Religion Jurisprudence and LGBT Rights: Background and Recent Trends

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Introduction

For decades, litigators have advanced LGBT rights by appealing to liberty and equality principles expressed in the Fifth and Fourteenth Amendments and their state-law counterparts.[1] These successes, coupled with gains in statutory protections against LGBT discrimination,[2] have motivated groups opposing LGBT equality to adopt new legal arguments. Frequently, they have sought to exempt religiously motivated conduct from the reach of nondiscrimination laws.[3] In other cases, the

[1] For examples in the U.S. Supreme Court, see, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

[2] The number of states that had enacted employment non-discrimination laws covering sexual orientation grew from two plus Washington, D.C., in 1990 to 21 plus Washington, D.C., in 2014. *See* Ian Burn, *Not All Laws are Created Equal: Legal Differences in State Non-Discrimination Laws and the Impact of LGBT Employment Protections,* 39 J. LABOR RESEARCH 462, 469 (2018).

[3] *Fulton v. City of Philadelphia*, 922 F.3d 140, 165 (3d Cir. 2019) (First Amendment challenge to government's contracting with organization practicing discrimination to deliver governmental services), cert. granted, No. 19-123 (2020); *see also Marouf v. Azar*, 391 F. Supp. 3d 23, 25-26 (D.D.C. 2019) (same); *Rodgers v. U.S. Dep't of Health & Human Servs.*, No. 19-cv-1567 (D.S.C. filed May 30, 2019) (same).

government itself is complicit in attempting to protect discriminatory conduct, ostensibly based on religious-freedom concerns.[4] These groups have recently enjoyed a degree of success asserting First Amendment claims.[5] For LGBT-allied practitioners facing an unfamiliar legal landscape, this paper provides a short summary of the religion jurisprudence that frames these attacks.[6]

I. The Religion Clauses

The Religion Clauses of the First Amendment work in tandem to safeguard religious freedom. The Establishment Clause commands that "Congress shall make no law respecting an establishment of religion," and the Free Exercise Clause mandates that Congress shall make no law "prohibiting the free exercise thereof."[7] Together, they bar "governmentally established religion" and "governmental interference with religion."[8] But the Supreme Court has repeatedly explained that there is "room for play in the joints" between the two clauses, meaning that legislatures may enact more robust protections for religious exercise or for antiestablishment interests (i.e., separation of religion and government), as long as

[4] *See New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019) (vacating a "conscience rule" promulgated by HHS (45 C.F.R. pt. 88) that would have allowed healthcare providers to deny services "on account of a religious or moral objection").

[5] *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019); *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147, 1163-64 (D. Colo. 2019); *Meriwether v. Trustees of Shawnee State Univ.*, No. 18-cv-753, 2019 WL 4222598, at *22-24 (D. Ohio Sept. 5, 2019).

[6] Speech and association arguments under the First Amendment sometimes appear alongside religious claims. They are beyond the scope of this paper.

[7] U.S. CONST. amend. I. Both Religion Clauses have been incorporated against the states through the Fourteenth Amendment. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Conn.*, 310 U.S. 296 (1940) (Free Exercise Clause).

[8] *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

they do not exceed the bounds set by the First Amendment.[9] Although the two Religion Clauses may sometimes be viewed as in tension with each other, they in fact work—or are supposed to work—hand-in-hand to protect religious freedom for all by keeping religion and government separate.

A. The Establishment Clause

The Establishment Clause mandates that government must remain "neutral[ ] between religion and religion, and between religion and nonreligion."[10] Hence, while the government may not target religious conduct for worse treatment *because* it is religious,[11] it also "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general."[12] Although the Establishment Clause does not bar government from accommodating private religious exercise to some extent, it does prevent governmental accommodations or exemptions that impose material burdens on third parties.[13] That is because, when government purports to accommodate the religious exercise of some while imposing the costs and burdens of that religious exercise on others, it impermissibly favors the faith of the benefitted over the rights of the burdened. Moreover, courts apply the

[9] *Walz*, 397 U.S. at 669; *see also Locke v. Davey*, 540 U.S. 712, 719 (2004); *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

[10] *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

[11] *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017).

[12] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality op.).

[13] *See Estate of Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985) (invalidating state law that guaranteed religious employees a day off on the Sabbath of their choosing based on burdens to other employees); *Texas Monthly*, 498 U.S. at 18 n.8 (invalidating sales-tax exemption for religious publications based on costs shifted to other taxpayers).

