FREEDOM OF RELIGION IN THE US IN LIGHT OF RECENT JURISPRUDENTIAL DEVELOPMENTS: IS THE SEPARATION OF CHURCH AND STATE A CONSTITUTIONAL MANDATE OR A CONSTITUTIONAL VIOLATION?

Magdalini-Christina Vlachou-Vlachopoulou
Attorney-at-Law, LLM in Public Law (NKUA),
LLM cand. (Harvard Law School),
PhD cand. (NKUA)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."
The Religion Clauses of the First Amendment to the US Constitution

INTRODUCTION

In the United States, freedom of religion is a constitutionally protected right enshrined in the Religion Clauses of the First Amendment to the US Constitution. Freedom of religion is closely associated with the separation of church and state, a concept advocated by colonial founders such as Dr. John Clarke, Roger Williams, William Penn, and later Founding Fathers such as James Madison and Thomas Jefferson[1].

The way freedom of religion is interpreted has changed over time in the US and continues to be controversial. The aim of the study at hand is to elaborate on the traditional constitutional framework regarding the Religion Clauses of the First Amendment to the Constitution (under I), as well as to present (under II) but also evaluate the jurisprudential developments promoted by the Supreme Court in its recent case-law, which, more or less, have reformulated the current doctrine in the area (final thoughts and key takeaways).

[1] See Th. Jefferson, *Jefferson's Letter to the Danbury Baptists* (01.01.1802), US Library of Congress, available at link (last visited on 31.12.2022); *The State Becomes the Church: Jefferson and Madison*, US Library of Congress, 4 June 1998, available at link (last visited on 31.12.2022).

I. FIRST AMENDMENT RELIGIOUS FREEDOMS – SETTING THE CONSTITUTIONAL FRAMEWORK

1. General Remarks

The First Amendment includes two clauses dealing with religion. The first, the Establishment Clause, provides that "*Congress shall make no law respecting an establishment of religion*". The second, the Free Exercise Clause, immediately adds that neither may Congress "*prohibit the free exercise thereof*". Taken together, the two Religion Clauses reflect a commitment to religious voluntarism or freedom of religious conscience. The Establishment Clause forbids governmental efforts to impose religious beliefs and practices, whereas the Free Exercise Clause stops the government from barring or discouraging religious observance[2].

One difficulty is that general propositions do not resolve hard cases, as a series of decisions by the US Supreme Court, including the ones relevant here, nicely illustrate. At the same time, interpreting these clauses is intriguing because the Framers of the First Amendment had diverging views of its purpose[3]. A third difficulty lies in the fact that the two clauses are ultimately contradictory. For instance, if a state provides scholarships to students studying to be pastors, it could be accused of violating the Establishment Clause. But if the state, in an effort to avoid establishment of religion claims, denies scholarships to students studying to be pastors, it could be accused of interfering with the free exercise of religion[4].

2. The establishment clause

There are three prominent theories of the Establishment Clause, which, in turn, form the basis for the relevant Establishment Clause tests.

The first theory –most often identified with Thomas Jefferson– is that the Religion Clauses erect a "*wall of separation*" between "*church and state*"[5]. Under this view, government should be secular and religious matters should be left to the private sector. An immediate problem with this theory is that strict separation is impossible – from "*In God We Trust*" appearing on the US currency to the fact that government services like fire and police have to protect religious and secular people and property alike. In addition, at its strictest, it would mean that the government could not enlist the assistance of religious organizations in performing some of its functions, such as education.

This, implicitly hostile to religion, theory was the foundation of the three-part test from *Lemon v. Kurtzman* 403 US 602 (1971) that the Supreme Court most frequently used in

---

[2] R. Fallon, Jr., *The Dynamic Constitution. An Introduction to American Constitutional Law*, 2013, p. 77 et seq.

[3] See A. Adams/C. Emmerich, A *Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses*, 1990, p. 3 et seq., 32 et seq., as well as H. Gillmanand/E. Chemerinsky, *The Religion Clauses: The Case for Separating Church and State*, 2020, p. 21 et seq.

[4] *Cf. Witters v. Washington Department of Services for the Blind* 474 US 481 (1986) (no violation of Establishment Clause to provide scholarship for religious education as part of a program funding all other areas of study) and *Locke v. Davey* 540 US 712 (2004) (state's refusal to fund student studying to become clergy did not violate Free Exercise Clause).

