

# Contents

<i>Preface</i>	xix
<i>Acknowledgments</i>	xxi
<b>Introduction</b>	
<b><i>The Context of the Religion Clauses</i></b>	1
A. The Constitutional Context	1
B. The Religion Clauses in Context	3
<b>Part I</b>	
<b>WHAT IS RELIGION?</b>	
<b>Chapter 1</b>	11
<b>Malnak v. Yogi</b>	
<b><i>The New Age and the New Law</i></b>	
A. Transcendental Meditation and the New Age	12
B. TM's Opponents Go to Law	13
C. The Trial	16
D. The New Definition	17
E. The New Definition Applied and Critiqued	21
F. The New New Religions	24
<b>Chapter 2</b>	33
<b>United States v. Ballard</b>	
<b><i>Government Prohibited from Declaring Religious Truth</i></b>	
A. History of the I AM Movement	33
B. Theological Influences on I AM	35
C. The Proceedings Against the Ballards	38
D. The Religious Freedom Argument in <i>U.S. v. Ballard</i>	39
E. The Aftermath	43
F. The Implications of the Case	43

## Part II

**FREE EXERCISE**

Chapter 3	53
<b>Wisconsin v. Yoder</b>	
<i>An Anthropologist Shapes a Supreme Court Decision</i>	
A. Introduction	53
B. Social Issues and Social Upheaval in 1972	54
C. The History of Amish Persecution	56
D. The Beginnings of the Case	57
E. The Life of the Amish	61
F. The Oral Argument and Decision of the Supreme Court	65
G. The Decision Over Time	68
Chapter 4	71
<b>Goldman v. Weinberger</b>	
<i>Religious Freedom Confronts Military Uniformity</i>	
A. The Facts	72
1. The Official Story	72
2. Goldman's Story	73
a. Goldman's Prior Military Service	73
b. The Origins of the Dispute	74
c. The Air Force's Conduct	75
B. The Litigation	76
1. The Official Story	76
a. The District Court	76
b. The Court of Appeals	77
c. The Supreme Court	78
2. The Unofficial Story	80
a. Perspectives of Judge Robinson and Judge Starr	80
b. The Government's Strategy	80
C. Looking Back at the Case — Questions That Remain	81
Chapter 5	85
<b>Bob Jones University v. United States</b>	
<i>A Journey Through Scripture and History</i>	
A. Introduction	85
B. History of the Schools and Their Policies	86
1. History and Operation of Goldsboro Christian Schools	86
a. In General	86
b. The GCS Admissions Policy: Based on Race	87
2. History and Operation of Bob Jones University	87
a. In General	87
b. The BJU Admissions Policy: Based on Conduct but Cognizant of Race	89
C. The Procedural Posture of the Case	90
D. The Substantive Legal Significance of the Case	92

E. Analyzing the Case in Context: The Theological and Cultural Factors That Drove the Controversies	93
1. The Theological Context of the Case: The Purportedly Biblical Basis of GCS and BJU for Opposing Interracial Marriage	94
2. An Alternative View of What the Bible Really Teaches on Matters of Race and Nations	96
3. The Broader Cultural Context of the Case: Southern Fundamentalism in Twentieth Century America	99
F. Epilogue	101
<b>Chapter 6</b>	<b>107</b>
<b>Employment Division, Department of Human Resources of Oregon v. Smith</b>	
<b><i>The Battle for Religious Freedom</i></b>	
A. Introduction	107
B. Al Smith	108
C. An Appeal for Unemployment Benefits	111
D. The Challenge in State Court	112
E. The United States Supreme Court	114
F. The Congressional Response	121
<b>Chapter 7</b>	<b>127</b>
<b>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</b>	
<b><i>The Protection of Majority Religions' Privilege at the Nexus of Race, Class, and Ethnicity</i></b>	
A. Why This Case Is Important: Then and Now	128
B. From Church to Court — A Narrative of the Dispute	129
1. Pichardo Versus the City — Round 1	131
2. Pichardo Versus the City — Round 2	132
C. Religion Beyond Narrative: The History of the Santería Religion	133
D. Beyond Narrative and History: The Faces of Assimilation and Religion	137
1. The Plaintiffs: Ernesto Pichardo and the Church of the Lukumi Babalu Aye	137
a. Ernesto Pichardo	137
b. The Church of the Lukumi Babalu Aye	138
2. The Defendants	138
a. The City of Hialeah	138
b. The Mayor of Hialeah	139
c. The Hialeah City Council	139
E. Rules of Law That Emerged from the Case	140
F. Aftermath	144

