

Constitutional Rights of Religious Organizations

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I. Overview of Constitutional Principles

A. Law in the United States: Roles of State and Federal Law

In the United States, there are two systems of laws—federal and state. Some laws—federal laws passed by Congress and related regulations promulgated by federal agencies apply to everyone. Other laws—state laws and regulations—apply to those who are residents of or are operating in that particular state. Because most state laws are not uniform, a religious organization will need to verify how an issue is affected by applicable state law.

Federal law is commonly referred to as having limited jurisdiction; all of the laws that can be passed by Congress are limited to those areas that are specifically set forth in the United States Constitution; everything else is reserved to the states (*see* Amendment 10 to the Constitution: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

B. The Bill of Rights

At the time the U.S. Constitution was adopted, there were concerns expressed that certain rights were not adequately addressed. As a result, the Bill of Rights (Amendments 1 through 10) was added to the Constitution setting forth the liberties thought to be essential to a free people.

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1. *The First Amendment*

For religious organizations, the most important part of the Constitution is the First Amendment, which provides that:

Congress shall make no law respecting *an establishment of religion*, or prohibiting the *free exercise* thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . (emphasis added)

The first clause prohibits the government from establishing a religion (including preferring one religion over another or over no religion). The second clause guarantees the free exercise of religion. In addition, as noted below, religious organizations have also used both the freedom of speech and freedom of assembly clauses to support and defend their activities.

2. *Applicability of Bill of Rights to States*

The Bill of Rights was not originally designed to apply to the states, which is why the First Amendment states that *Congress* shall make no law regarding religion or its free exercise. In fact, when the Constitution was adopted, some states actually had an official religion.¹ However, since that time, the Supreme Court has found that much of the Bill of Rights also applies to the states. The application of the First Amendment to the states has been found to have been made clear by the Fourteenth Amendment,² which provides, in part that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Therefore, no American governmental authority (state or federal) can prefer one religion over another, or interfere with one's right to believe as he or she chooses.

1. At the time of the Revolution in 1776, nine out of the original 13 colonies had their own form of established church, which was given special advantages not available to other religions. The American Revolution caused disestablishment of the Anglican church (Church of England) in four of the colonies, leaving only five with established state churches. This trend continued with the adoption in Virginia of the Virginia Statute of Religious Liberty of 1786, which provided that no man should be required to attend or support any religious ministry and guaranteed freedom of speech on religious matters.

2. The free exercise clause was first held to apply to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and the establishment clause in *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

C. Finding the Right Governmental Balance Between Non-Establishment of Religion and Free Exercise

While the language of the First Amendment is both brief and simple, its application has not been easy. Conflicts arise as the states find needs that should be addressed, while the church claims explicit freedom from governmental interference. For example, as states exercise their sovereignty by protecting the health and welfare of its citizens, laws are enacted to require compliance with building codes, fire codes, child care laws, and to provide for police protection. The purpose of the building codes are not meant to interfere with the free exercise of religion, but before one can build and occupy a church, one must get the requisite permits even though a strict interpretation may regard this as a limitation on the free exercise of religion. The limitation is constitutionally allowed, because of the state's compelling interest to protect its citizens from unsafe building construction:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.³

On the other hand, when a church seeks to voluntarily become involved in the programs of government (such as obtaining government funding), it must face the same entanglement argument (usually urged by the church) that church and state be separate. For example, in New York, the government provided remedial teaching assistance to church schools on the same terms as this assistance was provided to other private schools. This program was in effect for 19 years without incident, but the Court decided that such assistance violated the First Amendment.⁴

The examples above illustrate the two conflicting ideals in the language of the First Amendment: How does one maintain the ideal of "neutrality" towards religion, while, at the same time, also maintaining the ideal of "separation" of church and state?

3. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (citations omitted) (1971).

4. *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S. Ct. 3126 (1985). *See also* *MEEK v. PITTINGER*, 421 U.S. 349 (1975).

