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The Law of Church and State: U.S. Supreme Court Decisions Since 2002

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Summary

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof...." The language is commonly referred to as the Establishment Clause and the Free Exercise Clause. The two clauses serve to balance the collective freedom so that the government may neither coerce nor prohibit citizens' participation in religion. The U.S. Supreme Court historically has rendered its decisions on both clauses without applying brightline rules.

Recent political developments have raised new questions of church-state relations. Since taking office in 2000, President George W. Bush has implemented the Faith-Based Initiative, which has brought several First Amendment issues to the Court. Recent legislation provides vouchers for private schools and public funding to religious organizations with a social purpose. Furthermore, the makeup of the Court has changed within the last five years, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O'Connor. This may result in a shift in the Court's understanding of the religion clauses.

In the Court's recent cases, decided in the midst of these changes, the balance between non-establishment and free exercise continues to be decided on the basis of the facts specific to each case. The Court has decided somewhat similar cases differently, with the outcome turning on the details, suggesting that specific context may be the most determinative factor in church-state decisions. This report explains the holdings of each of the Court's church-state cases since 2002, and also explains the position of Justices who concurred in the judgments or dissented in each case.

This report is intended to supplement CRS Report 98-65, *The Law of Church and State: Developments in the Supreme Court Since 1980*, by David M. Ackerman. It will be updated as the Supreme Court renders relevant new decisions.

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The Law of Church and State: U.S. Supreme Court Decisions Since 2002

Introduction

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof...."[1] The language is commonly referred to as the Establishment Clause and the Free Exercise Clause. The two clauses serve to balance the collective freedom so that the government may neither coerce nor prohibit citizens' participation in religion.

The U.S. Supreme Court historically has rendered its decisions on both clauses without applying brightline rules. The Establishment Clause cases, in particular, have used three tests to determine whether a violation has occurred, (1) the *Lemon* test, (2) the coercion test, and (3) the endorsement test. The *Lemon* test assesses whether a government action constitutes an establishment of religion via a three-prong approach. The Court considers whether the action has a secular purpose, whether the primary effect of the act is to advance or inhibit religion, and whether the act creates excessive entanglement of religion and government.[2] The Court has also used a coercion test, under which it determines whether an individual would feel coerced to participate in religious activity as a result of a government action.[3] The final test the Court invokes is the endorsement test, which assesses the effect of a person's standing in the community as a result of a government action. Government action cannot be constitutional under this test if it suggests that non-adherents are outsiders and believers are insiders.[4]

As is the case in other freedoms guaranteed by the First Amendment, the freedom of religion is not absolute. The Court has interpreted the Free Exercise Clause historically to mean that government action alleged to interfere with religious practices could be constitutional only if it were shown to serve some compelling public interest and to be no more restrictive of religious practices than necessary.[5] Government action burdening religious exercise, in short, was deemed to be subject to a constitutional standard of strict scrutiny. Although historically the free exercise

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[1] U.S. CONST. AMEND. I.

[2] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

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

[4] *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *see also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

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

of religion has been considered a fundamental right and infractions given this heightened standard of review, the Court curtailed that standard for most cases in 1990. Currently, the strict scrutiny standard does not apply to generally applicable laws that are otherwise valid and neutral.[6] In other words, the government may take actions that infringe on one's free exercise of religion, so long as its action does not specifically target the practice of religion and applies without regard to religion.

Since taking office in 2000, President George W. Bush has implemented the Faith-Based Initiative, which has brought several First Amendment issues to the Court. The Faith-Based Initiative, created and developed by Executive Orders, allows non-governmental community organizations, including religious groups, to compete for public funding of social services.[7] The Charitable Choice legislation of the 1990s provides public funding to religious organizations with a social purpose.[8] More recent legislation provides for a voucher program for private schools, including religious schools.[9] Whether these provisions violate the Establishment Clause are core issues that the Court may face in coming terms as similar claims continue to work through the lower courts. Furthermore, the makeup of the Court has changed within the last five years, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O'Connor. This may result in a shift in the Court's understanding of the religion clauses.

