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The Law of Church and State: General Principles and Current Interpretations

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Summary

The First Amendment of the U.S. Constitution prohibits the government from establishing a religion and guarantees citizens the right to freely exercise their religion. The U.S. Supreme Court has clarified the scope of these broad guarantees. This report provides an overview of the governing principles of the law of church and state.[1] It explains the legal requirements for challenges under the Establishment Clause and Free Exercise Clause and the standards used to evaluate such challenges. The report includes current interpretations of these clauses and summarizes related statutes (the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act).

Threshold Issues: Standing to Challenge Government Actions

Alleged violations under the religion clauses must meet two threshold requirements: government action and standing. In order to bring a claim to enforce rights provided by the religion clauses, an individual must show that government action has interfered with those rights. In other words, actions by private actors cannot violate the religion clauses.

The individual must also have standing. Cases brought under the religion clauses are governed by general standing rules. Standing is the legal term used to indicate that the person has an individualized interest that has actually been harmed under the law or by its application.[2] For instance, a person who has been barred by the government from attending religious services or required by law to attend religious services would have standing because the individual has been individually affected by the government's action.

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[1] This report provides a brief summary of the law of church and state. For more detailed analysis of church-state cases, see CRS Report 98-65, *The Law of Church and State: Developments in the Supreme Court Since 1980*, by David M. Ackerman, and CRS Report RL34223, *The Law of Church and State: U.S. Supreme Court Decisions Since 2002*, by Cynthia Brougher.

[2] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

For some Establishment Clause cases, the Court has recognized special exceptions to the general rules for standing.[3] Generally, taxpayers do not have standing to sue the government on the grounds that their tax money has been spent in a manner that they consider improper.[4] The Court has recognized an exception to this rule, known as the *Flast* exception. Under the *Flast* exception, taxpayers may raise Establishment Clause challenges of actions taken by Congress under Article I's Taxing and Spending Clause.[5] The Court has maintained its narrow interpretation of this exception, refusing to extend it to permit taxpayer lawsuits challenging executive actions or taxpayer lawsuits challenging actions taken under powers other than taxing and spending.[6]

Establishment Clause

The Establishment Clause provides for separation of church and state, but advocates differ as to the extent to which it requires such separation. Some argue that government and religion operate best if each conducts its business independently of the other. Others argue that the drafters of the Constitution did not intend strict separation, and strict separation has not been practiced throughout American history.[7]

Tests Used. The primary test used to evaluate claims under the Establishment Clause is known as the tripartite test, often referred to as the *Lemon* test. Under this test, a law (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not lead to excessive entanglement with religion.[8] Although the *Lemon* test is the one commonly employed by the Court, it has been criticized by some Justices who have applied the test in different ways.

One application of the *Lemon* test focuses on whether the government has endorsed religion. The government is prohibited "from making adherence to a religion relevant in

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[3] These exceptions, the Court has explained, result because the Establishment Clause is a constitutional limit on the government's ability to act. According to the Court, the framers of the Constitution feared abuse of governmental power that might result in favoring one religion over another. *See* Flast v. Cohen, 392 U.S. 83, 103-04 (1968). It is difficult to imagine circumstances in which potential abuses of the Establishment Clause could be enforced without this exception.

[4] *See* Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923).

[5] *See* Flast v. Cohen, 392 U.S. 83, 105 (1968).

[6] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (refusing to allow a taxpayer challenge of government transfer of property to a sectarian institution without charge because the action was taken by an executive agency exercising power under the Property Clause); Hein v. Freedom from Religion Foundation, 127 S. Ct. 2553 (2007) (refusing to allow a taxpayer challenge of activities of the White House Office of Faith Based and Community Initiatives because the funding was made through discretionary executive spending).

[7] For more on interpretations of the Establishment Clause, see CRS Report 98-65, *The Law of Church and State: Developments in the Supreme Court since 1980,* by David M. Ackerman.

