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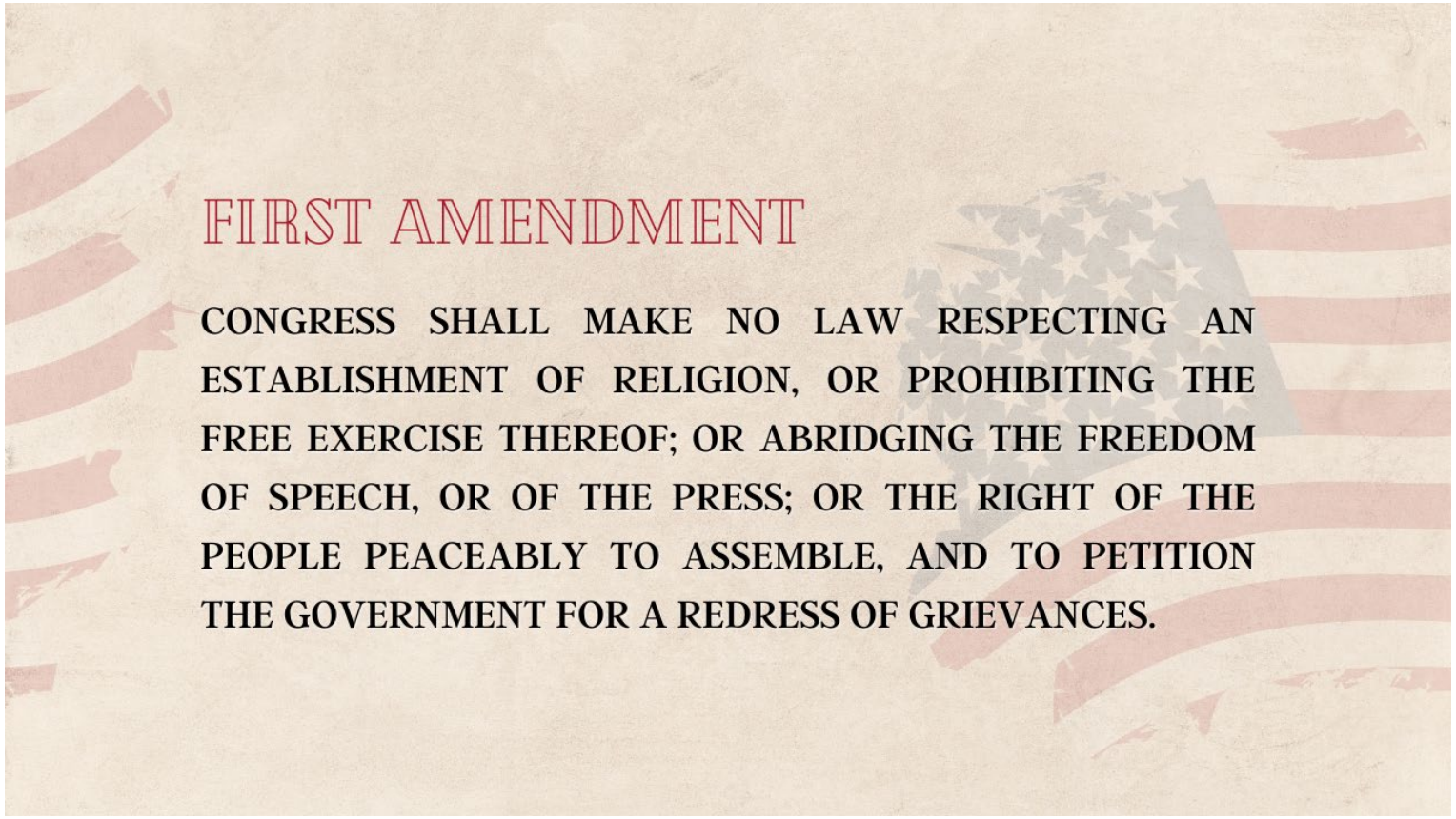
Religious Speech and the First Amendment



Police Department of Chicago v. Mosley

- "[A]bove all else the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subjects or its content"

- Content based regulations are presumptively invalid.

- The burden of proof lies with the government in showing that content-based regulation does not violate the First Amendment.

Turner Broadcasting System v. F.C.C.

- The Court said the general rule is that content based restrictions on speech must satisfy strict scrutiny, while content neutral regulation need only meet intermediate scrutiny.

Strict scrutiny
Intermediate scrutiny
Rational basis

- **Strict Scrutiny** – The government must show it has a compelling interest in discriminating and is using the most narrowly tailored means to do so.
- **Intermediate Scrutiny** – The government must show that it has an important interest and it is using means that are substantially related to that interest to achieve it.
- **Rational Basis** – The government must have a legitimate state interest and there must be a rational connection between the statute's means and goals.