D. Establishment Clause

The Supreme Court's modern Establishment Clause jurisprudence was begun under *Everson v. Board of Education*,⁵ which invoked the now famous "wall of separation" metaphor, drawn from Thomas Jefferson's 1802 letter to the Danbury Baptist Association. Although no clear legal rule is derived from this language, it is cited as supporting the proposition that neither the federal government nor the states "can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁶

The Supreme Court made another attempt at clarifying its establishment jurisprudence in *Lemon v. Kurtzman*,⁷ which announced a three-part test for determining whether a challenged governmental action is constitutional under the Establishment Clause. According to the Court in *Lemon*, in order to pass Constitutional muster:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excess government entanglement with religion."⁸

This test has been unevenly applied in subsequent Establishment Clause cases before the Court. In some cases the Court has avoided the three-prong *Lemon* test altogether, while in others it still seems to apply. This result has led to a great deal of confusion among (and complaints from) the lower courts.

E. Free Exercise

The Supreme Court's Free Exercise Clause jurisprudence has tried to balance the right of free exercise against the establishment protection, often times with mixed results. As a general rule, the Court has held that any government action inhibiting religious practice must have a "compelling state interest" in order to be constitutional.⁹ However, in *Employment Division v. Smith* the Court also determined that "neutral laws of general applicability" that burden religious practice or belief are constitutional, regardless of a compelling state interest.¹⁰ The court has clarified that neutrality and general applicability are separate determinations and that a law must be both neutral toward religion and applied generally in order to be constitutional.¹¹ Congress subsequently passed the Religious Freedom Restoration Act (RFRA),

5. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

6. *Id.* at 727.

7. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

8. *Id.* at 612.

9. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

10. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

11. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

which is designed to reinstate the pre-*Smith* standard. The Court has since held that RFRA can be applied only to the federal government, not the states.¹²

F. The Church Autonomy Principle

Drawn from the Religion Clauses of the First Amendment, together with the Speech Clause and the implicit right of freedom of association, the right of Church Autonomy is the right of churches to be free from government control with regard to their internal affairs. *Watson v. Jones* was the first in a line of cases articulating the Church Autonomy principle.¹³ In *Watson*, the Court held that disputes in churches should be decided by judicial deference to the ecclesiastical hierarchy:

[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them.¹⁴

The concept of Church Autonomy has generally been understood as the right of churches to select their ministers, control their doctrine, and determine how the organization is to be governed, without interference from the government.¹⁵ The right of Church Autonomy is often upheld against the government seeking to redefine or control church teaching and governance.

G. Other Constitutional Protections for Churches and Other Religious Organizations

1. Federal Constitutional Protections

In addition to the religion clauses contained in the First Amendment, the United States Constitution also provides other protections that are frequently relied upon by religious organizations, specifically, equal protection, freedom of speech, and freedom of assembly. In fact, freedom of speech¹⁶ and

12. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

13. 80 U.S. (13 Wall.) 679 (1871).

14. *Id.* at 727.

15. See Mark E. Chopko & Michael F. Moses, *Freedom to Be Church: Confronting Challenges to the Right of Church Autonomy*, GEO. J. L. & PUB. POL'Y, Vol 3:388 (2005).

16. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chape v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

freedom of assembly arguments have often been better received by the courts than have arguments based on free exercise of religion.¹⁷

There are also multiple federal statutory protections, some of which are discussed more fully herein. For example, the Religious Freedom Restoration Act mentioned above applies to the federal government, and the Religious Land Use and Institutionalized Persons Act of 2000,¹⁸ *which is discussed more fully in Chapter 11*, applies to both state and federal governments. Multiple federal anti-discrimination statutes provide religious organizations with certain exemptions; *see Chapter 5*.

2. *State Constitutional Protections*

As we noted above, the United States has a dual system of government, with the federal law, which applies to everyone, and the state law, which applies to the residents of that state. Many state constitutions often have broader protections for religious organizations than the First Amendment. Therefore, it is appropriate to find out what type of constitutional protection might be available on the state level.