[8] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). While the first two prongs of the test are self-explanatory, the Court noted that the third prong prohibited "an intimate and continuing relationship" between government and religion as a result of the law. *Id*. at 621-22.

any way to a person's standing in the political community."[9] This application of the *Lemon* test forbids "government endorsement or disapproval of religion," noting that "endorsement sends a message to nonadherents that they are outsiders ... and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[10]

Another application of the *Lemon* test focuses on neutrality as the governing principle in Establishment Clause challenges. Under this interpretation, the essential element in evaluating challenges under the *Lemon* test is whether or not the government act is neutral between religions and between religion and non-religion.[11]

In addition to the *Lemon* test, the Court has used two other tests to evaluate Establishment Clause claims. The coercion test forbids the government from acting in a way that may coerce support or participation in religious practices. This test is typically invoked in the school setting because of the impressionability of those affected by possible acts of establishment.[12] Another test permits government acts that involve religion if the Court finds that the religious element has played a part in the history of the nation, or as the Court has phrased it, has become "part of the fabric of our society."[13]

Regulation of Religious Speech. When faced with issues regarding religious speech, the Court may also encounter free speech claims under the First Amendment. As a general rule, the government may not limit religious speech without a compelling reason or in a manner that is not viewpoint-neutral, but it may impose reasonable time, place, and manner restrictions.[14] The Court has held that regulations that broadly prohibit religious speech (*e.g.*, prohibiting First Amendment activities in airports, including a ban on distribution of religious literature, or requiring permits for all door-to-door canvassing, including religious proselytizing) cannot be held constitutional.[15]

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[9] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[10] *Id.* at 688.

[11] Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

[12] *See* Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[13] Marsh v. Chambers, 463 U.S. 783, 792 (1983).

[14] The Court has developed the notion of the "public forum," *i.e.*, that certain sites are by their nature and history particularly appropriate for speech activities. *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., concurring); Schneider v. State, 308 U.S. 147 (1939). It also posited that not all public properties are public forums: "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). In nonpublic fora, however, government can impose regulations that are reasonable so long as the regulations are "not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 46 (1983).

[15] *See* Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987); Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002).

Access to Public Facilities for Religious Purposes. The Court has held it unconstitutional to deny religious groups access to public facilities, including public schools, if the same facilities are made available at similar times to nonreligious groups.[16] Such circumstances treat religious groups differently in a manner that suggests disapproval of religion, in violation of the Establishment Clause. The Court interpreted this requirement of equal access to include access to benefits offered by public institutions when it required a public university to provide student activity funds to student groups regardless of the religious content of the group's activities.[17]

Public Display of Religious Symbols. The Court has applied a variety of tests in determining the constitutionality of religious displays on public property, and its analysis in such cases is very fact-specific. Generally, the Court will uphold displays that are set in a diversified religious context. For example, a display that included Christian, Jewish, and nonreligious holiday elements at a government building has been held constitutional, but a display of a Christian symbol by itself has been held unconstitutional.[18] The Court generally also will uphold religious displays that are given historical secular context. For example, the Court has upheld a display of the Ten Commandments placed among dozens of other secular historical monuments on the grounds of a state capitol for several decades, but held a display that included the Ten Commandments among other religious items unconstitutional.[19]

Religion in School Settings. The Court has addressed the issue of prayer in schools by holding school-sponsored religious activities unconstitutional. The First Amendment prohibits the legislature, teachers, and school districts from initiating prayer during the school day or at school-sponsored events.[20] The Court has also struck down mandatory moments of silence if those moments are required for the purpose of voluntary prayer.[21] It also has held mandatory displays of the Ten Commandments in schools and prohibitions on teaching evolution to be unconstitutional.[22]

Government Aid to Religious Organizations. The permissibility of government aid to religious organizations generally depends on the purpose for which the

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[16] *See* Widmar v. Vincent, 454 U.S. 263 (1981); Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Good News Club v. Milford Central School, 533 U.S. 98 (2001).

[17] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

[18] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[19] *See* Van Orden v. Perry, 545 U.S. 677 (2005); McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005). *See also* Lynch v. Donnelly, 465 U.S. 668 (1984).

[20] *See* Treen v. Karen B., 455 U.S. 913 (1982), *aff'g mem.*, 653 F.2d 897 (5th Cir. 1981); Wallace v. Jaffree, 472 U.S. 38 (1984); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[21] Wallace v. Jaffree, 472 U.S. 38 (1984).