Content based or Content neutral

- To be **content neutral** the government prohibition must be both viewpoint neutral and subject matter neutral.

- **Viewpoint neutral** means that the government cannot regulate speech based on the ideology of the message.

- **Subject matter neutrality** means the government cannot regulate speech based on the topic of the speech.

Matal v. Tam

- A rock band of Asian Americans wanted to call themselves the Slants, in order to take back what ad been a derogatory term used to escribe Asians.
- They tried to get the name trademarked, but the Patent and Trademark Office refused citing the Lanham Act that says, in part, that a trademark cannot be registered if it "consists of matter which may disparage persons living or dead, institutions, beliefs or national symbols or bring them into contempt or disrepute."
- The Court struck down that part of the Lanham Act as unconstitutional viewpoint discrimination.
- The government cannot regulate speech on the grounds that the speech was offensive.

Religious group access to school facilities

Widmar v. Vincent

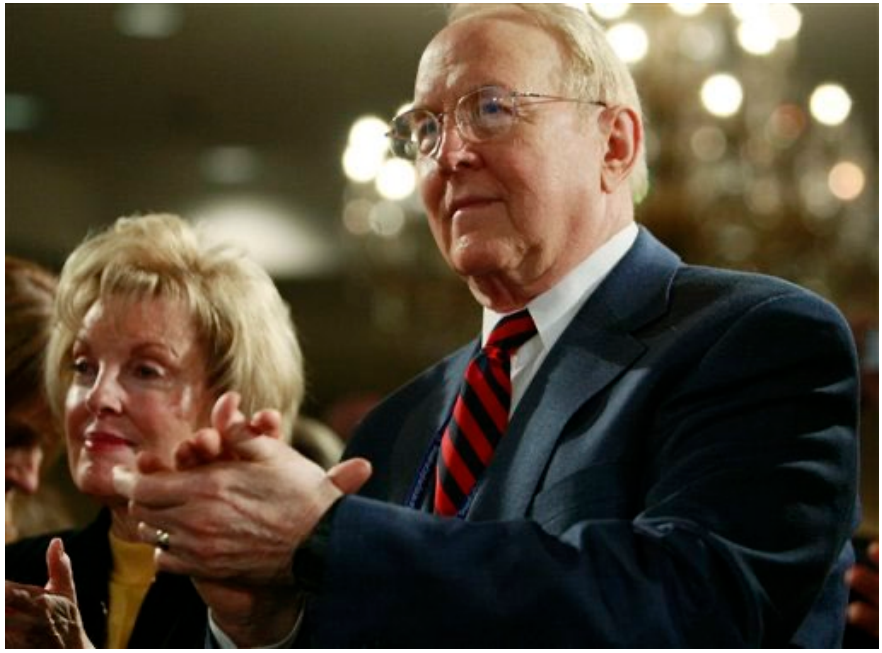
- Court struck down a state university's policy preventing student groups from using school facilities for religious worship or discussion as it allowed registered non-religious student groups to use the facilities.
- The university had created a public forum by opening its facilities to other student groups and excluding religious content in the student speech required the policy to satisfy strict scrutiny, which it did not.
- Court applied the Lemon test, concluding that openings university facilities to all groups served a secular purpose having only an incidental effect on advancing religion.

Board of Education of Westside Community Schools v. Mergens

- A challenge to the federal Equal Access Law, applying to any public school receiving federal financial aid.
- Law says that any school allowing noncurricular student groups to use its facilities may not deny equal access to student groups because of religious, political, philosophical or other content of their speech.
- Justices cited their opinion in Widmar and again applied the Lemon test.
- Court found preventing discrimination against speech because of its content was a legitimate secular purpose not advancing religion.

Lamb's Chapel v. Center Moriches Union Free School District

- Declared unconstitutional school district's exclusion of religious groups from using school facilities on evenings and weekends when non-religious groups were allowed.
- Court cited its Widmar decision, ruling that letting religious groups use the facilities would not have been an establishment of religion under the Lemon test
- The challenged governmental action had a secular purpose, did not have the principal or primary purpose of advancing or inhibiting religion and did not foster an excessive entanglement with religion.



Good News Club v. Milford

- An elementary school in Milford, Connecticut allowed its facilities to be used by community groups to conduct activities for students after school.
- The Good News Club were denied use of the facilities because of the religious content of its activities.
- The Court ruled 6 to 3 that excluding the groups violated its free speech rights and that allowing its use would not have violated the Establishment Clause.
- The majority wrote that in opening its facilities to these groups the school had created a limited public forum in which the government regulation of speech must be viewpoint neutral.

GOOD NEWS CLUB V. MILFORD (CONT.)

