The First Amendment and Religion in the Workplace and Schools

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Introduction

Religious liberty issues are now center stage at the U.S. Supreme Court. Since the founding of the Constitution, the Religion clauses of the first amendment—the Establishment Clause and the Free Exercise Clause—have been rightly understood to jointly demand government neutrality to religion. However, in mid-late 2022 the Court made dramatic changes to the First Amendment Jurisprudence. By overturning longstanding precedent on these issues, the Court has not guaranteed religious liberty for all but, instead, religious favoritism for some. Religious freedom in the workplace has many implications and there have been many interpretations in court. Specifically, there has been a lot of religious discrimination in the media against atheists. Protections against religious discrimination extend to both believers and non-believers.

Intro to Establishment Clause and Free Exercise Clause

The Establishment Clause prohibits the government from establishing a government-sponsored house of worship or showing preference to one or all religions by passing laws to favor religion, or by forcing citizens to profess belief in religion or attend religious services. This protects non-believers from being forced to participate in government-sponsored religion and from government reprisal if atheists do not participate. Second, the Free Exercise Clause is a further interpretation of the First Amendment that was added as part of the First Amendment in 1791. This is when Congress decided to add “free exercise of religion” to the Amendment. This

phrase makes plain the protection of actions as well as beliefs, but only those in some way connected to religion. The Free Exercise Clause withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority. Freedom of conscience is the basis of the Free Exercise Clause, and the government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.

The Free Exercise Clause recognizes our right to believe and practice our faith, or not, according to the dictates of conscience. The Establishment Clause bans the government from taking sides in religious disputes or favoring or disfavoring anyone based on religion or belief. The Establishment Clause thus makes the Free Exercise Clause's promise of religious freedom real for everyone, not just an empowered few. A majority of the current court now believes that the two clauses are inherently at odds and that long-settled anti-establishment interests—such as prohibition of government funding for religion—get in the way of the free exercise of religion. *Carson v. Makin* is a great example of this notion.

The court is completely changing the constitutional law of the first amendment. Originally it was the notion that the state would not support the establishment of religion or prevent the free exercise of religion. For example, the state will not impose religious requirements saying you have to practice a certain religion—the state will not be pro-religion. The state will also not be anti-religion where they make it harder for citizens to practice their faith. The state forms a sense of neutrality towards the issue. The Free Exercise Clause and Establishment Clause were put into place to support this idea of neutrality. Long established

precedents supported this notion; however, the court is establishing new precedents that lead towards religious favoritism and a strong free exercise clause.

The new deal, as we see today, strengthens the free exercise clause and weakens the establishment clause. The government can now actively support the free exercise clause. What used to be considered a violation of the establishment clause is now considered to be okay.

Carson v. Makin

Carson v. Makin is a 2022 case that took place in Maine shortly after the First Amendment was changed. The state of Maine implemented a program to provide tuition assistance for families that reside in rural areas of the state. Since more than half of the school districts in the state do not offer a secondary school, or contract with a school in a different district, parents can send their children to a designated secondary school of their choice, regardless of location. If parents send their children to a private school they must be accredited by the New England Association of Schools and Colleges (NEASC) or approved by the Maine department of education. In 1981, this program was changed to provide tuition assistance to only non-sectarian schools. In 2018, David and Amy Carson wanted to send their daughter to Bangor Christian Schools to attend high school through the assistance programs. This sectarian school was accredited by the NEASC, but did not qualify for tuition assistance payments under Maine law. The Carson family along with two other families sued in federal court on the grounds that the law was in violation of the Free Exercise Clause of the Constitution. The state of Maine argued that providing funds to religious schools would violate the establishment clause of the First Amendment. The case went all the way to the U.S. Supreme Court. In a 6-3 decision the Supreme Court ruled that the non-sectarian requirement was a violation of the free exercise clause of the first amendment. The court ruled that excluding individuals the benefits of the

program was discriminatory based on a person's religion and that providing funding would not violate the establishment clause of the first amendment.

In other words, the court concluded that the Free Exercise Clause demands public funding of religious education. The Carson family presented a challenge to Maine's education funding program. Because Maine's population is so spread out, and many students live in areas without their own public schools, the state provides vouchers for those students to get the equivalent of a public education—either at a public school elsewhere in the state or at a private school that has nonsectarian instruction. The parents of multiple families argued that they have a right to use those state funds for religious education. On June 21, 2022, the court concluded for the very first time that a state is **required** to allow vouchers (essentially taxpayer dollars) to be used for religious education. This was a huge change from earlier cases such as *Zelman v. Simmons-Harris* and *Locke v. Davey* which concluded that when it came to state funds for religious schools, neutrality was key; states could include religious schools in broad voucher programs but were not required to fund religious education.