[5] See *Everson v. Board of Education* 330 US 1, 18 (1947) ("*[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable*").

deciding Establishment Clause cases[6]. According to the Lemon test, to avoid collision with the Establishment Clause, (i) the statute or action must have a secular purpose; (ii) the primary effect of it must be that it neither advances nor inhibits religion; and (iii) it must not foster "*excessive government entanglement*" with religion. However, in recent years and, in particular, following the Reagan era, some members of the Court began expressing dissatisfaction with the Lemon test (primarily those leaning toward the accommodation approach, as per the below).

The second theory might be called the "neutrality" theory. Thus, the government cannot favor religion over secularism or one religion over others[7]. This can include not only direct and obvious endorsement, but also "symbolic endorsement"[8]. Among the problems with this theory is the issue of whose perspective one adopts in determining what the government's endorsement message means. And religious symbols make things even more complicated, given the wide variety of ways people can perceive them.

Based on this theory, Supreme Court Justice Sandra Day O'Connor proposed the "neutral observer" test in her concurring opinion in the crèche display case, *Lynch v. Donnelly* (1984), as a "*clarification of our Establishment Clause doctrine*". The main question to be asked is "*can the government be understood by a neutral observer as endorsing religion?*". This test has generally been treated as a gloss on the Lemon test, part of the primary effect prong thereof. Critics have charged that O'Connor's jurisprudence including the neutral observer test was too malleable. Others praised the endorsement analysis as a practical, commonsense approach to a most difficult area of First Amendment jurisprudence[9].

A third theory is the "accommodation" theory. This view posits that the government should recognize the important role of religion in society and accommodate its presence in the government, treating a religious point of view the same as any other point of view found in society. It posits that courts should step in only when the government actively aids or suppresses religion, such as by establishing a government church or punishing or rewarding adherents of a particular faith[10]. A problem with this theory is that it allows a degree of cooperation between government and religion that, at least some years ago, would seem more than many were willing to accept.

Nonetheless, the "accommodationist" approach forms the basis for the currently applicable "historical/coercion & one-sect proselytization" test, as established by the Supreme Court in *Kennedy v. Bremerton School District* (2022), officially overruling the Lemon test. According to this recently adopted test, decisions under the Establishment Clause must reflect the understanding

---

[6] Of note that the Warren and Burger Courts' approach to Religion Clauses was marked by their aim at protecting minorities in the US.

[7] See *Lynch v. Donnelly* 465 US 668, 694 (1984) ("*Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion*").

[8] A debate over symbolic endorsement can be seen in the opinions of the Justices in *Capitol Square Review and Advisory Board v. Pinette* 515 US 753 (1995) (unconstitutional for government to preclude the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio Statehouse).

[9] This test has been officially rejected in *Kennedy v. Bremerton School District*, as per the below.

[10] *Lee v. Weisman* 505 US 577, 587 (1992) ("*government may not coerce anyone to support or participate in religion or its exercise*"; "nonsectarian" prayer to be given by clergyman selected by school unconstitutional).

of the Founding Fathers –an explicitly originalist take[11]– and the government only violates the Establishment Clause if it engages in (a) coercion or (b) one-sect proselytization or (c) preferential funding for religious organizations.

3. The free exercise clause

On its face, the Free Exercise Clause of the First Amendment bars the banning of entire religions and prevents Congress and (after incorporation through the Fourteenth Amendment) the states from prohibiting religious practices just because of their religious origins. But however real such worries were in 1791, and however real they are in parts of the world now, such governmental actions are now so rare in the US as never to have generated a Supreme Court decision. In reality, the most common problem respecting Free Exercise of religion now has involved a generally applicable government regulation, whose purpose is nonreligious, that either makes illegal (or otherwise burdens) conduct that is dictated by some religious belief or requires (or otherwise encourages) conduct that is forbidden by some religious belief.

The Supreme Court's first major decision interpreting the Free Exercise Clause came in *Reynolds v. United States* 98 US 145 (1878). At issue was whether the Free Exercise Clause precluded the enforcement of a federal polygamy statute against a religious Mormon at a time when the Mormon Church considered polygamy a religious duty. The Court rejected Reynold's claim of right under the Free Exercise Clause and upheld the prosecution. The Reynolds Court invoked a distinction between religious belief, which was immune from regulation, and religiously motivated conduct, which was not: "*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 good order*". This is a plausible position, but also a harsh one. The government confronts its citizens with what the late Justice Potter Stewart –one of the Court's most lucid writers and clever phrase-makers– once termed "*a cruel choice*" when it demands that they either breach their religious duties or violate the secular law. It is not implausible to read the Free Exercise Clause as requiring the government to make reasonable accommodations to spare its citizens of this kind.

