

THE UNIVERSITY OF TEXAS SCHOOL OF LAW  
Continuing Legal Education

The Straight and Narrow:  
Walking the Fine Line of  
Religious Expression in  
Public Schools

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## I. RELIGION IN SCHOOLS—THE LEGAL FRAMEWORK

### A. The First Amendment

1. The Establishment Clause - freedom from religion: "Congress shall make no law respecting an establishment of religion, . . ." U.S. Const. amend. I.
2. The Free Exercise Clause - freedom of religion: ". . . or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I.
3. The Free Speech Clause - freedom of expression: ". . . or abridging the freedom of speech." U.S. Const. amend. I.

### B. Case Law

1. **Establishment Clause** The U.S. Supreme Court has evaluated Establishment Clause claims under three tests: the *Lemon* test, the coercion test, and the endorsement test. To avoid an establishment of religion, government action must:
  - Have a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
  - Not have a primary effect of advancing or inhibiting religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
  - Not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
  - Not persuade or compel a student to participate in a religious exercise. *Lee v. Weisman*, 505 U.S. 577 (1992).
  - Not endorse religion in public schools. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
2. **Free Exercise Clause** Courts have held that governmental bodies, including school districts, may not abridge the free exercise of a sincerely-held religious belief, absent a compelling governmental interest.
  - **Federal law:** The Free Exercise Clause prohibits governmental bodies from passing laws or establishing practices that specifically target adherents of particular faiths. Under the federal Free Exercise Clause, governmental bodies

may, however, adopt and apply neutral, generally applicable laws and practices. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

- **Texas law:** Under the Texas Religious Freedom Restoration Act, a school district may not substantially burden a person's free exercise of religion unless the school district can show that it is imposing the burden in furtherance of a compelling interest and it is doing so through the least restrictive means available. Tex. Civ. Prac. & Rem. Code §§ 110.001-.012.
3. **Free Speech Clause:** First amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

### C. Religious Neutrality in Public Schools

1. Public schools are not religion-free zones: "The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools . . . Indeed, the common purpose of the Religion Clauses 'is to secure religious liberty.' " *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (citations omitted).
2. Private speech protected: "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990)) (emphasis in original).
3. Public forums: School officials can open school facilities for private use, thereby creating a *public forum*, through the policies or practices of the district or an individual campus. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (concluding that school policy allowing one student to deliver an invocation before a high school football game did not create a public forum). Within a limited public forum, limits on expression must be *viewpoint neutral* and reasonable in light of the purpose of the forum. The government may impose reasonable

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