The interests for denying state funds to religious education are not theoretical. In *Carson v. Makin*, for example, one of the religious schools at hand teaches students to reject Islam. Another school requires teachers to agree that the LGBTQ community is perverted. Forbidding forced taxpayer subsidy of religious education is one of the very reasons that the Establishment Clause exists in the first place. Where is our country heading with first amendment? By striking down Maine's program, the court has required people to pay for things they may not accept. For example, the Islamic population is forced to pay into a program where a school teaches students to reject Islam. Does this bypass our freedom as we know it? Well, it is a different interpretation of the free exercise of religion. Essentially there is more freedom of religion because as we see in

Carson v. Makin more students are able to attend private religious schools because they are funded. However, there are those that are worse off such as Islamic families who supporting something they don't believe in.

Carson v. Makin Implications

The court continues to dismantle the wall of separation between church and state. What would the Framers of our Constitution think about this notion. *Carson v. Makin* changes a lot and is now a precedent for future cases. A majority of the justices appear to believe that free exercise is so important that it may supersede all other rights. The Constitution was once widely understood to guarantee religious freedom and equal protection for *everyone*. Now the trend is heading towards religious favoritism. The upcoming cases are multiple examples of religious favoritism and a step away from our constitutional understanding.

From the start of judicial system, courts in the United States have struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or "exempted" from laws that interfere with their religious practices, and the interests of society reflected in those very laws. Early state court decisions went both ways on this central question.

Tandon v. Newson

Another example of a case where the court is moving away from long settling anti-establishment interests is *Tandon v. Newson*. In this case, the U.S. Supreme Court considered whether a California Covid-19 regulation impermissibly restricted the free exercise of religion. In 2020, the California governor imposed restrictions on commercial and social activities in an effort to limit the spread of the Covid-19 virus. One of these restrictions limited attendance at

both secular and religious at home gatherings to individuals from no more than 3 households at a time. Tandon is an individual who applied for a federal district court injunction against the at-home meeting restriction arguing that it validated the free exercise clause. He pointed out that there was no evidence that at-home religious gatherings were inherently more dangerous than commercial gatherings of the same size. Therefore, Tandon argued that the restriction was not narrowly tailored to limit the spread of the virus. The trial court denied Tandon's application and the 9th circuit court affirmed. The U.S. Supreme Court granted injunctive relief against a California COVID-19 regulation that had the effect of restricting at-home Bible studies and prayer meetings by limiting all gatherings in private homes to no more than three households at a time. Government regulations are not neutral and generally applicable under the Free Exercise Clause when they treat any comparable secular activity more favorably than religious exercise. The court's ruling emphasized strict scrutiny for the Free Exercise Clause. The ruling does not justify unequal treatment, even if secular activities are treated poorly or less favorably than religious exercise. The government must establish that the challenged law satisfies strict scrutiny.

Burwell v. Hobby Lobby Stores

The Green family owns and operates Hobby Lobby Stores, Inc., a national arts and crafts chain with over 500 stores and over 13,000 employees. The Green family has organized the business around the principles of the Christian faith and has explicitly expressed the desire to run the company according to Biblical precepts, one of which is the belief that the use of the contraception is immoral. Under the Patient Protection and Affordable Care Act (ACA), employment-based group health care plans must provide certain types of preventative care, such as FDA-approved contraceptive methods. While there are exemptions available for religious

employers and non-profit religious institutions, there are no exemptions available for profit institutions such as Hobby Lobby Stores, Inc.

On September, 12, 2012, the Greens, as representatives of Hobby Lobby Stores, Inc., sued Kathleen Sebelius, the Secretary of the Department of Health and Human Services, and challenged the contraception requirement. The plaintiffs argued that the requirement that the employment-based group health care plan cover contraception violated the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA). The plaintiffs sought a preliminary injunction to prevent the enforcement of tax penalties, which the district court denied and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court also denied relief, and the plaintiffs filed for an en banc hearing of the Court of Appeals. The en banc panel of the Court of Appeals reversed and held that corporations were "persons" for the purposes of RFRA and had protected rights under the Free Exercise Clause of the First Amendment.