During the 1930s and 1940s, the Supreme Court gradually softened the harsh stance it had adopted in Reynolds and began to hold that the Free Exercise Clause sometimes protects conduct, at least when religiously motivated conduct is coupled with speech[12]. This shift, however, proved to be a rather far-reaching one. What is more, an interpretation of the Free Exercise Clause that mandates preferential treatment for those claiming religious motivations may lead to tension with other constitutional values, notably including those embodied in the Establishment Clause. In light of concerns such as these, the Supreme Court reversed once again its position and held that the Free Exercise Clause generally does not mandate

[11] It is true that the Court had addressed historical contexts in the past, like in *Allegheny County v. ACLU* 492 US 573 (1989), *Marsh v. Chambers* 463 US 783 (1983) and *Town of Greece v. Galloway* 572 US 565 (2014), but the test was officially adopted as the current doctrine (substituting the, already attenuated, Lemon test) in 2022.

[12] See *Sherbert v. Verner* 374 US 398 (1963) and *Wisconsin v. Yoder* 406 US 205 (1972).

exemptions for religiously motivated conduct[13], hence embracing a rather weak interpretation of the Free Exercise Clause of the First Amendment.

This back and forth in the interpretation of the Free Exercise Clause has not ended, though. On the contrary, the Supreme Court has lately been criticized as exceedingly accommodating of people's religious views[14]. Last term, two cases resulted in historic expansion of the Free Exercise Clause of the First Amendment. The Court held that Maine, which provides tuition funds for students who reside in districts lacking public secondary schools to attend secular schools elsewhere, must also provide funds for such students who choose to attend religious schools (*Carson v. Makin*, as per the below). The Court also held, in the case of a football coach at a public high school in Washington State, who knelt and prayed on the field after games, that the school district could not stop him, even if it wanted only to avoid the appearance of endorsing religion (*Kennedy v. Bremerton School District*, as per the below). The upshot, Justice Sotomayor wrote, in a dissenting opinion, is that the Court "*elevates one individual's interest in personal religious exercise … over society's interest in protecting the separation between church and state*". And, in a free-speech case last term, the Court held that Boston must allow a group to fly a Christian flag on the flagpole outside the City Hall if it allows other groups to hoist non-religious flags, such as the pride flag (*Shurtleff v. Boston*, as per the below).

4. Religion in special places: public schools and the penitentiary

By far, the greatest number of Establishment Clause cases involve the educational system. Either it is alleged that the government is improperly promoting religion in its public schools or that the government is improperly assisting religious schools or their students. Again, history is a difficult guide given that the contemporary system of public education available to all citizens today did not exist in the 18th century.

While public schools may require students to study religion or the Bible as part of a secular program on the subject, a public school may not require religious exercises in class. It does not matter whether the exercises are denominational (associated with one or another religious group) or non-denominational[15]. The same rule applies to prayers at graduation ceremonies and other school events – even if they are student-initiated and student-led[16]. Even a period

[13] In Employment Division, Department of Human Resources of *Oregon v. Smith* 494 US 872 (1990), the Supreme Court changed religious free exercise law dramatically by ruling that generally applicable laws not targeting specific religious practices do not violate the Free Exercise Clause of the First Amendment. The Court abandoned the compelling interest test that it had used in free exercise cases since 1963 in *Sherbert v. Verner*.

[14] J.S. Gersen, *The Supreme Court's Conservatives Have Asserted Their Power. But what if their big and fast moves, eviscerating some constitutional rights and inflating others, are bound for collision?*, July 3, 2022, available at link (last visited on 30.12.2022).

[15] See *Engel v. Vitale* 370 US 421 (1962) (New York statute required prayer: "*Almighty God, we acknowledge out dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country*"). See also *Stone v. Graham* 449 US 39 (1980) (posting of 10 commandments from Old Testament of Bible violated the Establishment Clause).

[16] *Lee v. Weisman* 505 US 577 (1992) (rabbi invited to recite non-sectarian prayer at graduation ceremony); *Santa Fe Independent School District v. Doe* 530 US 290 (2000) (students voted whether to have an "invocation" before all football games and who would deliver it).

of silence for "*mediation or voluntary prayer*" was prohibited, at least when implemented to "*return voluntary prayer to the public schools*"[17]. Excusing children who object to participation in such activities is not a solution. In fact, the Court has noted that excluding certain students exacerbates the problem, because it has a negative effect on their relationship with their classmates or teachers[18].