Establishment Clause with "particular vigilan[ce]" in cases involving public schools, because students are impressionable and their attendance is mandatory.[14]

The Supreme Court has developed multiple tests to determine whether governmental action complies with the Establishment Clause, and "there is no single formula for resolving Establishment Clause challenges."[15] These tests apply both when government acts directly and when it "delegate[s] a governmental power to religious institutions" that then may apply religious tenets in exercising governmental authority.[16]

Because the "clearest command of the Establishment Clause is that one denomination cannot be preferred over another," all denominational preferences (meaning favoritism of one faith or denomination over others) are presumptively invalid and subject to strict scrutiny.[17] Several other tests may also apply—both when there isn't a denominational preference and even when there is.

Under the test first articulated in *Lemon v. Kurtzman*, governmental action violates the Establishment Clause if any of the following is true: (1) its primary purpose is religious rather than secular, (2) it has the principal effect of advancing or inhibiting religion, or (3) it excessively entangles government with religion.[18]

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[14] *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992).

[15] *American Legion v. Am. Humanist Society*, 139 S. Ct. 2067, 2090 (Breyer, J., concurring).

[16] *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 125-26 (1982); *accord Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-97 (1994).

[17] *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982); *but see Trump v. Hawaii*, 138 S. Ct. 2393, 2416-20 (2018).

[18] 403 U.S. 602, 612-13 (1971).

Although the *Lemon* test remains valid law and is regularly applied by the lower courts, several Justices have criticized or warned against overreliance on it.[19]

Governmental conduct also violates the Establishment Clause when it impermissibly endorses religion.[20] The concept underlying this endorsement test is that government violates the Establishment Clause by sending a message to non-adherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders."[21]

Additionally, the bare-minimum guarantee of the Establishment Clause is that "government may not coerce anyone to support or participate in religion or its exercise,"[22] because "the machinery of the State" must not be used "to enforce a religious orthodoxy."[23] Thus, government also violates the Establishment Clause when it coerces participation in religion. And even "subtle coercive pressure" is sufficient to render governmental action improper.[24]

The Court has recently applied more permissive standards in cases concerning

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[19] *American Legion*, 139 S. Ct. at 2080 (Alito, J.) ("The [*Lemon*] test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."); *id.* at 2097 (Thomas, J., concurring in the judgment) (describing the *Lemon* test as "long-discredited"); *id.* at 2101-02 (Gorsuch, J., concurring in judgment) (describing the *Lemon* test as a "misadventure"); *cf. id.* at 2094 (Kagan, J., concurring in part) ("Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere.").

[20] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000).

[21] *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 688 (1984) (O'Connor, J., concurring)). This endorsement test is sometimes viewed as the framework for applying various parts of the *Lemon* test, and it is sometimes treated as a distinct test. Which approach is taken varies from circuit to circuit.

[22] *Lee v. Weissman*, 505 U.S. 577, 587 (1992).

[23] *Santa Fe*, 530 U.S. at 312.

[24] *Lee*, 505 U.S. at 592.

legislative prayer[25] as well as in a case challenging a long-standing religious monument maintained on public land,[26] relying in part on the historical longevity of particular practices to establish their validity.[27] The Court also applied only rational-basis review when analyzing an Establishment Clause challenge to President Trump's "Muslim Ban" because of the ban's ostensible connection to national security.[28] Establishment Clause analysis now depends in part, therefore, on the activity being challenged and the setting in which the challenged activity took place. For example, official prayer in a public school will trigger a much higher level of judicial scrutiny than official prayer in a legislature.[29]

B. The Free Exercise Clause

The Free Exercise Clause generally prohibits governmental action that either requires a religious adherent to engage in conduct that her religion forbids or prevents her from engaging in conduct that her religion requires.[30] Out of regard for the twin dangers of repressing religion and subverting the rule of law, the Supreme Court has set out a two-tiered standard for evaluating Free Exercise Clause claims. Laws affecting religious exercise that are neutral and generally applicable (meaning that they apply to everyone regardless of religion or belief and do not specifically target any particular religious beliefs) need only be rationally related to a legitimate

[25] *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014).

[26] *American Legion*, 139 S. Ct. at 2089 (plurality op.).

[27] *Id.* at 2087 (plurality op.).

[28] *Trump v. Hawaii*, 138 S. Ct. 2393, 2416-20 (2018).

[29] *Compare Weisman*, 505 U.S. at 592 *and Town of Greece*, 572 U.S. at 577.