In a 5-4 ruling the court decided the Religious Freedom Restoration Act allows for-profit companies to deny contraception coverage to employees based on a religious objection. The Court held that Congress intended for the RFRA to be read as applying to corporations since they are composed of individuals who use them to achieve desired ends. Because the contraception requirement forces religious corporations to fund what they consider abortion, which goes against their stated religious principles, or face significant fines, it creates a substantial burden that is not the least restrictive method of satisfying the government's interests. In fact, a less restrictive method exists in the form of the Department of Health and Human Services' exemption for non-profit religious organization, which the Court held can and should be applied to for-profit companies such as Hobby Lobby. Additionally, the Court held that this ruling only

applies to the contraceptive mandate in question rather than to all possible objections to the Affordable Care Act on religious grounds, as the principal dissent fears.

The SCOTUS Kennedy v. Bremerton Decision: Where Friday Night Lights and Freedom of Religion Converge

In this case, a public high school football coach filed a lawsuit stating that his rights to free speech and freedom of religion were violated when he was fired for praying at the 50-yard line after each game.

In the Kennedy v. Bremerton school district decision, the U.S. Supreme Court made a bold move that seems to disregard established precedent and leaves school district administrators and boards puzzled as to how best handle freedom of religion in the school setting (Harris Beach PLCC, 2022).

According to the Court, Coach Kennedy 'made it a practice to give 'thanks through prayer on the playing field.' Over time, some students asked to join him. He told them they could do what they wished, and many did. This persisted for some time. Eventually concerns were raised, and Coach Kennedy was requested to stop. The school offered various accommodations which would allow him to continue his prayer but in a manner that did not appear to coerce student athletes or seem to be school sponsored. Coach Kennedy continued. Ultimately, he was placed on leave from coaching and not rehired as a coach. He sued, claiming these actions violated his First Amendment rights to freely exercise his religious beliefs.

There were many questions presented to the court. They include the following: Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection. Whether,

assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it. All in all, in a 6-3 decision, the Court ruled that the coach's conduct was protected by the First Amendment and his right to pray at the 50 yard line was kept intact.

Masterpiece Cakeshop V. Colorado Civil Rights Commission

Masterpiece Cakeshop v. Colorado Civil Rights Commission, (2018) was a case in the Supreme Court of the United States that dealt with whether owners of public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion, and therefore be granted an exemption from laws ensuring non-discrimination in public accommodations—in particular, by refusing to provide creative services, such as making a custom wedding cake for the marriage of a gay couple, on the basis of the owner's religious beliefs.

The case dealt with Masterpiece Cakeshop, a bakery in Lakewood, Colorado, which refused to design a custom wedding cake for a gay couple based on the owner's religious beliefs. The Colorado Civil Rights Commission evaluated the case under the state's anti-discrimination law, the Colorado Anti-Discrimination Act. The commission found that the bakery had discriminated against the couple and issued specific orders for the bakery. Following appeals within the state, the Commission's decision against the bakery was affirmed, so the bakery took the case to the U.S. Supreme Court.

In a 7–2 decision, the Court ruled that the Commission did not employ religious neutrality, violating Masterpiece owner Jack Phillips's rights to free exercise, and reversed the Commission's decision. The Court did not rule on the broader intersection of anti-discrimination

laws, free exercise of religion, and freedom of speech, due to the complications of the Commission's lack of religious neutrality.

The US Supreme Court has ruled that a baker had the right to refuse to make a wedding cake for a same-sex couple because it violated his religious beliefs (Deng, 2018). The decision struck down a lower court ruling that favored David Mullins and Charlie Craig, who had sued Jack Phillips, the baker, for discrimination in Colorado in 2012. In the case of the baker, the justices ruled by seven to two that the Colorado panel had mishandled the case by showing hostility towards religious liberty. The state judicial commission had said that Mr. Phillips violated Colorado's anti-discrimination laws. However, the Supreme Court opinion, written by Justice Anthony Kennedy, said that it had been made in a manner "inconsistent with the first amendment's guarantee that our laws be applied in a manner that is neutral toward religion". The justices declined to make a broader ruling on how the freedoms of expression and religion should be weighed. "The outcome of cases like this in other circumstances must await further elaboration in the courts," Justice Kennedy wrote.