It is undeniable that children are different from adults in some respects. To the question whether such differences should require special Establishment Clause restraints on permissible government speech and actions in the public schools, the traditional answer given by the Supreme Court is yes, mainly taking into account children's distinctive susceptibility to felt coercion, as well as to messages of endorsement and outsider status[19]. However, the current composition of the Supreme Court seems rather skeptical of arguments involving susceptibility of children to endorsement and coercion (*Kennedy v. Bremerton School District* 2022, as per the below), which makes the lines quite blurry in this area.

On the other hand, the Court has recognized the exceptional government-created burdens on private religious exercise in state-run institutions, such as prisons, in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. In this vein, *Cutter v. Wilkinson* 544 US 709 (2005), per Ginsburg, J.[20], held that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) – "*No government shall impose a substantial burden on the religious exercise of a person residing [in] an institution*", unless it survives strict judicial scrutiny[21] – does not violate the Establishment Clause[22]. This rather protective stance of the Court toward the prisoners' rights in terms of Religious Freedoms seems to be gaining even more traction, as *Ramirez v. Collier*, analyzed below, shows.

II. RECENT JURISPRUDENTIAL DEVELOPMENTS – UPSETTING (?) THE CONSTITUTIONAL FRAMEWORK

1. *Carson v. Makin*[23] – Financial aid to religion: establishment and free exercise clause issues

The State of Maine relies on local school administrative units (SAUs) to ensure that every school-age child in the state has access to a free education. Not every SAU operates its own public secondary school. To meet the state requirements, an SAU without its own public

[17] See *Wallace v. Jaffree* 472 US 38 (1985). Presumably, such a moment of silence, which is not religious by itself, would have to be sustained if it was not enacted for a religious purpose.
[18] *School District of Abington Twp. v. Schempp* 374 US 203 (1963).
[19] See, more generally, C. Eisgruber/L. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, University of Chicago Law Review: Vol. 61: Iss. 4, 1994, Article 2, p. 1245 et seq., available at site (last visited on 31.12.2022).
[20] Relying on *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* 483 US 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).
[21] This form of judicial review is further analyzed below.
[22] *Cf. Charles v. Verhagen* 384 F.3d 601 (C.A.7 2003) (prison's regulation prohibited Muslim prisoner from possessing ritual cleansing oil); *Young v. Lane* 922 F.2d 370 (C.A.7 1991) (restricted wearing of yarmulkes); *Hunafa v. Murphy* 907 F.2d 46 (C.A.7 1990) (Jewish and Muslim prisoners were served pork, with no substitute available).
[23] 596 U. S. ___ (2022).

secondary school may either (1) contract with a secondary school to provide school privileges or (2) pay the tuition of a secondary school at which a particular student is accepted. In either circumstance, the secondary school must be either a public school or an "approved" private school. To be an "approved" school, a private school must meet the state's compulsory attendance requirements[24], and it must be "*nonsectarian in accordance with the First Amendment*".

Three families, namely the Carsons, Gillises, and Nelsons, who live in SAUs that do not operate a public secondary school of their own but instead provide tuition assistance to parents who send their children to an "approved" private school, opted to send their children to private schools that are accredited but do not meet the nonsectarian requirement because they are religiously affiliated. Because the schools are not "approved," they do not qualify for tuition assistance. The families filed a lawsuit in federal court arguing that the "nonsectarian" requirement violates the Constitution on its face and as applied. On cross-motions for summary judgment, the district court granted judgment to the state and denied judgment to the plaintiffs. The US Court of Appeals for the First Circuit affirmed, noting that it had twice before rejected similar challenges, and even though the US Supreme Court had decided two relevant cases in the interim, those cases do not produce a different outcome here.

Based on the above facts, the Supreme Court had to answer the question whether a state law prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction violates the Religion Clauses or Equal Protection Clause of the US Constitution. The Court, per Chief Justice Roberts, held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments to parents who live in school districts that do not operate a secondary school of their own violates the Free Exercise Clause of the First Amendment. According to the majority opinion, two cases resolve the dispute in this case. In Trinity Lutheran Church of Columbia, *Inc. v. Comer*[25], the Court held that the Free Exercise Clause did not permit Missouri to discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. And in *Espinoza v. Montana Department of Revenue*[26], the Court held that a provision of the Montana Constitution barring government aid to any school "*controlled in whole or in part by any church, sect, or denomination*" violated the Free Exercise Clause because it prohibited families from using otherwise available scholarship funds at religious schools. Applying those precedents to this case, Maine, the Court held, may not choose to subsidize some private schools but not others on the basis of religious character.