In sum, the political events of the past five years have continued to raise church-state issues in the Court. The trend of fact-specific rulings issued by the Court since 1980 has continued into the 21st century. This report summarizes and examines the Court's decisions regarding church and state from its October, 2002 Term, through the present (i.e., October, 2002, through June, 2007).

2003 - 2004 Term

Elk Grove Unified School District v. Newdow. In *Newdow*, the Court considered the constitutionality of a California school district's policy that required each class to recite the Pledge of Allegiance daily. The main issue in the case was whether the school could enforce this mandatory daily Pledge policy. In other words, the case raised the question whether the public school district, by requiring elementary students to recite the Pledge each day, was establishing religion in violation of the First Amendment. The Court held in favor of the school district, 8-0.[10] Five Justices (Stevens, Kennedy, Souter, Ginsburg, and Breyer) dismissed the case on the preliminary issue of standing to sue (discussed below) without reaching

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[6] *See Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

[7] *See* Exec. Order Nos. 13198, 13199, 13279, 13280, 13342, 13397.

[8] *See* the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193, Title I — Block Grants for Temporary Assistance for Needy Families, § 104.

[9] *See* the Consolidated Appropriations Act, 2004, P.L. 108-199, Title III — D.C. School Choice Incentive Act of 2003, §308(d).

[10] *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

the merits. Three Justices (Rehnquist, O'Connor, and Thomas) concurred in the judgment after reaching the merits. Justice Scalia did not participate in the case.

In *Newdow*, the father of a child in the school district claimed that requiring his daughter to recite the Pledge, including the phrase "under God," constituted indoctrination of a religion in which he did not believe and did not want his child to be taught. The Court decided that Newdow, as the child's non-custodial parent under California law, did not have the standing required to sue on her behalf.[11] The concept of standing derives mainly from the Constitution's case and controversy requirement. Under Article III, federal courts are permitted to hear only cases that present actual controversies between parties. In order to bring a case in federal court, a person must meet general requirements of standing: a harm must be (1) suffered, (2) caused by the act being challenged, and (3) capable of being remedied in the judicial system.[12] In addition to these constitutional standing requirements, courts have also imposed other limitations, known as prudential standing requirements, on a person seeking to litigate certain issues. One of these is a general prohibition on third-party standing, which arises when one person attempts to sue on behalf of another person.[13] One exception to the prudential standing requirements concerns the rights of minors; the parent of a child generally may sue on the child's behalf. However, under California law, only the parent with sole legal control over the child may bring a suit on her behalf.[14]

Three members of the Court-Rehnquist, O'Connor, and Thomas-concurred with the majority's decision in favor of the school district, but wrote opinions that reached the merits of the case. Citing examples dating back to President Washington, Rehnquist found that the phrase "under God" was a variation on references to religion that had been a part of public statements by the nation's leaders for centuries. Rehnquist emphasized that the phrase was part of a patriotic practice, not a religious exercise.[15] O'Connor's opinion interpreted the phrase as an expression of ceremonial deism, something that refers "to the divine without offending the Constitution."[16] She further stated that such references' "history, character, and context prevent them from being constitutional violations at all."[17] Justice Thomas believed that, because students are compelled to attend school by law and because the school mandates that the Pledge of Allegiance be recited, the students are effectively coerced.[18] However,

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[11] *Id*. at 16-18.

[12] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[13] *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

[14] *See Newdow v. U.S. Congress*, 313 F.3d 500, 502 (9th Cir. 2002).

[15] *See Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring).

[16] *Id*. at 37 (O'Connor, J., concurring).

[17] *Id*.

