

The Protection of Religious Liberty Under the American Constitution

Religious liberty is a favored value under the United States Constitution. The Constitution provides two-fold protection to religious liberty by means of the **Establishment Clause** and the **Free Exercise Clause**. The Establishment Clause, sometimes referred to as the separation of church and state, requires that the government maintain a course of complete official neutrality toward religion. The government cannot favor one religion over another, nor can it favor religion over non-religion. The Free Exercise Clause is a textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs.

Introduction: The Two-Fold Constitutional Protection of Religious Liberty

Religious liberty is a favored value in the American constitutional system. It is the first guarantee of the First Amendment, which provides that there shall be “[n]o law respecting the establishment of religion or prohibiting the free exercise thereof.”

The First Amendment was enacted against the background of an established church in Great Britain during the colonial period and the official persecution of religious dissenters in Great Britain and colonial America. It provides a two-fold protection to religious liberty by what we refer to as the “religion clauses.” The Establishment Clause protects against the “establishment” of an official church by the government and against governmental action “establishing religion,” while the Free Exercise clause is a textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs, free from governmental interference.

The two-fold protection of religious freedom under the American Constitution is a distinctly American phenomenon. It is possible in a democratic society for governmental establishment of religion to coexist fully with religious liberty. This is clearly the situation in Great Britain. Under British law, the Church of England and the Church of Scotland are the officially established national churches. As a legal matter, the government is extensively involved in the affairs of the Church of England, and to a limited extent in the affairs of the Church of Scotland. Government funds may be provided for the support of the national churches, and the government aids other religions by providing substantial public funds to sectarian schools. All state-supported schools, sectarian and non-sectarian are required to provide religious education and a daily act of worship. Ecclesiastical courts are a part of the British legal system, and in appropriate cases, the civil courts will decide questions of ecclesiastical law. In addition, the British courts have the

power to strike down religiously-based decisions of religious institutions when they found those decisions to be violative of national anti-discrimination laws. At the same time, Great Britain affirmatively protects religious liberty by its enactment of human rights laws and its adherence to the European Convention on Human Rights, much in the same way and to the same extent as religious liberty is protected under the Free Exercise Clause in the United States.

The approach to the protection of religious liberty in the United States differs significantly from the approach to the protection of religious liberty in Great Britain and Canada because of the Establishment Clause. The Establishment Clause not only generally prohibits the federal and state governments from establishing an official church, but also prohibits any financial assistance of any kind to religious institutions for religious purposes. In addition, the Establishment Clause also prohibits as an “entanglement” with religion, any judicial interference with religiously-based decisions of religious institutions. In the United States then, as a matter of constitutional structure, we provide two-fold protection to religious liberty, both by prohibiting the government from “advancing or inhibiting religion” - the Establishment Clause requires that the government maintain a course of complete official neutrality toward religion - and by specifically guaranteeing religious freedom.

The Establishment Clause as a Protector of Religious Liberty

We will begin by focusing on the function of the Establishment Clause as a protector of religious liberty. When American courts strike down governmental action advancing religion as violative of the Establishment Clause, such as when they hold that the Establishment Clause prohibits school-sponsored prayer or bible reading in the public schools, or that it prohibits the use of public funds for religious purposes, the courts are not acting with hostility toward religion. Rather in terms of constitutional theory, they are acting to protect the religious liberty of all persons, and particularly the liberty of religious minorities. To illustrate, the religious liberty of some public school students could be impinged if they are forced to participate in teacher-led prayer or to suffer embarrassment by asking to be excused from class. Prohibiting teacher-led prayer thus protects the religious liberty of these students whose religious beliefs are impinged by a prayer that is imposed with the authority of the school. Because the imposition of teacher-led prayer has been held to violate the Establishment Clause, it is not necessary for the courts to decide whether or not this imposition violates the Free Exercise Clause. The use of public funds to support

one religion or some religions is prohibited by the Establishment Clause, because it is considered to violate the religious liberty of those who are non-believers or not members of the benefitted religions by the use of their money to support a competitive religious belief. The display of a Christian religious symbol such as a Nativity Scene on a city hall front lawn has been held to violate the Establishment Clause on the ground that the display sends a message to non-Christians that their beliefs are not favored in that political community and that they are not full members of that community.