The central axis of the Court's syllogism also resonates the anti-discrimination rule of *City of Hialeah v. Church of Lukumi Babalu Aye*[27], as per which it is impermissible for the government to single out religious people and/or practices for disfavored treatment under the Free Exercise Clause, unless it can satisfy strict judicial scrutiny[28]. Whereas in the past, mainly under the

[24] Which can be demonstrated by accreditation by a New England association of schools and colleges or by approval by the Maine Department of Education.
[25] 582 US ___ (2017).
[26] 591 US ___ (2020).
[27] 508 US 520 (1993).
[28] Strict judicial scrutiny is the highest form of judicial review that courts use to evaluate he constitutionality

Warren Court, it would be plausible to say that (indirectly) giving money also to sectarian schools might violate the Establishment Clause, what is pushed here for the first time, which makes the case remarkable, is the fact that the government now *must* (instead of *may*) extend the benefit to sectarian schools, in order to comply with the Free Exercise Clause.

Justice Breyer authored a dissenting opinion, in which Justices Sotomayor and Kagan joined, arguing that the majority gives "*almost exclusive*" attention to the Free Exercise Clause while paying "*almost no attention*" to the Establishment Clause. In Justice Breyer's view, Maine's nonsectarian requirement strikes the correct balance between the two clauses. Justice Sotomayor dissented separately, as well, to highlight the Court's "*increasingly expansive view of the Free Exercise Clause*" that "*risks swallowing the space between the Religion Clauses*"[29].

2. *Kennedy v. Bremerton school district* – symbolic aid to religion and religion in public schools

Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school games. His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause. Kennedy refused and instead rallied local and national television, print media, and social media to support him. Kennedy sued the School District for violating his rights under the First Amendment[30] and Title VII of the Civil Rights Act of 1964. The district court held that because the School District suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified. Kennedy appealed, and the US Court of Appeals for the Ninth Circuit affirmed.

In light of the above, is a public-school employee's prayer during school sports activities protected speech, and if so, can the public-school employer prohibit it to avoid violating the Establishment Clause? Justice Gorsuch, writing for the Court, held that the coach's prayer does not violate the Establishment Clause. On the contrary, the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. In forbidding Mr. Kennedy's prayers, the District sought to restrict his actions because of their religious character, thereby burdening his right to free

---

of laws, regulations or other governmental policies under legal challenge as opposed to the lower standards of review – intermediate scrutiny or rational basis. Under strict judicial scrutiny, the government must show that there is a compelling, or very strong, interest in the law, and that the law is either very narrowly tailored or is the least restrictive means available to the government. As Justice Souter famously wrote in his dissenting opinion in *Alameda Books v. City of Los Angeles* 535 US 425 (2002), "*Strict scrutiny leaves few survivors*". This means that when a court evaluates a law using strict scrutiny, the court will usually strike down the law. In other words, strict judicial scrutiny is *strict in theory, but fatal in fact*. See. R. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007), available at site (last visited on 31.12.2022).

[29] The "*room for play in the joints*" between the Religion Clauses of the First Amendment recognized by the Court in the past (see, indicatively, *Walz v. Tax Commission of City of New York* 397 US 664 (1970)), seems to be further eroded in *Carson v. Makin*.

[30] Alleging a Free Exercise Clause, as well as a Free Speech violation, triggering strict judicial scrutiny, because his religious practice was singled out for prohibition absent a "generally applicable" (not religiously targeted) rule.

exercise. As to his free speech claim, the timing, and circumstances of Kennedy's prayers – during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities– confirm that Kennedy did not offer his prayers while acting within the scope of his duties as a coach. The District did not show that its prohibition of Kennedy's prayer served a compelling purpose and was narrowly tailored to achieving that purpose.

Moreover, the Court, conspicuously influenced by originalism, formally overruled the Lemon test, stated that what a reasonable observer might mistakenly have inferred about endorsement does not matter, hence effectively declaring the neutral observer test as "abandoned", and replaced such tests by a consideration of "*historical practices and understandings*." Applying this historical test, the Court held that there was no conflict between the constitutional commands of the First Amendment in this case.

Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan joined, expressing their objections to "*elevating history and tradition over purpose and precedent*".

3. *Ramirez v. Collier* – Prisoners' rights and religious freedoms

State laws differ and have vacillated as to whether and to what extent spiritual advisers may be present in the execution chamber[31]. In 2019, the Court upheld Alabama's refusal to allow an imam present at the execution of a Muslim man, even though the state at the time permitted a Christian chaplain to be present. A month later, the Court prohibited Texas from executing a Buddhist inmate unless he was allowed to have a Buddhist priest present. As a result, Texas passed a law prohibiting all spiritual advisers from the execution chamber but then, after another legal challenge, reversed course to allow their presence. The Court subsequently prohibited another Alabama death-row inmate's execution without his pastor present, so the state executed him eight months later with his pastor at his side, praying with him and touching his leg. John Ramirez, a Texas death-row inmate, brought a lawsuit asking that he be permitted to have his pastor present at his execution and that his pastor be allowed to pray audibly and touch him while he is being executed.

The issue before the Court was whether Texas's decision to allow Ramirez's pastor to enter the execution chamber but not to lay hands on the parishioner as he dies, sing, pray, or read scripture violates the Free Exercise Clause of the First Amendment or the Religious Land Use and Institutionalized Persons Act (RLUIPA)[32]. Chief Justice Roberts, who delivered the majority opinion[33], addressed Ramirez's First Amendment claims in light of the Religious Freedom Restoration Act (RFRA) of 1993 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which had been adopted in the aftermath of Employment Division, *Department of Human Resources v. Smith* 494 US 872 (1990). These laws prohibit the government from imposing a substantial burden on the free exercise of religion unless it could show that such a restriction was "*in furtherance of a compelling governmental interest*" and was "*the least restrictive*

[31] For a history of clergy presence in the execution chamber, see link (last visited on 31.12.2022).
[32] For further details about the case, see also link (last visited on 31.12.2022).
[33] With Justices Sotomayor and Kavanaugh filing concurring opinions and Justice Thomas issuing a dissent.

means of furthering that compelling governmental interest". The Chief Justice did not believe Texas had shown compelling interest in restrictions. Noting that Ramirez's beliefs appear to be sincere, he observed that there had been a long history, dating back to Newgate Prison in England and continuing through the US Revolutionary period and after, of allowing pastors to deliver prayers at executions and allowing them to "lay hands" on the individual being executed. Moreover, both the Federal Bureau of Prisons and other states have permitted this.

Prison officials had proclaimed the need for "absolute silence" and a complete prohibition of touching. But Chief Justice Roberts did not believe that Texas had shown a compelling interest for either and wrote that lesser restrictions such as regulating the volume of prayer or allowing hands only on parts of the body away from any IV lines would accomplish the same objectives. The Chief Justice also noted the possibility of "*irreparable harm*" because the deprivation of liberty would occur "*in the final moments*" of life and would, as a spiritual deprivation, not be easily remedied through pecuniary penalties. Chief Justice Roberts also stressed that in interpreting such issues, the Court "*requires a case-specific consideration of the particular circumstances and claims*".

In his concurring opinion, Justice Kavanaugh noted that prior cases had stressed the need for religious equality (permitting rights to non-Christian religions similar to Christian ones) as well as religious liberty that applied to all. He encouraged states "*to try to accommodate an inmate's timely and reasonable requests about a religious advisor's presence and activities in the execution room if States can do so without meaningfully sacrificing their compelling interests in safety, security, and solemnity*"[34].

4. *Shurtleff v. Boston* – Interplay between Religion Clauses and Freedom of Speech

The City of Boston owns and manages three flagpoles in front of the City Hall, the seat of Boston's municipal government. Ordinarily, the City raises the United States flag and the POW/MIA flag[35] on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Upon request and after approval, the City has decided to occasionally fly another flag for a limited period of time instead of its own flag. The Commissioner of Boston's Property Management Department reviews applications for flag-raising events to ensure the flag is consistent with the City's message, policies, and practices. The City has approved 284 flag-raising events over a 12-year period, and the Commissioner had never denied a flag-raising application. Camp Constitution, an organization that seeks

[34] In the only dissent, Justice Thomas pointed to the barbarity of Ramirez's crime and the adverse effect of delays of execution on the family members of the victim. Justice Thomas also observed how Ramirez had used previous appeals, including one about the ineffectiveness of his council, to postpone execution dates. He argued that Ramirez's appeal was frivolous and, in fact, contradicted an earlier appeal in which he had denied that the prayers of his pastor needed to be audible.

