated. On the other hand, teachers are not subject to the Establishment clause when they are on their own time outside the school setting. Whether teachers can participate in religious activities outside the contract day may depend on a variety of factors, including where the activities occur. If the activities occur on or near campus, such as at the flagpole, they must be sufficiently removed in time from the school day to prevent a reasonable

²³ *DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D. Mich. 1992); *Guidry v. Broussard*, 897 F.2d 181 (M.D. La. 1989); *Cole v. Oroville Union High School*, 228 F.3d 1092 (2000).

²⁴ *Roberts v. Madigan*, 921 F.2d. 1047 (10th Cir. 1991); *Webster v. New Lenox School District*, 917 F.2d. 1009 (7th Cir. 1990).

observer (such as a parent dropping off her child) from concluding that the teacher or school is endorsing religion. Teachers may not use their position either to promote or to discourage such religious activities.

What about student clubs?

Students in secondary schools may also form religious clubs pursuant to the federal Equal Access Act. If a school permits extracurricular student groups to meet during noninstructional time, this Act requires that religious groups be given equal treatment. Again, the Act does not allow teachers or other adults to lead such meetings.²⁵ The Act applies only to secondary schools as defined by state law. (See Chapter 9 on Student Religious Clubs).

Do students have the right to form religious clubs below the secondary level?

Probably not. Although the Equal Access Act does not apply, some argue that the free-speech clause protects the right of middle-school students to form religious clubs on an equal footing with secular clubs. Congress declined to apply equal access to the primary grades due to the difficulty younger students may have distinguishing between government speech endorsing religion and student speech endorsing religion. School officials confronted with such requests should consult their school-board attorney.

May community groups, including religious organizations, use public school facilities during non-school hours?

A unanimous Supreme Court has ruled schools may not discriminate on the basis of religious viewpoint when making their facilities available to community groups.²⁶ Schools are not required to open their facilities to any community group, but once the facilities are opened, all groups should be treated the same. Schools may, of course, impose reasonable, content-neutral restrictions on the use of their facilities. For example, schools may decide when meetings may be held, how long they may last, whether they may continue during weeks or months when school is not in session, what sort of maintenance fee must be paid and what sort of insurance might be required. Some content-based restrictions may also be allowed. For example, schools may probably exclude for-profit, commercial businesses even though community nonprofits are allowed to use school facilities after hours. They may also limit the use of the facilities to such things as “educational purposes,” but such distinctions may prove difficult to administer, as many groups may claim to meet the stipulated purpose.

Content-based restrictions can raise difficult constitutional questions. For example, the Supreme Court has held in *Good News v. Milford*, that in the case of the Good News Club a

²⁵ 20 U.S.C. Section 4071 *et seq.*

²⁶ *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 214 (1993); *Good News Club v. Milford*, 2001 U.S. Lexis 4312 (2001).

content-based restriction excluding religious worship and instruction amounted to impermissible viewpoint discrimination. School districts should be especially mindful to consult with local counsel when drafting content-based restrictions.

May religious communities and public schools enter into cooperative agreements to help students with such things as tutoring and after school care?

Yes, but only if appropriate constitutional safeguards are in place. Remember, public schools must remain *neutral*, neither favoring nor disfavoring religious faith. For that reason, religious groups must refrain from proselytizing students when they are taking part in joint ventures with public schools. Participation by a student in such cooperative programs should not affect the student's academic ranking or ability to participate in other school activities. In addition, cooperative programs may not be limited to religious groups, but must be open to all responsible community groups. For more information, see the guidelines *Public Schools & Religious Communities: A First Amendment Guide*, (Pub. No. 99-F02 (b), available from the First Amendment Center at 1-800-830-3733).

What about graduation prayer?

One of the most confusing and controversial areas of the current school-prayer debate involves graduation prayer. While the courts have not clarified all of the issues, some are clear.