- “We have said that a state interest in avoiding an Establishment Clause violation ‘may be characterized as compelling’ and therefore may justify content-based discrimination. However, it is not clear whether a state’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.”
- If faculty took part in the religious activities or the school encouraged students to take part, there would be a strong argument for an Establishment Clause violation.
- But majority is saying this might be permissible to avoid viewpoint discrimination in speech.

Good News Club v. Milford (Effects)

- Good News Club followed and cited previous decisions regarding not allowing religious student groups from using school facilities constituting impermissible discrimination based on the content of speech.
- But Good News Club extended those earlier decisions to elementary schools and to times immediately after the school day.
- Hence there may be the possibility of “as applied” challenges to such policies on the right facts.
- In those situations the decision might be different.

Kennedy v. Bremerton School District

High School football coach that prayed on the field after games along with his players.

- School district told him to stop to which he first agreed and then disagreed.
- His contract was not renewed for the following season.
- He sued in federal court arguing the school district had violated his First Amendment rights of free speech and free exercise of religion.
- Federal district and appellate courts both ruled against Kennedy.

Kennedy v. Bremerton School District (cont.)

- Supreme Court cited to its previous decisions regarding the free speech rights of public employees.
- If they are speaking as private citizens on matter of public concern their free speech rights are protected.
- If they are speaking publicly on issues involving the government unit for which they work the government employer has more leeway in restricting their speech.
- Court ruled that Kennedy was speaking as a private citizen when he prayed with and talked to his players.

Kennedy v. Bremerton School District (cont.)

- Bremerton began with the premise that the Establishment Clause was violated whenever a reasonable observer concluded that the government was endorsing religion.
- Using the Lemon test the district court had found that a reasonable observer could conclude that the government was endorsing religion by not stopping Kennedy from engaging in his challenged behavior.
- The Supreme Court wrote that the lower federal courts overlooked what it called the shortcomings of the Lemon test, which the Court said invited chaos in the lower federal courts.

Kennedy v. Bremerton School District (cont.)

- “An Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor private religious speech. Nor does the Clause compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.”
- In place of the Lemon test the Establishment Clause should be interpreted by reference to historical practices and understandings.
- The line between the permissible and impermissible has to accord with history and reflect the understanding of the Founding Fathers.

Santa Fe Independent School District v. Doe

- School district had allowed student delivered prayers at high school football games.
- It defended this practice as a protection of the students' free speech rights.
- Court expressly rejected that argument.
- The school had not created a public forum where students could say whatever they wanted.
- The student-lead prayers were not private speech and the exclusion of the prayers was not a violation of their free speech rights.

Santa Fe Independent School District v. Doe (cont.)

- “The invocations are authorized by a government policy and take place on government property at government sponsored school events.”
- Several students were required to attend, some of them even for academic credit.
- “[I]t is a tenet of the First Amendment that the state cannot require one of its citizens to forfeit his or her rights or benefits as the price of resisting conformance to state-sponsored religious practice.”

STUDENT RELIGIOUS GROUP RECEIPT OF GOVERNMENT MONEY

Rosenbeger v. Rector and Visitors of the University of Virginia

- Court declared unconstitutional the university's refusal to give student activity funds to a Christian groups that published an explicitly religious magazine.
- Kennedy cited decisions in Widmar, Mergens and Lamb's Chapel to conclude that the government discriminated against the group because of the religious content of its speech.
- Also, providing funds to the religious group would not violate the Establishment Clause because the government would be acting neutrally in providing a wide array of activities and viewpoints on campus.

Justice Souter's Dissent

This was the first time the Court had allowed, much less required, direct government subsidies to a religious group.

"[U]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money."

When Can Religion Be Part of Government Activities?

McCollum v. Board of Education

- Court ruled unconstitutional a policy allowing students to be dismissed early to receive religious instruction during school hours in the school building by outside teachers.
- “Here not only are the sate’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.”

Zorach v. Clauson

- Court upheld a policy that allowed early release of students for religious instruction outside the school.
- Douglas concluded that allowing this policy was not a violation of the Constitution because the religious instruction was using neither government money nor property.
- An accommodation of religion.

Engel v. Vitale

- First decision where the Court held that prayers in the schools were unconstitutional.
- A non-denominational prayer written by the state's Board of Regents that was recited at the beginning of every school day.
- "Almighty God we acknowledge our dependence on Thee and we beg Thy blessing upon us, our parents, our teachers and our country."
- The Establishment Clause stood for the Founders' belief that "religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate."

Engel v. Vitale (cont.)