[35] The National League of Families POW/MIA flag, often referred to as the POW/MIA flag, was adopted in 1972 and consists of the official emblem of the National League of Families of American Prisoners and Missing in Southeast Asia in white on a black background. In 2019, the National POW/MIA Flag Act was signed into law, requiring the POW/MIA flag to be flown on certain federal properties, including the US Capitol Building, on all days the US flag is flown. The history of the POW/MIA flag is available at link (last visited on 31.12.2022).

"*to enhance the understanding of the country's Judeo-Christian moral heritage*", applied to fly a "*Christian flag*" for its event. The Commissioner denied Camp Constitution's flag-raising request, finding it was the first time any entity or organization had requested to fly a religious flag. Camp Constitution sued and the district court found for the City. On appeal, the US Court of Appeals for the First Circuit affirmed.

The question for the Supreme Court to answer was whether Boston's refusal to fly a private religious organization's flag depicting a cross on a city flagpole violates the organization's First Amendment rights. Justice Breyer, writing for the Court, held that Boston's flag-raising program does not constitute government speech[36], so its refusal to fly the private religious organization's flag violates the organization's First Amendment rights. In particular, the Court first considered whether Boston's flag-raising program is government speech. The test for government speech is a holistic inquiry that considers, among other things, the history of the expression at issue, the public's perception as to who is speaking, and the extent to which the government has controlled the expression. Although the history of flag displays favors Boston, the other two factors, the Court held, outweigh the first factor. The public would not necessarily associate a flag's message with the City, and, most importantly, the City has exercised almost no control over flag content. In fact, the City has no record of denying a request until the petitioner's in this case. Thus, on balance, the flag-raising program is not government speech[37].

The Free Speech Clause of the First Amendment disallows the government from engaging in "*impermissible viewpoint discrimination*". When it is not speaking for itself, the government may not exclude speech based on "*religious viewpoint*". Thus, Boston's refusal to allow Shurtleff and Camp Constitution to raise their flag based on "*religious viewpoint*" violated the First Amendment[38].

It is noteworthy that Justice Gorsuch authored an opinion concurring in the judgment, in which Justice Thomas joined, criticizing the so-called Lemon test the Court had adopted for resolving Establishment Clause disputes. Justice Gorsuch argued that Boston erroneously relied on the now-abandoned Lemon test, leading it to believe that flying the flag would violate the Establishment Clause. Such concurrence was one of the harbingers of *Kennedy v. Bremerton School District*, paving the way for the official overruling of the Lemon test later that term, as per the above.

---

[36] Under the government speech doctrine, the government has its own rights as speaker, immune from free speech challenges. It can assert its own ideas and messages without being subject to First Amendment claims of viewpoint discrimination. More information about the government speech doctrine available at link (last visited on 31.12.2022).

[37] Justice Alito authored an opinion concurring in the judgment, in which Justices Thomas and Gorsuch joined, disclaiming the three-factor test used by the majority. Rather, when faced with a question whether speech constitutes government speech, Justice Alito would ask "*whether the government is actually expressing its own views, or the real speaker is a private party, and the government is surreptitiously engaged in the 'regulation of private speech'*".

[38] Justice Kavanaugh authored a concurring opinion to reiterate that the government does not violate the Establishment Clause when it treats religious persons or organizations equally with secular persons or organizations, but it does violate the Free Speech Clause when it excludes religious persons or organizations.

FINAL THOUGHTS AND KEY TAKEAWAYS ABOUT THE RELIGION CLAUSES OF THE US CONSTITUTION: WHERE DO WE STAND NOW?

In light of *Carson v. Makin*, the modern doctrine involving financial support for religion seems to be that formal neutrality in the distribution of funds to religious and nonreligious uses or institutions generally defeats Establishment Clause challenges, at least to indirect aid, i.e., aid not directly provided to religious entities, such as religious schools, but instead, for example, to parents who wish to send their kids to such schools. In contrast to the Warren Court approach of strong Establishment Clause and strong Free Exercise Clause doctrines –an approach that may have admittedly been unrealistic– we are now experiencing a shift in ideological valence, with the current Court adopting a relatively weak interpretation of the Establishment Clause. On the contrary, this shifting of liberal and conservative positions –a reminder of how the politics of appointment can move the Court on particular issues, how the Court is situated in politics and how political/cultural divides can come to be mirrored in constitutional debates– has brought a strong Free Exercise Clause forbidding any discrimination against religious recipients in the distribution of funds. To put it in a different way, the doctrinal arc seems to have moved from Establishment Clause worries to Free Exercise Clause mandate.