Some states have other specific protections as well. For example, Massachusetts has what is commonly termed the Dover Amendment, which exempts agricultural, religious, and educational corporations from many zoning restrictions.¹⁹ And a number of states have adopted religious freedom acts, restoring the “compelling interest test,” which was overturned by the 1990 *Smith* decision.²⁰ As is mentioned above, after the *Smith* decision, Congress adopted the Religious Freedom Restoration Act; however, this was found to be unconstitutional as it applies to the states. In light of this, a dozen states have enacted similar laws, restoring the “compelling interest test.” In other states, this has been established through decisions of the state courts.

It is clear that religious organizations occupy a special place in American society. Although they are similar to other charitable entities, because of the First Amendment protections, religious organizations are often less subject to governmental regulations or are otherwise treated differently. However, this does not mean that those operating a religious organization can ignore the law and do whatever they please. Many federal and state laws are applicable, in whole or in part, to religious organizations.

17. Although it is beyond the scope of this book, it might be noted that the U.S. Constitution also specifically states, in Article VI, Section 3, that: “. . . no religious test shall ever be required as a qualification to any office or public trust under the United States.”

18. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*

19. MASS. GEN. LAWS ch. 40A, § 3.

20. Employment Div. v. Smith, 494 U.S. 872 (1990).

II. Definitions Relating to Churches and Other Religious Organizations

The definitions discussed below are relevant to the legal rights of religious organizations—under not only Constitutional law, but also other federal laws (including tax law) and under state law.

A. What Is Religion?

Initially, the courts and the founders of the country essentially considered “religion” to be any of the various denominations of Christianity, but since the First World War there has been judicial recognition in America that “religion” is not limited to “Christianity.” In 1961, the Supreme Court acknowledged that some religions did not even recognize the existence of God.²¹ By the 1960s, the definition of religion no longer required a belief in God.²² This expansive viewpoint of “religion” has been a part of the move away from being a “Christian” nation to that of a nation hospitable to all religions, until it has become evident that the First Amendment freedom to believe also includes the freedom *not* to believe.²³

B. What Is a Church?

“Churches” are often treated as a special class of religious organization. Courts use the word “church” to refer both to the body of people gathered together and to the church building, itself.²⁴

It should be noted that “church” is the term used in the Internal Revenue Code (Tax Code) probably again a carryover from the idea of religion as referring to Christianity. Because it is used in the Tax Code, we are also using it here; however, the use of this term in this book is intended to include synagogues, mosques, temples, and any other organization with “church-type” characteristics. *See following section on the factors used to determine if an entity is a “church” for tax law purposes.*

21. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

22. *See also* *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971).

23. *County of Allegheny v. ACLU*, 492 U.S. 573, 649 (July 3, 1989), *quoting with approval* from *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

24. *See, e.g.*, *Anderson v. Brock*, 3 Me. (3 Greenl.) 243, 247; *McAllister v. Burgess*, 37 N.E. 173, 161 Mass. 269, 24 L.R.A. 158, *quoting* *Baker v. Fales*, 16 Mass. 488, 495; *Scott Co. v. Roman Catholic Archbishop for Diocese of Oregon*, 163 P. 88, 91, 83 Or. 97; *Pehu v. Kauai*, 3 Haw. 50; *Wiggins v. Young*, 57 S.E.2d 486, 487, 206 Ga. 440, 13 A.L.R.2d 1237.

C. How the IRS Defines Church

The IRS does not have a definition for what constitutes a “church.” As stated in IRS Publication 557 “[b]ecause beliefs and practices vary so widely, there is no single definition of the word ‘church’ for tax purposes.” Rather, the IRS considers the following fourteen factors under a “facts and circumstances” test:²⁵

- a distinct legal existence;
- a recognized creed and form of worship;
- a definite and distinct ecclesiastical government;
- a formal code of doctrine and discipline;
- a distinct religious history;
- a membership not associated with another church or denomination;
- an organization of ordained ministers;
- ordained ministers selected after completing prescribed studies;
- a literature of its own;
- established places of worship;
- regular congregations;
- regular worship services;
- Sunday schools for religious instruction of the young; and
- schools for the preparation of ministers.