Conclusion/Summary

The Constitution was once widely understood to guarantee religious freedom and equal protection for *everyone*. Now the trend is heading towards religious favoritism. A majority of the current court now believes that the two clauses are inherently at odds and that long-settled anti-establishment interests—such as prohibition of government funding for religion—get in the way of the free exercise of religion. A majority of the current court now believes that the two clauses are inherently at odds and that long-settled anti-establishment interests—such as prohibition of

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It is going to take at least a generation for changes to be made regarding the clauses of the first amendment. We now have all of these precedents of religious favoritism where we have a strong free exercise clause.

References

Amy McCaig-Rice University. (March 15, 2022 Tuesday). Workplace discrimination differs by religion. *Newstex Blogs Futurity.org.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:650S-YBX1-JCMN-Y24P-00000-00&context=1516831.

Boer Deng, Washington. (June 4, 2018 Monday). US judges back baker who refused to make gay couple's wedding cake. *thetimes.co.uk.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5SGG-NHM1-JCJY-G1C8-00000-00&context=1516831.

Kelsey Dallas. (November 26, 2023 Sunday). Why abortion concerns held up Religious Freedom Restoration Act. The Deseret News. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:69R4-BXF1-JCMC-W149-00000-00&context=1516831.

Eugene Volokh. (May 9, 2022 Monday). Abortion and the Free Exercise Clause. *Newstex Blogs The Volokh Conspiracy.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:65DM-JRG1-JCMN-Y29B-00000-00&context=1516831.

Harris Beach PLLC. (July 1, 2022 Friday). The SCOTUS Kennedy v. Bremerton Decision: Where Friday Night Lights and Freedom of Religion Converge. *Newstex Blogs JD Supra.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:65TY-19Y1-F03R-N4HR-00000-00&context=1516831.

Josh Blackman. (August 2, 2022 Tuesday). The Progressive Free Exercise Clause. Newstex Blogs The Volokh

Conspiracy. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:662S-3FK1-F03R-N3WC-00000-00&context=1516831.

Katelynn Richardson. (September 27, 2023 Wednesday). Federal Judge Rules Texas Drag Ban Violates First Amendment. *Newstex Blogs Conservative Daily News.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:698B-DXS1-JCMN-Y0KP-00000-00&context=1516831.

Kevin Hurler. (July 13, 2023 Thursday). New Lawsuit Claims Texas TikTok Ban Violates First Amendment. *Gizmodo.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:68X5-3YF1-JCMC-W3KW-00000-00&context=1516831.

Michigan Lawyers Weekly Staff. (January 23, 2020 Thursday). Constitutional Law - First Amendment Abortion PPO. Opinion Digest. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5YS7-VNB1-JCP2-500B-00000-00&context=1516831.

(November 17, 2022 Thursday). New Legal Issues Research from James Madison University Outlined (Religion in the Public Workplace: A Primer for Public Employers). *NewsRx Policy and Law Daily.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:66WF-WK21-DY7R-R0NF-00000-00&context=1516831.

(October 11, 2023 Wednesday). Do You God? Free Exercise Clause - The Tack Online. *The Tack: Buena Vista University.*

https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:69DN-TYY1-JBSN-31HM-00000-00&context=1516831.

Patrick Semansky / AP Photo. (September 22, 2022 Thursday). Inspector General: Denying religious exemptions to service members who refuse COVID-19 vaccines violates federal law. *The Breeze: James Madison University.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:66FH-6H11-JBSN-330B-00000-00&context=1516831.

Paul Ingram/TucsonSentinel.com. (January 19, 2022 Wednesday). Native activist found not guilty in border protest after new arguments on religious freedom defense. Newstex Blogs Arizona Mirror. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:64K5-YRJ1-F03R-N1DG-00000-00&context=1516831.

Rebecca Pifer. (September 18, 2023 Monday). Tennessee BCBS sued by former employees over COVID vaccine mandate. *Healthcare Dive.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:696W-3Y71-F03F-K09W-00000-00&context=1516831.

Rick Garnett. (May 30, 2023 Tuesday). Justice Breyer And The Establishment Clause. Newstex Blogs The Volokh Conspiracy. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:68BT-7PW1-F03R-N3YD-00000-00&context=1516831.

Rose Krebs. (August 22, 2023 Tuesday). Southwest Hit With $180K Fee Bid In Religous Bias Case. Law360 Legal News -

Corporate. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:691H-DWF1-JBWC-W323-00000-00&context=1516831.

Succeeding in Your Business. (January 11, 2022 Tuesday). Do Atheists Have a Right to a 'Religion-Free Workplace'?. *Creators Syndicate.* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:64H9-XKD1-JC8H-N1S4-00000-00&context=1516831.