[18] The coercion test was announced in the Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992). In that case, the Court held that a prayer at a high school graduation ceremony violated the Establishment Clause because students, although not officially required to attend the ceremony, were effectively coerced to participate in a school event that promoted

(continued...)

because Thomas believed *Lee v. Weisman* (the case announcing the coercion test) to be wrongly decided, Thomas voted to uphold the Pledge policy as well.[19]

Locke v. Davey. The Court's next case illustrated the tension that may arise between the two clauses. In some cases, in order to comply with a statute that has a valid secular purpose, such as a law prohibiting polygamy, a person may be forced to violate his religious beliefs. In order to avoid such situations, some statutes grant exemptions for violations based on religious beliefs. But these laws granting an exemption to some individuals in order to satisfy the right to free exercise arguably may be read as making an improper accommodation of religion in violation of the Establishment Clause. On the other hand, if Congress does not allow an exemption, the person cannot obey the statute without violating his religion. By not granting the exemption and satisfying the Establishment Clause's requirements of neutrality, the law creates a burden that arguably violates the Free Exercise Clause. Thus, if a statute has an exemption, a person who does not hold religious beliefs that entitle him to the exemption might bring an Establishment Clause challenge, and, if the statute has no exemption, a person who does hold a particular religious belief might bring a Free Exercise challenge. This situation illustrates the complexities of the religion clauses of the Constitution that played out in *Locke v. Davey*.

In *Locke v. Davey*, Washington offered students state funding for college under its Promise Scholarship Program. The Program offered academic scholarships to college students but required that recipients not use the funds to pursue devotional theological degrees. After receiving a Promise Scholarship from the state, Davey enrolled in Northwest College to pursue a dual major in pastoral ministries and business management and administration. Because Davey's pastoral ministries major was considered devotional and ineligible for funding under the Program, Washington did not provide Davey with the scholarship funds. Davey challenged the Program's limitation for devotional degrees, claiming that the state's refusal to fund his chosen path of education interfered with his Free Exercise rights.[20] In clarifying the issues raised by this challenge, the Court noted that, under federal constitutional law, when a recipient of public funds makes an independent choice to spend those funds on religious training, there is no violation of the federal Establishment Clause.[21] However, state constitutions, such as Washington's in this case, may contain religion clauses that more strictly limit the state's role in religious matters. Washington's

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[18] (...continued)
a religious exercise because of the significance of the ceremony as a lifetime achievement and peer pressure involved in attending high school events.

[19] *Id*. at 49. For additional information on *Newdow*, see CRS Report RS21250, *The Constitutionality of Including the Phrase "Under God" in the Pledge of Allegiance*, by Henry Cohen.

[20] *Locke v. Davey*, 540 U.S. 712, 715-718 (2004).

[21] *See Mueller v. Allen*, 463 U.S. 388, 399-400 (1983); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

Supreme Court interpreted the state constitution's religion provision to prohibit the state from funding religious instruction intended to prepare students for ministry.[22]

The issue of the case, thus, was whether Washington, acting pursuant to the anti-establishment provision in its own constitution, could deny students state funding for devotional degrees without violating the federal Constitution's Free Exercise Clause. The majority (Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer) held that the withholding of the funds did not improperly infringe on Davey's federal right to free exercise.[23] Justices Scalia and Thomas dissented, finding that the scholarship policy violated Davey's right to freely exercise his religion.

When a law discriminates against religion on its face (e.g., the text of the law itself limits religious exercise), the law is subject to a strict scrutiny standard of review. Because laws that specifically target religion are considered suspect, the Court will strike them down unless it finds that the law serves a compelling government interest and uses the least restrictive means necessary to achieve that interest.[24] In this case, the Court found that the Program's "disfavor of religion (if it can be called that) [was] of a far milder kind" than cases previously decided against facially discriminatory laws.[25] The Program "imposes neither criminal nor civil sanctions" on a religious practice, "does not deny to ministers the right to participate in the political affairs of the community," and "does not require students to choose between their religious beliefs and receiving a government benefit."[26] Factors such as these were present in previous cases where the limitation on free exercise was found to be unconstitutional. Thus, the Court distinguished the issue presented in *Locke* from First Amendment precedent, explaining that the "State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."[27] Scholars still were free to choose to attend accredited religious schools and to enroll in devotional theology elective courses, but were restricted only from using the state's funds to support ministry as a major. The policy, according to the Court, struck a correct balance between the Clauses. The federal Free Exercise Clause was satisfied because students had the freedom to choose religious schools and religion courses, and the Program also avoided violations of the state constitution's prohibition on state sponsoring and funding of religious ministry.