Although no single factor is controlling, and having all 14 (or even one) is not necessary, the IRS is unlikely to recognize an organization as being a church unless it has a number of these characteristics. In the 1993 IRS Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, in *Defining “Church” —The Concept of a Congregation*, is a statement to the effect that an organization must have a congregation (usually including participation in mutual ceremonies, observances and celebrations important to the religion) in order to be considered a “church.” Therefore, although having a congregation may not be sufficient to determine that the organization *is* a church, not having a congregation is likely to be considered by the IRS sufficient to determine that the organization *is not* a church. Organizations that believe they qualify as a church should review the fourteen factors. To the extent possible, the organization’s activities and beliefs should be described in such a way as to demonstrate how it has some or all of the characteristics.²⁶

25. Am. Guidance Found., Inc. v. United States, 490 Fed. Supp. 304 (1980).

26. A recent issue that has come before the IRS is whether it is possible to have a “virtual” church that does not have a physical presence, but functions over the Internet. Although there have been no cases in this area, it appears that if the organization has enough of the characteristics of a church, it should qualify for such status.

D. Convention or Association of Churches; Integrated Auxiliary of the Church

In addition to references to a “church,” the Internal Revenue Code sometimes refers to a convention or association of churches or to an integrated auxiliary of a church when discussing a particular matter. A “convention or association of churches” appears to apply either to the particular group of churches as a whole, or to the national or governing entity for the group, if separate from the local churches.

There are currently two requirements to be an integrated auxiliary of a church, besides being a 501(c)(3) corporation that is not a private foundation. These include that the organization be:

- 1) affiliated with a church or convention or association of churches; and
- 2) internally supported.²⁷

An organization is considered affiliated with a church or convention or association of churches if it is: a) covered by a group exemption letter; or b) operated, supervised, or controlled by or in connection with a church or convention or association of churches; or the relevant facts and circumstances show that it is so affiliated.²⁸

An organization is considered internally supported, *unless* it:

- Offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and
- Normally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.²⁹

E. Religious Orders

The legislative history of Tax Code Section 170 pertaining to the deductibility of contributions, clearly indicates that the term “church” was intended to include religious orders.³⁰

27. IRS Reg. § 1.6033-2(h)(1).

28. IRS Reg. § 1.6033-2(h).

29. There is a special rule for men’s and women’s organizations, seminaries, mission societies, and youth groups. If they meet the other requirements, they will be considered to be integrated auxiliaries of a church even if they do not meet the internal support requirement.

30. S. REP. NO. 1622, 83d Cong., 2d Sess. at p. 30 (1954).

Religious orders include congregations of Roman Catholic vowed religious men or women. There are many other religious orders, including some well-established Protestant religious orders (some of which have existed from the time of the Middle Ages) and Buddhist monks.³¹ Many of these religious orders are made up of individuals who have taken a vow of poverty and devoted their entire lives to communal worship and service to God.

Religious orders typically carry on a variety of religious-oriented activities. However, the “personal” character of religious orders (in that their predominate characteristic is the total, personal commitment of their members) may be the best way of distinguishing a religious order from a church or other type of religious organization. For example, while a church is often regarded as the body of believers, it is regarded by the Internal Revenue Service as an organization that is separate and apart from the people who attend and participate in church services. On the other hand, it may be impossible to define a religious order apart from the role and requirements placed upon the individuals comprising the order (such as vows of poverty, service, etc.). In 1991, the Internal Revenue Service issued Rev. Proc. 91-20 to provide guidelines (including a list of defining characteristics) to be used in determining when an organization may be considered to be a religious order.

F. Religious Organizations Other Than Traditional Churches

1. General

Although a number of laws and case references apply only to “churches,” “conventions or associations of churches,” or “integral agencies of churches,” there are many other organizations that, being religious in nature, have the same First Amendment (and other state and federal constitutional and statutory) protections. Some of these entities may exist as a part of a church. Others exist as entities separate and apart from a particular church, but often operate in conjunction with the church. Although much of the law discussed here is applicable to these entities, they also may have other problems and concerns not covered fully in this discussion.