For instance, the Supreme Court ruled in the 1992 case of *Lee v. Weisman* that inviting outside adults to pray at graduation ceremonies was unconstitutional. The case involved prayers delivered by clergy at middle-school commencement exercises in Providence, Rhode Island.²⁷ The school designed the program, provided for the invocation, selected the clergy and even supplied guidelines for the prayer. The Supreme Court held that the practice violated the First Amendment's prohibition against laws "respecting an establishment of religion." The majority based their decision on the fact that (1) it is not the business of schools to sponsor or organize religious activities, and (2) students who might have objected to the prayer were subtly coerced to participate. This coercion was not mitigated by the fact that attendance at



²⁷ *Lee v. Weisman*, 505 U.S. 577 (1992).

the graduation was “voluntary.” In the Court’s view, few students would want to miss the culminating event of their academic career.

A murkier issue is student-initiated, student-led prayer at school-sponsored events. On one side of the debate are those who believe that student religious speech at graduation ceremonies or other school-sponsored events violates the Establishment clause. They are bolstered by the 2000 Supreme Court case of *Santa Fe v. Doe*.²⁸ The *Santa Fe* case involved the traditional practice of student-led prayers over the public-address system before high school football games. Students would vote each year on whether they would have prayers at home football games and then select a student who would deliver the prayers. The school district required these prayers to be “non-sectarian, non-proselytizing.”

For a number of reasons, a 6-3 majority of the Supreme Court found the Santa Fe policy to be unconstitutional. The majority opinion first points out that constitutional rights are not subject to a vote. To the contrary, the purpose of the Bill of Rights was to place some rights beyond the reach of political majorities. Thus, the Constitution protects a person’s right to freedom of speech, press or religion even if no one else agrees with the ideas he or she professes. Therefore, the students could not vote to suspend the Establishment clause and have organized prayer at a school-sponsored event.

Having a student, as opposed to an adult, lead the prayer also failed to solve the constitutional dilemma. A graduation exercise is still a school-sponsored event, and the students are still being coerced, however subtly, to participate in a religious exercise.

Finally, the requirement that the prayer be “nonsectarian” and “non-proselytizing” not only fails to solve the problems addressed in *Weisman*, it may aggravate them. While some might like the idea of an inclusive, nonsectarian “civil” religion, many do not. To some Americans the idea of nonsectarian prayer is offensive. Many Americans, for example, feel compelled to pray “in Jesus’ name.” Moreover the Supreme Court made clear in *Weisman* that even nondenominational prayers may not be established by government in the public schools. There is also the thorny problem of determining whether a particular prayer tends to proselytize. Such entanglement of school officials in religious matters could itself be unconstitutional. In fact, one Texas school district was sued for discriminating against those who wished to offer more sectarian prayers at graduation exercises.

On the other side of this debate are those who contend that not allowing students to express themselves religiously at school events violates the students’ free exercise of religion and free-speech rights. Case law indicates that this may be true only in instances involving strictly student speech and not where a student is conveying a message controlled or endorsed by the school. As the 11th Circuit case of *Adler v. Duval County* suggests, it may be possible for a school to provide a forum for student speech within a graduation

²⁸ *Santa Fe v. Doe*, 530 U.S. 290 (2000).

ceremony, during which time prayer or religious speech might occur. For example, a school might allow the valedictorian or class president an opportunity to speak during the ceremony. If such a student chose to express a religious viewpoint, it seems unlikely it would be found unconstitutional unless the school had suggested or otherwise encouraged the religious speech.²⁹ In effect, the school must create a genuine forum for student speech in the graduation program, thus distancing itself from the students remarks.

Again, there is a risk to such an approach. By creating a forum for student speech, the school may be stuck with most anything the student wishes to say. While the school would not be required to allow speech that was profane, sexually explicit, defamatory or disruptive, the speech could include political or religious views offensive to many, as well as speech critical of school officials.

A far better approach to the graduation-prayer dilemma would seem to be a privately sponsored, voluntarily attended baccalaureate service held after school hours, perhaps at a local church. The school could announce the event and even allow it to be held on campus if other community groups were given similar privileges. In fact, schools are prohibited from discriminating against religious groups in the after-hours use of their facilities.³⁰ Schools may not, however, sponsor such religious exercises.

If school officials still see the need to accommodate religion at the graduation exercise, a neutral moment of silence might be considered.