The dissenters found the majority opinion to be inconsistent with the Court's previous interpretation of laws burdening religious practices. Justice Scalia explained that because the state "created a generally available public benefit, whose

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[22] *See* WASHINGTON CONST., Art. I, § 11; *Witters v. Commission for Blind*, 112 Wash.2d 363, 369-70 (1989); *cf. Witters v. State Comm'n for the Blind*, 102 Wash.2d 624, 629 (1984).

[23] *Id.*

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

[25] *Locke*, 540 U.S. at 720-21.

[26] *Id.*

[27] *Id.* at 725.

receipt is conditioned only on academic performance, income, and attendance at an accredited school," the state therefore must allow the recipient of that benefit to use the funds to pursue his chosen path of study.[28] Scalia argues that the majority's weighing of the state's interest and the recipient's burden is inappropriate if the law is not facially neutral. Laws involving discrimination on the face of the statue, according to Scalia, cannot be solved with mere balancing. Instead, *any* burden based on one's religious practice suffices to strike the facially discriminatory law as a violation of the Free Exercise Clause.[29]

2004 - 2005 Term

Cutter v. Wilkinson. Occasionally, as occurred in *Locke*, some governmental act aimed at protecting religious liberty may be seen as a threat to that same liberty. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA).[30] The act provided that the government could not substantially burden religious exercise of any person residing in or confined to an institution, unless a compelling state interest was present and the state used the least restrictive means in placing the burden. In effect, the legislation ensured that strict scrutiny would apply to government actions that interfere with individuals' religious exercise. The issue presented to the Court in *Cutter* was whether that provision attempting to protect Free Exercise advanced religion in violation of the Establishment Clause.[31]

The Court held that Section 3 of RLUIPA, the provision applying the strict scrutiny standard to burdens on institutionalized persons, did not violate the Establishment Clause and in fact was a permissible accommodation of religion. Current and former inmates of Ohio correctional facilities brought the suit, claiming that officials did not accommodate their religious needs as believers in non-traditional religions. The inmates claimed that they were denied the chance to dress as their religion required, denied various ceremonial items recognized by their religions, and denied a chaplain trained in their religion. State officials responded that the RLUIPA was unconstitutional because it improperly favored religion under the Establishment Clause and that therefore they were not obligated to accommodate the inmates' requests. The unanimous Court ruled that some accommodation of religious practices is not by itself sufficient to constitute a violation of the Establishment Clause. Citing several historic First Amendment cases, including its recent decision in *Locke*, the Court held that the challenged portion of the act "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[32]

The Court noted that, as a part of protecting religious liberty guaranteed by the First Amendment, the government sometimes is required to facilitate and

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[28] *Id*. at 727.

[29] *Id*. at 728-32.

[30] 42 U.S.C. § 2000cc et seq.

[31] *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

[32] *Id*. at 714.

accommodate the exercise of religion by those "institutionalized persons who are unable freely to attend to their religious needs...."[33] The Court noted that its decision in *Cutter* did not "elevate accommodations of religious observances over an institution's need to maintain order and safety" and that the Justices had "no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."[34] The Court declined to strike down the law on its face, but noted the possibility that application of the law in certain circumstances might violate the Establishment Clause. In closing its opinion the Court suggested that state institutions may decline to make religious accommodations if those accommodations "become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of the institution...."[35] Without such imposition of burdens, the Court said, accommodation of religious practice in state institutions cannot be in violation of the First Amendment.