The underlying theory of the Establishment Clause then is that prohibiting the government from taking actions to advance or inhibit religion will serve to protect the religious liberty of all persons, and particularly the liberty of religious minorities. I think that this point is often not fully understood by religious believers, who may see such restrictions as demonstrating hostility to religion. Again it is not hostility to religion, but a structural concern for religious liberty in the United States that prohibits the government from using its power or its funds in any way to advance or inhibit religion. At least this is the theory of our Constitution.

Moreover, the fact that the Constitution prohibits the government from taking actions to advance or inhibit religion does not in any way violate the religious liberty of religious believers. It merely prevents religious believers from trying to enlist the power of the government to advance their own religious beliefs. They are free to advance those beliefs themselves without the assistance of the government and are also protected against governmental action interfering with their religious liberty.

Continuing with the principle of neutrality, not hostility toward religion, the Court has held that in some circumstances, the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits, and to this extent the Court has interpreted the Establishment Clause in a manner that protects the religious liberty of individuals and religious institutions. Examples of the permissible non-discriminatory inclusion of the religious with the secular include providing tax exemptions for contributions to or for property owned by religious, charitable, and educational organizations; allowing parents to take tax deductions for educational expenses, notwithstanding that most of the deductions will be taken for tuition payments made by parents who are sending their children to sectarian schools; and allowing a blind student to use state payments provided to such students for educational purposes to attend a religiously-affiliated college in order to pursue a religious vocation.

Similarly, while the Establishment Clause prohibits the state from providing financial assistance to sectarian schools, it permits the state to provide many benefits to the children attending such schools. These benefits include bus transportation, the loan of state-approved textbooks in secular subjects, sign language interpreters, diagnostic and remedial services, and even instruction in “enrichment” secular subjects by public school teachers in the sectarian schools themselves. Finally, the Court has held that providing students and religious groups with equal access to school buildings after hours and to other public facilities does not violate the Establishment Clause, so that the government is constitutionally required to provide such access under the First Amendment's public forum doctrine.

The Role of the Free Exercise Clause

We now turn to the Free Exercise Clause, which is a specific textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs, free from governmental interference. However, because the Supreme Court has interpreted the Establishment Clause very broadly, some of the protections for religious liberty that might otherwise have been dependent on the Free Exercise Clause have in fact been afforded by the Establishment Clause.

What is the role of the Free Exercise Clause in protecting religious liberty under the American Constitution? First, as we have pointed out previously, the Free Exercise Clause invalidates laws that expressly discriminate against religion or against people because of their religious beliefs, such as a law that disqualifies members of the clergy from serving as legislators, or a law requiring a declaration of a belief in the existence of God as a test for holding public office. In the same vein, the Court has invalidated under the Free Exercise Clause, a municipal ordinance prohibiting “animal sacrifice,” which the Court found was directed against the Santeria religion, which practices “animal sacrifice” as an essential part of its religious beliefs. Second, the Free Exercise Clause provides a textual basis for challenging truly neutral laws - laws that cannot be challenged as violating the Establishment Clause - that impact on a person's religious beliefs or practices by (1) compelling people to do something that their religion forbids, such as a requirement of compulsory school attendance applied to a religious group whose religion prohibits children from attending school beyond a certain age, or (2) forbidding people from doing something that their religion requires, such as a law forbidding the use of illegal drugs as applied to a religious group such as the Native American Church whose religion requires the use of peyote

in their religious services, or (3) a law that imposes a burden on a person because of that person's religious beliefs, such as a law denying unemployment compensation to persons who are not available for Saturday work, as applied to a Sabbatarian who is unable to work on Saturday because of religious beliefs.