[30] *See Employment Div. v. Smith*, 494 U.S. 872, 874-79 (1990).

government end.[31] The Supreme Court granted certiorari in a case to be heard at the beginning of the upcoming term that invites the Court to change this free-exercise standard.[32] In contrast, laws that lack neutrality or general applicability (such as by targeting the practices of a particular religion so as to punish or deter the practice of the disfavored faith) are subject to strict scrutiny.[33] The Free Exercise Clause requires government to maintain neutrality both in passing laws and enforcing them.[34]

C. Interplay of the Two Clauses

Although the Free Exercise Clause at times may permit (and occasionally even require) government to accommodate a particular religious practice, accommodations are limited by the Establishment Clause and so must not "devolve into an unlawful fostering of religion."[35] This principle prevents government from responding to a Free Exercise Clause challenge by, for example, creating a religious accommodation or exemption that would materially burden third parties.[36] Such accommodations violate Establishment Clause principles by imposing the burdens and costs of religious exercise on non-adherents, thereby impermissibly favoring that religion.

Thus, for example, the Supreme Court rejected a Free Exercise Clause challenge by employers who objected to paying Social Security taxes on religious grounds, in

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[31] *Id.* at 879.

[32] *Fulton v. City of Philadelphia*, 922 F.3d 130 (2019), cert. granted, No. 19-123 (2020).

[33] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

[34] *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

[35] *Cutter*, 544 U.S. 709, 714 (2005) (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987)).

[36] *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

part because granting an exception would "impose the employer's religious faith on employees."[37] A narrow exception to this limitation arises in cases implicating "religious organizations['] autonomy in matters of internal governance,"[38]—most notably with respect to a church's decisions relating to the employment of clergy. In those instances, both Religion Clauses together bar (or with respect to internal financial operations, drastically limit) governmental interference in the internal operational decisions of a religious body.[39]

II. The Play in the Joints: Other Significant Laws Implicating Religion

A. RFRA and RLUIPA

The Religious Freedom Restoration Act of 1993 was enacted following the Supreme Court's decision in *Employment Division v. Smith*, which held that the Free Exercise Clause requires only minimal rational-basis review of neutral, generally applicable laws that incidentally burden religious practices.[40] Through RFRA, Congress sought to restore pre-*Smith* free-exercise jurisprudence, which had applied a heightened standard of review to governmental action that substantially burdened religious practice.[41] Accordingly, RFRA forbids the government to "substantially burden a person's exercise of religion," unless the burden is in furtherance of a

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[37] *United States v. Lee*, 455 U.S. 252, 261 (1982); *see also Prince v. Mass.*, 321 U.S. 158, 166 (1944) (state's authority to enforce child-labor law "not nullified merely because" seller of religious magazines "ground[ed] his claim [for an exemption] . . . on religion.").

[38] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring).

[39] *Id.* at 181.

[40] 494 U.S. at 874-79.

[41] *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

compelling governmental interest and is the least restrictive means of achieving that interest.[42]

Although originally intended to apply at both the federal and state levels, the Supreme Court held in *City of Boerne v. Flores* that the statute exceeded Congress's enforcement authority against the states under Section 5 of the Fourteenth Amendment.[43] RFRA continues to apply to actions by the federal government that substantially burden religious exercise. Twenty-one state legislatures have also enacted state-level RFRA analogues,[44] which are generally modeled on the federal bill.[45]

Additionally, Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act, which provides heightened free-exercise protections to persons in prisons and state hospitals, as well as to houses of worship involved in zoning disputes.[46] RFRA and RLUIPA are sufficiently similar that they are often referred to as "sister statutes," and precedents interpreting one statute are frequently cited in cases involving the other.[47]

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[42] 42 U.S.C. §2000bb-1.

[43] 521 U.S. 507, 530-36 (1997).

[44] Paul Baumgardner and Brian K. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 ALB. L. REV. 1385, 1391 (2019).

[45] *See, e.g.*, *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 918 (Ariz. 2019) (explaining that Arizona's Free Exercise of Religion Act was modeled after RFRA).

[46] 42 U.S.C. § 2000cc *et seq*.

[47] *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718 (2014).

RFRA and its state equivalents "adopt[ ] a statutory rule comparable to the constitutional rule rejected in *Smith*,"[48] meaning that limitations on free-exercise claims and governmental accommodations of religion articulated in the Court's pre-*Smith* free-exercise jurisprudence apply under these statutes. One significant limitation is the Establishment Clause's prohibition against accommodations that materially burdens third parties.[49] Thus, there can be no colorable RFRA claim for an exemption that would impose meaningful costs or harms on others.[50] Other limitations arise from the statute's requirements that only substantial burdens on religious exercise may be challenged[51] and that religious objections to governmental action must be sincere.[52] These statutory prerequisites to RFRA claims likewise arise out of pre-*Smith* free-exercise jurisprudence and reflect the interplay of the two Religion Clauses.