McCreary County v. American Civil Liberties Union. Twice in its 2004-2005 term the Court considered the constitutionality of the government's displaying the Ten Commandments on public property. In the first case, two counties in Kentucky put up large displays of the Ten Commandments in their courthouses, prompting the American Civil Liberties Union of Kentucky to sue for injunctive relief. In reaction to the suit, the counties expanded the exhibit to show that the Commandments were "Kentucky's precedent legal code" to include eight other documents, the common theme of which was a reference to religion. As the dispute between the parties continued, the counties changed the display a third time. The final display included the nine documents of similar size to each other, with a title "The Foundations of American Law and Government Display."[36]

Declining the counties' request to abandon the *Lemon* test's purpose prong, the Court held, 5-4, that the context of the display and purpose behind the actions could not be ignored when considering whether the display violated the Establishment Clause. The majority (Souter, Stevens, O'Connor, Ginsburg and Breyer) held that the "manifest objective [of the displays] may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose."[37] The Court noted that the evolution of the displays throughout the dispute rested on religious themes, rather than on any historical link or secular purpose. The Court explained that the Establishment Clause requires neutrality among religious and between religion and nonreligion, and that, if "the government acts with the ostensible and predominant purpose of advancing religion,

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[33] *Id*. at 721.

[34] *Id*. at 722.

[35] *Id*. at 726.

[36] *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 851-56 (2005).

[37] *Id*. at 850-851.

it violates that central Establishment Clause value of official religious neutrality."[38] The Court clarified that the purpose prong of the *Lemon* test was aimed not at secret or subtle motivations that would escape notice from the common observer, but rather that the test turned on whether a religious purpose was observable "from readily discoverable fact."[39]

Justice Scalia, writing for the dissent, cited historic instances of religious references in public speaking and religious displays in public life as evidence that the Establishment Clause was not meant to forbid all public displays of religion. The dissent disputed the majority's claim that the Establishment Clause's requirement of neutrality should be interpreted as forbidding preference among religions or between religion and nonreligion. Instead, Justice Scalia argued, the principle of neutrality applies where public aid or a restriction on free exercise is contemplated but not where public acknowledgment is made. To require such acknowledgment be kept within those neutrality limits would require that religion be "entirely nondenominational," which would mean "there could be no religion in the public forum at all."[40] This distinction between acknowledgment and establishment is dispositive in Justice Scalia's interpretation of the Establishment Clause.

Van Orden v. Perry. The second Ten Commandments case the Court considered yielded a different result. The Court considered whether a monument of the Ten Commandments on display on Texas State Capitol grounds constituted an establishment of religion under the First Amendment. The state placed the monument on the grounds as part of its larger display of dozens of other historical markers and monuments that were intended to reflect components of Texan identity. Unlike in *McCreary*, the Court upheld this display as constitutional, but the Justices did not reach a consensus in its reasoning.[41]

The plurality opinion, written by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, and Thomas, explained that the *Lemon* test was inappropriate for evaluating the constitutionality of monuments and stated that analysis in this case should be "driven both by the nature of the monument and by our Nation's history."[42] The opinion listed references to religion in public life and religious displays in public buildings that had been a part of American heritage throughout U.S. history.[43] Rehnquist emphasized that context matters in decisions involving public displays of religious symbols, noting that the Court did not uphold a statute requiring displays of the Ten Commandments in schools. Because schools are particularly sensitive areas in terms of creating a sense of religious establishment, the Court recognizes a

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[38] *Id*. at 860.

[39] *Id*. at 862.

[40] *Id*. at 893.

[41] *Van Orden v. Perry*, 545 U.S. 677, 681-83 (2005).

[42] *Id.* at 686.

[43] *See id*. at 686-88.

need for more restrictions when religious symbols are displayed in that setting.[44] The plurality found the Texas monument "a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden ... apparently walked by the monument for a number of years before bringing this lawsuit."[45] Because the monument was part of a broader display focused not merely on religion, the plurality held the Establishment Clause was not violated.