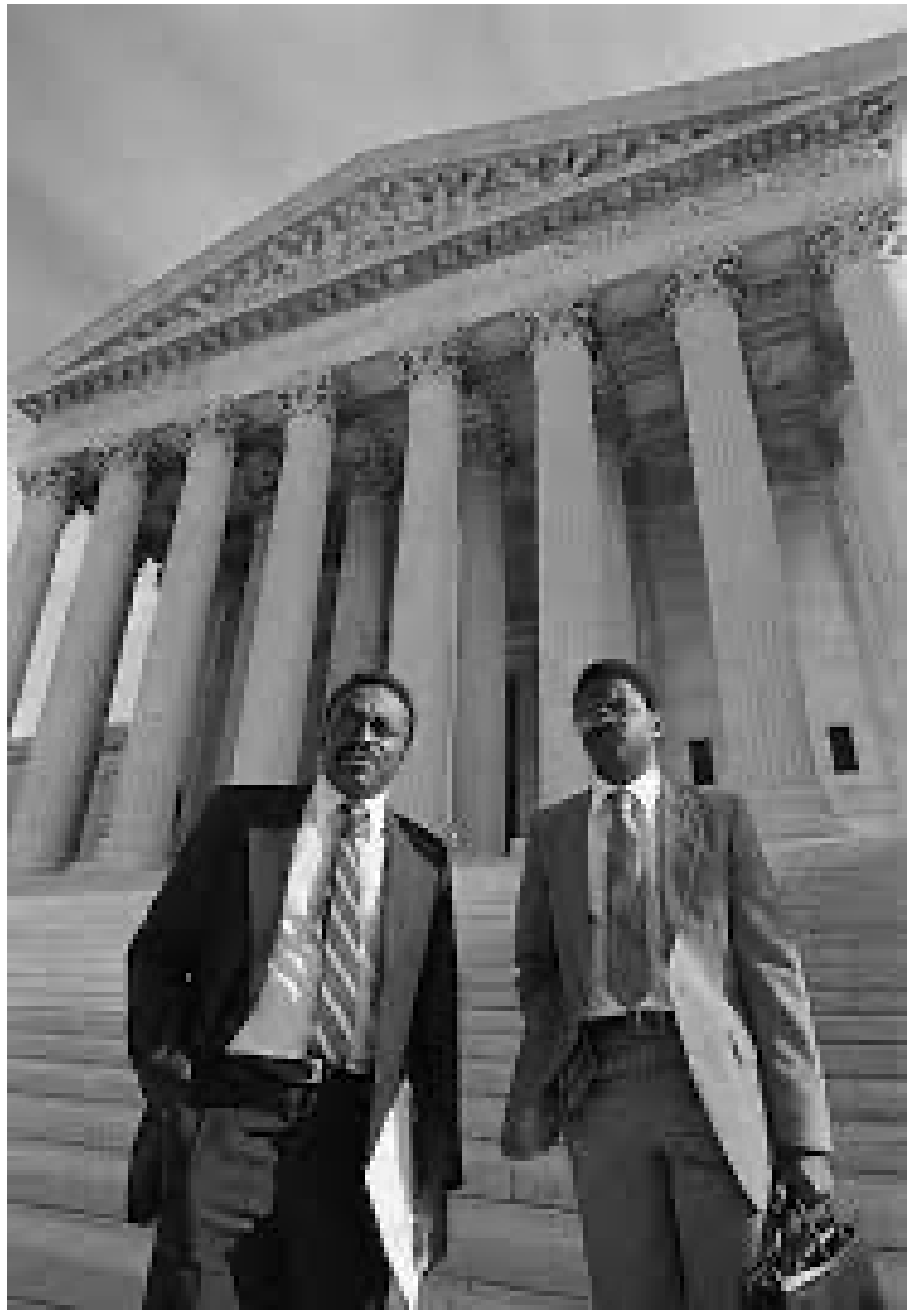
- Black specifically rejected the argument that declaring the prayers unconstitutional was hostility toward religion.
- “It is neither sacrilegious or anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people chose to look to for religious guidance.”

Abingdon School District v. Schemp

- Court held unconstitutional a state law and local rule that required the reading, without comment, at the beginning of each school day of Bible verses and the recitation of the Lord's Prayer by the students in unison.
- The Court pointed out that these activities were part of the mandatory, curricular activities of students, conducted in school buildings, supervised by teachers.

Wallace v. Jaffree

- Struck down an Alabama law authorizing a moment of silence in public schools for meditation or silent prayer
- Court looked at the legislative history of the law and wrote that it was “unambiguous that the law was not motivated by any secular purpose-indeed the statute had to secular purpose.
- The law’s purpose was to reintroduce prayers into the public schools.



Lee v. Wiseman

- Court declared clergy delivered prayers at public school graduations unconstitutional
- Kennedy that the reasoning in Engel, Schemp and Wallace was controlling and that this case was indistinguishable from those.
- Prayer at high school graduations were inherently coercive
- While students were not required to attend their graduation it was an important event in their lives and they felt pressure to attend.