[22] *See* Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.S. 578 (1987).

aid is distributed and the manner in which it is distributed.[23] Generally, the government may not provide direct aid to religious organizations that use the aid for religious purposes, but the Court has allowed aid for non-religious purposes. The Supreme Court currently interprets the Establishment Clause to permit public school teachers to provide remedial and enrichment educational services to sectarian school children on the premises of the schools they attend.[24] It has held the use of federal funds to provide instructional materials and equipment to public and private religious schools to be constitutional.[25] The Court appears to have abandoned a distinction it had previously recognized that prohibited public aid to "pervasively sectarian" organizations, instead suggesting that the purpose of the aid and the types of programs that it was used to fund are the critical factor in its analysis, not the type of organization that received and administered the public funds.[26]

If government aid is distributed in an indirect manner, *i.e.*, if an individual uses funds received from a federal agency to pay for some sectarian service, the Court has held the aid to be constitutional when the distribution reflects the individual's choice.[27] In other words, if the individual can be seen as intervening in the chain of distribution, the aid is considered to be the individual's, rather than the government's, thereby negating a threat of establishment. The Court has upheld aid programs in which the aid was distributed to the initial recipients on a religion-neutral basis and the initial recipients had a "genuine choice among options public and private, secular and religious."[28]

Free Exercise Clause

Constitutional Requirements. For much of the second half of the 20th century, the Court had held that religious interests were to be considered of paramount importance in the constitutional scheme. Under this interpretation, any government act that infringed on religious practices of citizens had to serve a compelling state interest.[29]

In 1990, the Supreme Court significantly altered its interpretation of the Free Exercise Clause. It abandoned the compelling state interest test (a strict scrutiny standard) with respect to neutral statutes. The Court held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of

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[23] The constitutionality of government aid to religious organizations has been of particular interest to Congress since 1996, when then-Senator John Ashcroft introduced Charitable Choice legislation that allowed religious organizations to compete for federal funds in social programs. Under President Bush, the executive branch has continued the efforts that began with this legislation under the Faith-Based Initiative. For more information on these issues, see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie A. Welborn.

[24] *See* Agostini v. Felton, 521 U.S. 203 (1997).

[25] Mitchell v. Helms, 530 U.S. 793 (2000).

[26] *Id.* at 826-29.

[27] *See* Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[28] Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

[29] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

general applicability."[30] The constitutional strict scrutiny standard was not abandoned entirely, though. It still applies to cases that involve religious claims for exemption in programs allowing for individualized assessments and cases that involve deliberate governmental targeting of religion.[31]

Statutory Requirements. A standard required by the Constitution is a baseline, which Congress may raise but can never lower. In response to the Court's reinterpretation of the standard necessary under the Free Exercise Clause, Congress brought back the compelling interest test by statute. Congress sought to broaden the legal protection afforded religious exercise with the Religious Freedom Restoration Act (RFRA) of 1993,[32] which prohibited government action that has the effect of substantially burdening religious practice. RFRA provided that a statute or regulation of general applicability could lawfully burden a person's exercise of religion only if it were shown to further a compelling governmental interest and to be the least restrictive means of furthering that interest.[33] This statutory requirement for any law, including those of general applicability not aimed at religious practice, would supplement the constitutional protection, which prohibits only government action that intentionally burdens the exercise of religion.

RFRA, when originally passed, applied to federal, state, and local government actions. In 1997, the Court held that, because of federalism, Congress lacked the constitutional power to impose such a sweeping requirement on states and localities.[34] Therefore, the strict scrutiny standard imposed by RFRA applies only to actions of the federal government. Congress responded to the inapplicability of RFRA to state and local government by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[35] To avoid the federalism problems presented by RFRA, Congress limited the scope of RLUIPA's application. RLUIPA applies only where the burden could be linked to situations involving Congress's spending power or commerce power, or to situations involving land use in which individualized assessments are involved.[36] Thus, RLUIPA provides a statutory strict scrutiny test for state and local zoning and landmarking laws that impose a substantial burden on an individual's or institution's exercise of religion and on state and local actions that impair the religious practices of individuals in public institutions such as prisons, mental hospitals, and nursing homes.[37]

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[30] Employment Div., Oregon Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990) (internal quotes omitted).

[31] *Id.*

[32] P.L. 103-141, 103d Cong., 1st Sess. (November 16, 1993); 42 U.S.C. § 2000bb *et seq*.

[33] P.L. 103-141, § 3; 107 Stat. 1488, 1488-89; 42 U.S.C. § 2000bb-1.

[34] City of Boerne, Texas v. Flores, 521 U.S. 407 (1997).

[35] P.L. No. 106-274, 106th Cong., 2nd Sess. (September 22, 2000); 114 Stat. 803; 42 U.S.C. §§ 2000cc *et seq.*

[36] *See id.* at §§ 2(a)(2), 3(b).

[37] P.L. 106-274, §§ 2-3; 114 Stat. 803, 803-04; 42 U.S.C. §§ 2000cc, 2000cc-1.