Justice Breyer, who provided the deciding vote in both Ten Commandments cases, concurred with the judgment but wrote separately to explain why he reached different outcomes in each case. Breyer notes that there is "no single mechanical formula that can accurately draw the constitutional line in every case" in any of the Court's historic Establishment Clause precedent.[46] According to Breyer, the Establishment Clause requires the government to "avoid excessive interference with, or promotion of, religion" but "does not compel the government to purge from the public sphere all that in any way partakes of the religious."[47] Recognizing *Van Orden* as a borderline case, Breyer suggests that objective legal judgment is the most effective evaluation in such fact-specific cases. This objective legal judgment considers "the underlying purpose of the Clauses" and the "context and consequences measured in light of those purposes."[48] According to Breyer, in *Van Orden*, the monument had stood unchallenged for 40 years as part of a larger display that communicates a secular message and suggests no state-initiated plan for a sacred display of religious messages. Breyer found that the display satisfied the *Lemon* test because it had an apparently secular purpose, did not advance or inhibit religion and did not create an excessive entanglement of religion and government.

The dissent (Justices Stevens, O'Connor, Ginsburg, and Souter) believed the monument to be an unconstitutional endorsement of religion, claiming that the monument's presence violates the requirement of government neutrality. The dissenters emphasized that government not only cannot promote one religion over another, but cannot promote religion generally over non-religion.[49] Because the monument explicitly states a religious code that recognizes a divine being and also "commands present worship of Him and no other deity," it "cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it upon objection be explained as a simple desire to preserve a historic relic."[50] Constitutional neutrality, according to the dissent, cannot be achieved in a case where "a pedestrian happening upon the monument ... needs no training in religious doctrine to realize that the statement of the Commandments ... proclaims [that] the

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[44] *Id*. at 690.

[45] *Id*. at 691.

[46] *Id*. at 699.

[47] *Id*.

[48] *Id*. at 700.

[49] *Id*. at 710.

[50] *Id*. at 717, 712.

will of a divine being is the source of obligation to obey the rules, including the facially secular ones."[51]

2005 - 2006 Term

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal. In this case, the Court considered the Religious Freedom Restoration Act of 1993 (RFRA). In 1990, the Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* rejected its previous interpretation of the Free Exercise Clause.[52] Prior to 1990, the Court required that the strict scrutiny standard be applied to any government actions alleged to interfere with religious practice.[53] When the Court rejected that interpretation in *Smith*, it held that the Free Exercise Clause generally did not protect individuals who broke generally applicable laws while practicing their religion.[54] Therefore, under *Smith*, free exercise protections became more limited in scope. RFRA created broader protection for religious exercise by requiring that strict scrutiny be applied when a generally applicable law (one that applies to all individuals, without regard to religion) interferes with religion. RFRA thus replaced the constitutional rule of *Smith*. In other words, the statute, rather than a constitutional interpretation, now provides that the federal government cannot substantially burden individuals' exercise of religion unless it uses the least restrictive means to promote a compelling interest.[55]

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court again, as in *Smith*, considered a challenge of a generally applicable law that incidentally burdened a religious group's religious practice.[56] Members of the O Centro Espirita Beneficente Uniao Do Vegetal (UDV) church celebrate their faith in part by drinking hoasca, a sacramental tea containing a hallucinogen that is regulated under the Controlled Substances Act (CSA). When U.S. Customs inspectors seized

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[51] *Id*. at 738.

[52] 494 U.S. 872 (1990).

[53] *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd., Indiana Employment Sec. Comm'n*, 450 U.S. 707 (1981). For further discussion of the evolution of the standard of review applied to Free Exercise cases, see CRS Report 98-65, *The Law of Church and State: Developments in the Supreme Court Since 1980*, by David M. Ackerman, at 5-9.

[54] The Court did not abandon strict scrutiny entirely. Under *Smith*, strict scrutiny would still apply in cases involving government programs allowing individualized assessment of claims for exemption (i.e. state unemployment compensation programs) and cases involving governmental actions that discriminate against religion or deliberately impose special burdens on religion. The Court suggested, but did not make clear, that strict scrutiny may apply in challenges that involved a free exercise claim coupled with another constitutional interest such as freedom of speech.

[55] 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court, on federalism grounds, held RFRA to be unconstitutional as applied to the states.