## Part III

**ESTABLISHMENT**

Chapter 8	153
<b>Lemon v. Kurtzman</b>	
<b><i>The Parochial School Crisis and the Establishment Clause</i></b>	
A. Introduction	153
B. Background	154
1. The School-Aid Question	154
2. Establishment Clause Precedents	155
3. The Catholic School Crisis	156
C. Legislation and Litigation	157
1. Pennsylvania	157
2. Rhode Island	158
3. The Parties and Lawyers	158
4. The Pennsylvania Case ( <i>Lemon</i> ): Religion and Race	160
5. The Rhode Island Case	162
6. The Colleges Case ( <i>Tilton</i> )	163
D. The Cases in the Supreme Court	163
1. Briefing and Oral Argument	163
2. Deciding and Opinion Drafting	164
E. The Supreme Court's Opinions	165
1. <i>Lemon</i>	165
2. <i>Tilton</i>	166
3. The Racial Segregation Issue	167
F. <i>Lemon's</i> Regime	168
1. School Funding Cases	168
2. Establishment Clause Cases Generally	169
G. <i>Lemon's</i> (Partial) Decline	170
1. Funding Cases	170
2. The Establishment Clause Generally	171
Chapter 9	177
<b>Lynch v. Donnelly and Allegheny County v. ACLU</b>	
<b><i>"Christ Is Not a Turkey"</i></b>	
A. The Crèche in the Context of Other Christmas Symbols	179
1. <i>Lynch v. Donnelly</i>	179
a. The Lower Court Decisions	179
b. The Arguments in Favor of the Crèche Display	180
c. The Arguments Against the Crèche Display	182
d. The Oral Argument	183
e. The Justices' Deliberations and Opinions	184
2. Application of <i>Lynch</i> in the Courthouse Context: <i>County of Allegheny v. ACLU</i>	187
a. The Lower Court Decisions	188
b. The Arguments at the Supreme Court in Favor of the Crèche Display	189

c. The Arguments at the Supreme Court Against the Crèche Display	189
d. The Oral Argument	190
e. Distinguish or Follow <i>Lynch</i> ? — The Justices’ Deliberations and Opinions	192
B. Discussion and Analysis of the Crèche Cases	195
Chapter 10	203
<b>Board of Education of Kiryas Joel Village School District v. Grumet</b>	
<b><i>A Religious Group’s Quest for Its Own Public School</i></b>	
A. Introduction: The Creation of Kiryas Joel	203
B. The Issue: Is Creating a Public School District in/for a Religiously Homogeneous Community a Violation of the Establishment Clause?	204
C. The Facts: The History of the Satmars and Kiryas Joel	205
D. The Parties, the Lawyers, and the Lawsuit	210
E. The Arguments	212
F. The Court’s Decision: The Holding and Its Ambiguities	214
G. Issues, Resolved and Unresolved	215
1. Neutrality: Intent vs. Effects and Non-Preferentialism	215
2. Neutrality and Accommodation	215
3. Neutrality and Delegation (the “Fusion” Theory)	216
4. A School District <i>for</i> a Particular Religious Community vs. A School District <i>in</i> a Particular Religiously Homogeneous Community (an Intent Analysis)	218
5. Religious Gerrymandering: Justice Souter’s Confusion and Justice Kennedy’s Concurrence	219
6. The Tension Between Neutrality as Equal Opportunity Separatism (Accommodation) and the Anti-Gerrymandering and Anti-Line-Drawing Principles	222
7. Anti-Separatism: Justice Steven’s Concurrence	222
H. Conclusion: Contradictions and Confusions and the Aftermath of <i>Grumet</i>	224
Chapter 11	231
<b>Edwards v. Aguillard</b>	
<b><i>Evolution and Creation in the Legal Crucible</i></b>	
A. The American Saga of Darwin Versus the Bible	232
B. The Early Legal Clashes	233
C. The Origins of Creation-Science	234
D. The Arkansas Statute and Trial	237
E. The Louisiana Statute in the Lower Courts	238
F. The Professors and the Scientists in the Supreme Court	239
G. The Main Briefs in the Supreme Court	240
H. Oral Argument	242
I. The Conference	243
J. The Opinion for the Court	244
K. The Aftermath	246

Chapter 12	251
<b>Rosenberger v. Rector and Visitors of the University of Virginia</b>	
<b><i>The Triumph of the Neutrality Principle</i></b>	
A. The Background to <i>Rosenberger</i>	252
B. In the Lower Courts	257
C. Before the U.S. Supreme Court	259
D. The Supreme Court's Decision	263
E. The Impact of the <i>Rosenberger</i> Decision	265
<b>Part IV</b>	
<b>ACCOMMODATION AND TOLERANCE</b>	
Chapter 13	273
<b>Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos</b>	
<b><i>Addressing Tensions Between the Free Exercise and Establishment Clauses</i></b>	
A. Frank Mayson and the Church of Jesus Christ of Latter-day Saints	274
B. Religious Discrimination	277
C. Bringing Suit	279
1. Beehive Clothing Mills	279
2. Deseret Industries	280
3. The Lawyers	281
D. <i>Amos</i> in the Federal District Court	284
E. At the Supreme Court	285
Chapter 14	293
<b>Freeman v. Dep't of Highway Safety &amp; Motor Vehicles and Webb v. City of Philadelphia</b>	
<b><i>Accommodation Tangles in the Laws Over Hair</i></b>	
A. Introduction	293
B. Rethinking Concepts Relevant to the Debate	294
1. Accommodation and Tolerance	294
2. Rethinking Hair and the Cloth That Covers It	295
3. Rethinking Islam, Muslims, and the 9/11/2001 Attacks	296
C. The Cases	297
1. The <i>Freeman</i> Case	297
2. <i>Webb v. City of Philadelphia</i>	300
D. Remaining Legal Tangles	306
<i>Index</i>	311