Is there a key principle that might help school officials when confronted with questions about religious expression?

Yes. Although the school-prayer debate has caused much confusion for teachers, administrators and board members, most questions are easily resolved if the school will keep in mind the distinction between government (in this case “school”) speech endorsing religion — which the Establishment clause prohibits — and private (in this case “student”) speech endorsing religion, which the free speech and Free Exercise clauses protect.³¹

May students distribute religious literature in a public school?

Court decisions on the issue generally fall into two categories. A minority of decisions hold that schools can prohibit the distribution of any publication that is not sponsored by the school. Of course, the ban must be applied even-handedly to all student publications. A school could not, for example, allow the distribution of political literature while barring religious publications. This is particularly evident in light of the Supreme Court’s decision in *Westside Community School Board v. Mergens*, upholding the federal Equal Access Act.

²⁹ See *Doe v. Madison School District* (9th Cir. 1998); *Adler v. Duval County*, 206 F.3d 1070 (2000).

³⁰ *Lamb’s Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 214 (1993); *Good News Club v. Milford*, 2001 U.S. Lexis 4312 (2001).

³¹ See *Board of Education v. Mergens*, 110 S.Ct 2356 (1990).



Under this minority view, however, a blanket prohibition on all student publications would be permissible.

The majority of courts take a different view. These courts hold that while schools may place some restrictions on the distribution of student publications, they may not ban it altogether. The courts base their decisions on the landmark case of *Tinker v. Des Moines School District*, which upheld the right of students to wear black armbands protesting the Vietnam War, even in a public school. Included in this right of free speech is not only the right to speak for oneself but also to distribute the writings (i.e., speech) of others. Thus, courts have generally upheld the rights of students to distribute non-school publications, subject to the school's right to suppress such publications if they create substantial disruption, harm the rights of other students or infringe upon other compelling interests of the school. Again, the *Mergens* decision makes clear that the fear of a First Amendment violation is not sufficient justification to suppress a student publication that happens to be religious. Some states, such as California, have incorporated the majority view into their own state education codes.³²

Do schools that permit the distribution of student religious literature give up all control over how it is done?

No. Just because schools may not prohibit the distribution of all student materials does not mean that schools have no control over what may be distributed on school premises. On the contrary, courts have repeatedly held that schools may place reasonable “time, place and manner” restrictions on all student materials distributed on campus. Thus, schools may specify when the distribution can occur (e.g., lunch hour or before or after classes begin), where it can occur (e.g., outside the school office) and how it can occur (e.g., from fixed locations as opposed to roving distribution). One recent decision upheld a policy confining the distribution of student literature to a table placed in a location designated by the principal and to the sidewalks adjacent to school property. Of course, any such restriction must be reasonable.

It is also likely that schools may insist on screening all student materials prior to distribution to ensure their appropriateness for a public school. Any such screening policy should provide for a speedy decision, a statement of reasons for rejecting the literature and a prompt appeals process. Because the speech rights of students are not coextensive with those of adults, schools may prohibit the distribution of some types of student literature altogether. Included in this category would be:

1. Materials that would be likely to cause substantial disruption of the operation of the school. Literature that uses fighting words or other inflammatory language about students or groups of students would be an example of this type of material.

³² See e.g., West's Ann.Cal.Educ.Code § 48907.

2. Material that violates the rights of others. Included in this category would be literature that is libelous, invades the privacy of others or infringes on a copyright.
3. Materials that are obscene, lewd or sexually explicit.
4. Commercial materials that advertise products unsuitable for minors.
5. Materials that students would reasonably believe to be sponsored or endorsed by the school. One recent example of this category of speech was a religious newspaper that was formatted to look like the school newspaper.

While schools have considerable latitude in prohibiting the distribution of materials that conflict with their educational mission, schools generally may not ban materials based solely on content. Similarly, schools should not allow a heckler's veto by prohibiting the distribution only of those materials that are unpopular or controversial. If Christian students are allowed to distribute their newsletters, Buddhists, Muslims and even Wiccans must be given the same privilege.



What about the right of outside groups to distribute material on campus?