On the other hand, *Kennedy v. Bremerton School District* reformulated the modern doctrine with respect to the Establishment Clause in cases involving symbolic support for religion. In this context, decisions under the Establishment Clause must faithfully reflect the understanding of the Founding Fathers, interpreted to forbid (a) coercion, (b) preferential funding for religious organizations (neutrality required), and (c) one-sect proselytization, but not for most other symbolic support. This case highlights the movement from concern about signals of outsider status of religious minorities under the Warren Court and the (implicitly hostile to religion) Lemon test to history-based acceptance of (non-coercive) religious symbols in the public square, sometimes justified as an "accommodation" of religious minorities.

At the same time, this rather originalist approach embraced by the Court in its current Religion Clauses jurisprudence flies in the face of the same Court's stance in Free Speech cases, where history plays a much more limited, if not minimal, role[39].

Speaking of Freedom of Speech, *Kennedy v. Bremerton School District*, per Gorsuch, J., emphasized the possible overlap of Speech and Free Exercise Clause claims, with Justice Gorsuch pointing that Speech and Free Exercise Clauses are mutually reinforcing and Justice Kagan, in dissent, highlighting that the result of such an interpretation is to devalue the Establishment Clause. *Shurtleff v. Boston* also touched upon Freedom of Speech, ruling in favor of the petitioners, too[40]. Considering the drift to a creeping near absolutism in the area of Freedom of Speech by the Supreme Court[41], these observations beg the question, is this where

[39] For an extensive but rare reliance on history, see *McIntyre v. Ohio Elections Commission* 514 US 334 (1995). For the view that post-1791 history should play a larger role than philosophical theory in First Amendment (Freedom of Speech) analysis, see L.A. Powe, *Situating Schauer*, 72 Notre Dame L.Rev. 1519 (1997).

[40] It should be noted, though, that this case does not fully reflect the current ideological division among the Justices.

[41] Mainly motivated by the so-called (and almost sacrosanct) "persuasion principle", as per which the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the

we are headed for a while? Increasingly robust protections of speech under Freedom of Speech Clause and of religion under Free Exercise Clause –but not actual absolutism in either case– to the detriment of the Establishment Clause?

With respect to children's susceptibility to endorsement in public schools, although the traditional view does accept that children are different from adults and more impressionable in some respects, the new conservative super-majority of the Court seems quite skeptical of arguments involving susceptibility to endorsement and coercion (see *Kennedy v. Bremerton School District*). In parallel, is it plausible that the new majority will view mandated neutrality[42] as mandated secularist hostility to religion? Above all, will public schools remain special[43]? Unfortunately, in view of the current composition of the Supreme Court, looming questions seem clearer than the looming answers.

Last but not least, this near First Amendment absolutism embraced by the Supreme Court does not go hand in hand with the Court's interpretation of other fundamental rights embedded in the US Constitution. *Dobbs v. Jackson Women's Health Organization* 597 US (2022)[44] blatantly illustrates the Court's rather repressive view of constitutional liberties. Although we are accustomed to hearing religious objections to *abortion*, religious objections to *abortion bans* are not to be excluded either. In fact, religious groups have filed several lawsuits pressing a free exercise claim that objects to abortion bans. This is not surprising, as for many people questions of when human life begins and whether to have a child are centrally informed by their religious beliefs. How will the Court react to such claims?

When it rains it pours, they say. In recent years, with the Supreme Court's conservatives incrementally asserting their power, Washington D.C. seems to be constantly outcast, as the Court has adopted an approach that would see the lines between church and state hopelessly blurred. Does every cloud have a silver lining, or will those lines be eliminated altogether? ❑

government considers harmful. See D. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Columbia Law Review 334 (1991), available at link (last visited on 31.12.2022).

[42] See e.g., *Edwards v. Aguillard* 482 US 578 (1987).

[43] *Cf. Engel v. Vitale* (1962) with *Town of Greece v. Galloway* (2014).

[44] See M.-C. Vlachou-Vlachopoulou, *Reflections on the US Supreme Court decision Dobbs v. Jackson: The right to abortion confronted with the "tyranny" of the majority, on the pretext of democratization*, Law Journal "Theory and Practice of Administrative Law", 2022 issue, p. 1009 et seq. (in Greek).