31. In addition, SIM, International (Sudan Interior Mission) and Campus Crusade for Christ have both obtained determinations from the Internal Revenue Service that they are religious orders.

2. Religious Schools and Seminaries

A religious school is often operated under the corporate structure of the church. As such, it is not a separate entity, and is considered to be, in the law, privy to all of the same protections as the church itself. However, when a school is separately incorporated, it may either be controlled by a church or churches, or may have an independent board of directors with no church affiliation, even though it is religious in nature. When separately organized, it is sometimes treated in the same manner as a church, and sometimes as a religious organization other than a church. For example, a church school may be an “integrated auxiliary of the church,” pastors working with the school may be able to obtain a parsonage allowance, and the school may be able to have a church retirement plan that is exempt from ERISA requirements. On the other hand, a separately incorporated school is not accorded the same safeguards and protections from an IRS audit as are given to a church, and it may be required to pay unemployment insurance.³²

3. Parachurch Organizations

The term, “parachurch” is not a legal term, but has been developed by the religious community to refer to religious organizations that have some of the characteristics of a church, but that are not the typical church with a defined congregation. Some of these “parachurch” organizations are treated as churches for some purposes, and as religious organizations which are not churches for others. These can include evangelistic organizations, and interdenominational organizations.

4. Religious Social Welfare Organizations

In addition to the above-mentioned types of entities, there are also religious organizations that are organized to provide some social benefit. Although this may be done for religious purposes (such as to fulfill a scriptural directive to take care of widows and orphans), the organization itself is normally not considered to be a church. In addition, such an organization may have to continually justify receiving the benefits of protection of the First Amendment as a religious organization, and may often find itself subject to more intensive governmental regulation than a traditional church, even though it is performing similar activities. These organizations must comply with many of the same regulations and requirements as other nonprofits.

32. See Chapter 2, “Formation and Governance Structures of Religious Organizations,” Section III.H, *Operating Sponsored Functions Under Same or Different Entity—Case Study: Church-Sponsored School*. See also Chapter 6, “Special Tax and Other Considerations for Ministers and Other Employees of Religious Organizations,” Section II.G, *Unemployment Tax*.

5. *Supporting Organizations*

As with other 501(c)(3) organizations, it is not uncommon to have an organization formed as a supporting organization of a church or convention or association of churches. Such an organization may be formed as an integrated auxiliary.

6. *International Operations*

Some religious organizations, including churches, are international in scope. It should be noted that the freedom of religion guaranteed by the First Amendment to the United States Constitution is peculiarly American.

Although freedom of religion is internationally recognized as a fundamental human rights norm and most countries have constitutional provisions protecting religious belief and exercise, other countries provide religious organizations with protections different in both nature and scope as found in the United States.³³ Moreover, the Establishment Clause is almost completely unique to the United States, as many other countries have established or official religions.

III. Conclusion

The U.S. Constitution accords churches and other religious organizations a special place under U.S. law, and the effect of the First Amendment and Establishment clauses is far reaching. Many generally applicable laws have special provisions relating to churches, and many times laws have been created particularly to respect Constitutional requirements. It is important to be aware of the possibility for unique treatment of churches. On the other hand, the day-to-day operations of a church are very much affected by generally applicable laws and regulations and churches may be surprised by how often they are treated the same as a commercial enterprise for regulatory purposes. The following chapters more specifically identify areas of the law in which churches receive special treatment, and areas where they do not.

33. It should be noted, however, that there has been a move toward providing protection of religious exercise as a basic human right; for example, see the European Convention on Human Rights, which has been adopted to protect human rights and fundamental freedoms (Article 9 provides a right to freedom of thought, conscience and religion, but makes it subject to restrictions “in accordance with law”); the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on Dec. 10, 1948 (Article 2 states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . .”); and the International Covenant on Civil and Political Rights, which is a United Nations treaty based on the Universal Declaration of Human Rights, and is binding on the nations that have signed it.