Adults and teachers from outside the school, on the other hand, have no right to distribute materials to students in a public school. Moreover, schools generally may not give the Gideons and other religious groups access to distribute their materials on campus. At least one state attorney general has suggested outside religious groups could distribute materials on campus if the distribution were “passive” (i.e. materials were left for students to browse through and take if they wished), a wide variety of other outside community groups were given similar privileges and school personnel did not promote the materials. One federal appeals court has ruled that such passive distribution of religious materials would not be appropriate in an elementary school.³³

³³ *Peck v. Upshur County*, 155 F.3d 274 (1998)

What about the power of schools to control speech in the classroom?

Schools have great latitude to control the speech that occurs in a classroom and, in that setting, can probably prohibit the distribution of student publications altogether. Similarly, schools may impose any reasonable constraint on student speech in a school-sponsored publication such as the school newspaper.

How do schools resolve the tension between freedom of speech and the need for discipline and control?

Preserving the speech rights of students and maintaining the integrity of public education are not mutually exclusive. Schools should model First Amendment principles by encouraging and supporting the rights of students to express their ideas in writing. On the other hand, students should not expect to have unfettered access to their classmates and should be prepared to abide by reasonable time, place and manner restrictions.

Schools must continue to maintain order, discipline and the educational mission of the school as they seek to accommodate the rights of students.

Are released-time programs legal?

Many states have laws authorizing students to be released periodically for off-campus religious instruction during the school day. Such off-campus released-time programs have been ruled constitutional by the United States Supreme Court. In an opinion by staunch separationist William O. Douglas, the court stated: “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to accommodate sectarian needs, it follows the best of our traditions.”

What about on-campus released time?

Earlier, the justices had been asked to rule on a released-time program that provided for on-campus religious instruction. In this program, students were released from classes once a week to receive religious training in the public school. There were separate classes for Protestants, Catholics and Jews, and all religious instructors were under the supervision of the superintendent of schools. Students who did not wish to receive religious instruction were required to leave their classrooms and go elsewhere in the school for additional nonreligious studies. The Supreme Court held that the use of public schools and compulsory-attendance laws for religious training violated the First Amendment’s ban against laws respecting an establishment of religion.³⁴ In the words of Justice Hugo Black: “Here not only are the State’s tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery. This is not separation of Church and State.”

³⁴ *McCollum v. Board of Education*, 333 U.S. 203 (1948).

Must schools provide for off-campus released time?

No. While released-time programs were upheld by the Supreme Court, schools are under no obligation to create such programs. The Court's decision simply permits them. States are free to allow released-time programs when they are requested by students and their parents, but most states leave this decision up to individual school districts. If a released-time program is created, schools may not discriminate among religious groups. That is to say, the program must be administered in a fair and even-handed manner so that all religious groups are treated the same.

May schools promote off-campus religious instruction?

It should be noted that schools are not permitted to endorse or promote religious instruction, even when it is held off campus. Solicitation of students to attend religious classes may not be done at the expense of the school,³⁵ and only those students whose parents have signed permission slips should be allowed to attend. Students who do not wish to attend may not be penalized. Of course, schools may not rent their facilities to religious groups for religious instruction during the school day.³⁶

May schools give academic credit for released-time programs?

The question has arisen whether schools may give academic credit for released-time courses. Although the answer remains unclear, it is likely such a program would be unconstitutional, especially if credit is not given for other nonschool courses. There is very little to distinguish many of these religious courses from a religious education class, a nonacademic exercise for which schools could almost certainly not give credit.³⁷

³⁵ *Doe v. Shenandoah County School Board*, 737 F.Supp. 913 (W.D. 1990); *Smith v. Smith*, 523 F.2d. 121 (4th Cir. 1975); *Perry v. School District*, 54 Wash.2d. 886, 344 P.2d. 1036 (1959).

³⁶ *Arizona O.A.G.* 86-078 (1986); *Iowa O.A.G.* 292 (1965).

³⁷ See *Lanner v. Wimmer* 463 F.Supp. 867 (D.Utah 1978), aff'd in relevant part, 662 F.2d 1349 (10th Cir. 1981); *State ex rel Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918).