B. Antidiscrimination Regulations in the Religion-Law Context

Despite the limitations imposed by the Establishment Clause, an increasing number of cases involve religious plaintiffs seeking free-exercise exemptions from antidiscrimination laws.[53] In these cases, free-exercise claims are often brought

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[48] *Gonzales*, 546 U.S. at 424; *see, e.g.*, *Brush & Nib*, 448 P.3d at 918 ("Like RFRA, [Arizona's] FERA created a rule based on the Supreme Court's pre-*Smith* framework.").

[49] *Cutter*, 544 U.S. at 720 ("courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries").

[50] *Holt v. Hobbs*, 135 S. Ct. at 867 (Ginsburg, J., concurring).

[51] *E.g.*, *Mahoney v. Doe*, 642 F.3d 1112, 1121-22 (D.C. Cir. 2011) (regulation against defacing government property did not substantially burden religious exercise by preventing religious protesters from writing chalk messages on the sidewalk across from the White House).

[52] *Hobby Lobby*, 573 U.S. at 717 n.28.

[53] *E.g. Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 918 (Ariz. 2019) (free-exercise challenge to public-accommodations law prohibiting discrimination against LGBT customers); *Telescope*, 936 F.3d at 759 (same); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560

alongside free-speech claims;[54] and the Eighth Circuit recently accepted a "hybrid-rights" theory, ignored or roundly rejected by the courts and legal scholars across the political spectrum before now, under which plaintiffs might use "Free Exercise Clause concerns to reinforce their free-speech claim[s]," essentially using the repackaging of their arguments under multiple parts of the First Amendment to obtain strict scrutiny that would not be available for either claim separately.[55]

Despite some recent successes enjoyed by religious litigants in these cases,[56] however, neutral, generally applicable antidiscrimination laws should withstand free-exercise challenges at least absent a watershed change by the Supreme Court in free-exercise jurisprudence. For one thing, exemptions from antidiscrimination laws impose harms on third-party nonbeneficiaries of the supposed religious accommodations by making third parties suffer invidious discrimination and the attendant denials of service and dignitary harms as the price for governmental preferencing of discriminating business owners' or public officials' religious beliefs over the rights of others. Moreover, the government's interest in combating discrimination is compelling and thus should withstand strict-scrutiny review.[57] And

(6th Cir. 2018) (employer invoked RFRA to seek exemption from Title VII antidiscrimination requirements), cert. granted, No. 18-107 (2019); *Minton v. Dignity Health*, 252 Cal. Rptr.3d 616 (Cal. Ct. App. 2019) (faith-based hospital claiming immunity from suit under the Unruh Act).

[54] *See, e.g., Meriwether v. Trustees of Shawnee State Univ.*, Case No. 1:18-cv-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020); *303 Creative v. Elenis*, 405 F. Supp. 3d 907 (D.Colo. 2019), *appeal docketed*, No. 19-1413 (10th Cir. Oct. 28, 2019).

[55] *Telescope*, 936 F.3d at 759 (quotation marks omitted).

[56] *See, e.g.*, *id.*

[57] *See State v. Arlene's Flowers, Inc.*, 441 P.3d 1202, 1234-35 (Wash. 2019) ("we assume without deciding that strict scrutiny applies to [Washington antidiscrimination law] . . . and we hold that the law satisfies that standard").

although in *Masterpiece Cakeshop* the Supreme Court concluded that a religious objector had been denied a religiously neutral administrative adjudication process below, it also explained that "it is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services."[58]

C. No-Aid Clauses

Several state constitutions contain "no-aid clauses" that prohibit the use of state money to support religious instruction, houses of worship, or other religious uses.[59] These clauses may enforce separation of government and religion to a greater extent than the federal Establishment Clause does.[60] But a state's interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause" is also limited by the Free Exercise Clause: The Supreme Court recently held that Missouri may not deny a religious entity a general public benefit *solely* because it is religious.[61] A case involving the interaction between the Religion Clauses and Montana's no-aid clause is currently before the Supreme Court.[62]

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[58] *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *see also Arlene's Flowers*, 441 P.3d at 1234-35.

[59] *E.g.* GA. CONST. art. I, § II; FLA. CONST. art. I, § 3; MONT. CONST. art. X, § 6; WASH. CONST. Art. I, § 11.

[60] *See Locke*, 540 U.S. at 722.

[61] *See Trinity Lutheran*, 137 S. Ct. at 2024 (church could be excluded from a governmental "scrap tire program" purely because it was a religious body).

[62] *Espinoza v. Montana Dep't of Rev.*, 435 P.3d 603 (Mont. 2018), cert. granted, No. 18-1195 (2020).