[56] *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

a shipment of hoasca under the CSA, the UDV challenged the seizure as a violation of RFRA's protections for free exercise of religion.[57]

The unanimous Court (except Justice Alito, who did not participate in the case) held that the government had not demonstrated a compelling interest that RFRA requires to justify barring the UDV's sacramental use of hoasca. Although the government asserted three interests in completely banning hoasca, the Court did not believe that any of these interests satisfied the strict scrutiny standard that RFRA requires for laws that interfered with religious practices. One of the interests the government cited was that the nature of drugs that were highly regulated under the CSA precluded individual exceptions such as the UDV was requesting. These drugs, according to the government, had a high potential for abuse, had no currently acceptable medical use, and were unsafe for medical use.[58] Because of these factors, the government claimed that a complete ban was necessary and that any exceptions would be detrimental to its purposes for regulating the drugs. However, the Court noted that the CSA itself provides for possible exemptions and that there has been an exemption made for use of peyote by the Native American Church for 35 years.[59] The Court explained that, because the CSA appears to recognize the restrictions it places on certain substances are not absolute, mere categorization of substances by the CSA "should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them."[60] Thus, the Court recognized "that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA," but the Court did not allow the government to apply broad prohibitions that affect individuals' free exercise of religion without a specific compelling interest in the particular case.[61]

2006 - 2007 Term

Hein v. Freedom from Religion Foundation. The Court's most recent church-state case focused on the issue of taxpayer standing to raise Establishment Clause claims. Taxpayers typically do not have standing to sue the government on the grounds that their tax money has been spent in a manner that the taxpayer considers improper. Such claims are considered to be too generalized and more appropriately remedied through the political process rather than by the courts. One exception to this rule, created by *Flast v. Cohen*, allows taxpayers to raise Establishment Clause challenges of actions taken by Congress under Article I's Taxing and Spending Clause.[62] The Court considered the scope of this exception, specifically its application to executive branch spending, in the context of conferences held by the White House Office of Faith-Based and Community Initiatives (OFCI).

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[57] *Id*. at 425-26.

[58] *Id*. at 432.

[59] *Id*. at 432-33.

[60] *Id*.

[61] *Id*. at 436-37.

[62] 392 U.S. 83, 88 (1968).

When President Bush created the OFCI, he did so by presidential prerogative, without specific congressional authority.[63] The Office is funded through general executive branch appropriations rather than any specific appropriations legislation. Several taxpayers, relying on *Flast*, challenged the funding of the Office as an unconstitutional promotion of religion with public funds. A divided Court held that the *Flast* exception was not broad enough to cover executive spending such as the challenge raised in this case.

Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, considered the background of the OFCI and noted the general rule that payment of taxes is insufficient to establish standing in cases against the government. The purpose of the OFCI was to ensure "private and charitable community groups, including religious ones ... the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes."[64] The challenge in the case claimed that conferences organized by the OFCI promoted religious groups over secular groups. Alito explained the underlying principles of the Court's standing doctrine: "federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution" and may only "'decide on the rights of individuals.'"[65] The Court has consistently held that taxpayer claims regarding federal spending are "'too indeterminable, remote, uncertain and indirect'" to allow courts to validly consider the merits of the case under standing doctrines.[66] The *Flast* exception, Alito noted, was created as a narrow exception to standing requirements.

In a previous case, the Court had ruled that Flast "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power under the Taxing and Spending Clause.'"[67] According to the plurality in *Hein*, if expenditures are not specifically authorized or required by congressional action, a challenge to such expenditures "is not directed at an exercise of congressional power and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'"[68] When a general appropriation is made to an executive branch agency, the disbursement of those funds by the agency is considered "an administrative decision traditionally regarded as committed to agency discretion" and thus not eligible for review by the judicial branch.[69] Justice Alito noted that, in declining to extend *Flast* "to encompass discretionary Executive Branch expenditures," the Court recognized that *Flast* has been confined to its facts for four

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[63] *See* Exec. Order No. 13,199 (January 29, 2001).

[64] Exec. Order No. 13,199, Section 1.

[65] *Hein v. Freedom from Religion Foundation*, 127 S.Ct. 2553, 2562 (2007).

[66] *Id*. at 2563.

[67] *Id.* at 2566, *quoting Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (internal quotation marks omitted); *see also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 228 (1974).

[68] *Id*. at 2568 (citations omitted).

[69] *Id.* at 2567, quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

decades.[70] Alito explained that, "because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action ... to Establishment Clause challenge by any taxpayer in federal court."[71] Alito suggested that such a decision would essentially open the floodgates of litigation and that democratic power would be undermined if taxpayers could assert their political grievances in the courts rather than through the political process.

Justices Scalia and Thomas concurred in the judgment, but wrote separately regarding *Flast*. Agreeing with the plurality on the need for limits on taxpayer standing, Justice Scalia noted his preference that the Court re-evaluate the validity of the *Flast* exception altogether. Scalia believed that the Court should choose between two options: apply *Flast* to all challenges to expenditures alleged to violate constitutional provisions that limit the taxing and spending power or reject *Flast* entirely.[72] He argued that there is "no intellectual justification" for the distinction that the plurality drew between expenditures that are expressly authorized by Congress and those that come from general executive branch appropriations.[73] Scalia noted that he shares "the dissent's bewilderment ... as to why the plurality fixates on the amount of additional discretion the Executive Branch enjoys ... beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional."[74] Because the exception illogically justifies standing in some, but not all, executive branch spending cases, the concurring Justices would have denied standing in this case.

The dissent in *Hein* (Souter, Stevens, Ginsburg, and Breyer) criticized the distinction made by the plurality in recognizing standing only for expenditures expressly authorized by Congress. Justice Souter objected that, with "no basis for this distinction in either logic or precedent," the plurality "closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury."[75] The dissent rejected the argument that executive spending should be given a lesser level of judicial review than legislative spending, noting that "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away."[76]

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[70] *Id*. at 2568.

[71] *Id*. at 2569.

[72] *Id*. at 2573-74. Scalia clearly preferred the latter option, finding that "*Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction...." *Id*. at 2574.

[73] *Id*. at 2579.

[74] *Id*. at 2581.

[75] *Id*. at 2584.

[76] *Id*. at 2586.

Conclusion

This survey of Supreme Court opinions over the past five years illustrates the challenges the Court faces in religion cases arising under the First Amendment. In *Newdow* and *Hein*, the Court upheld standing requirements to bar Establishment Clause claims. In *McCreary* and *Van Orden*, the Court provided a clear illustration that context matters in questions of religious displays on government property. Deciding two cases challenging Ten Commandments displays on courthouse property differently, the Court considered factors such as the length, size and placement of the display, the degree of controversy the display created, and the general purpose for which the display was created-all very fact-specific inquiries.

Cutter and *Gonzales* further illustrate the emphasis that the Court appears to place on the importance of facts in its church-state decisions. *Cutter*, while allowing states to accommodate individuals' religious needs without establishing religion, also allows states to make determinations that accommodations are inappropriate either for constitutionality or for safety purposes. *Gonzales*, allowing the challenging church to continue its sacramental use of an illegal substance, allows the government to prohibit such use provided the limitation is not a broadly sweeping one that ignores the particular aspects of the specific drug and its usage.

The Court's decision in *Locke* was made in what it termed "room for play in the joints," a phrase the Court used to refer to the gray area where the Establishment Clause and Free Exercise Clause occasionally intersect.[77] In balancing the two clauses, the Court determined that free exercise may not necessarily be infringed when the state is enforcing its own constitution's strict anti-establishment provision.

In conclusion, in the cases that the Court has considered, the balance between non-establishment and free exercise continues to be debated on a case-by-case basis. The Court has decided somewhat similar cases differently, with the outcome turning on the details, implying that specific context may be the most determinative factor in church-state jurisprudence.

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[77] *Locke*, 540 U.S. at 719.