

‘Play in the joints’ in the religion clauses

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I. Creation of ‘play in the joints’

“The religion clauses of the First Amendment provide: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people. While the two Clauses express complementary values, they often exert conflicting pressures.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

In *Cutter*, the Supreme Court’s most recent case involving the “play in the joints” between the religion clauses, the Court emphasized the difficulty in resolving conflicts between the potentially competing interests of the establishment and free-exercise clauses.

A “play in the joints,” according to the Court, involves actions and regulations “permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Id.* at 668. The expression was first introduced in *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). “The Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.” *Id.* at 668-669.

The religion clauses may be thought of as lying on a spectrum with one extreme being total government accommodation of religion and the other being total separation between government and religion. These locations delineate the minimum requirement for regulations to pass constitutional standards. Laws are bound on one side by the restriction that they may not “respect[] the establishment of religion” and on the other that they may not “prohibit the free exercise” of religion. The Court has used a number of tests to determine the precise location of the Religion clauses along this spectrum. Once the location of the “joints” has been determined, the proper relationship between them must be resolved. The Court has utilized essentially three approaches to elucidate this relationship.

“Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom.” *Engel v. Vitale*, 370 U.S. 421, 430 (1962). If the two clauses overlap, the Court may interpret their locations using one of two theories: permissive accommodation or strict separation. Accommodation permits a state to act in ways that arguably violate the establishment clause in order to avoid violating the free-exercise clause. This concept shows respect for religion – set apart by the First Amendment to protect freedom of conscience. Strict separation, on the other hand, means a state should always defer to the establishment clause, even if it means acting in a way that arguably violates the free exercise rights. This option views religion as especially dangerous and thus highlighted by the First Amendment because of its potentially divisive quality. However, when the Religion clauses do not overlap, there is space left for valid laws to be placed within the minimum requirements for both of the clauses – hence, a “play in the joints.”

The complexities of the religion clauses are further complicated by their application to the states. This is a particularly important issue considering many of the religion-clause cases affect local and state governments. At the time of the Founding, most states had some form of religious establishment, including religious tests for holding office. It was not until 1940 that the free-exercise clause was applied to the states through the 14th Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The establishment clause followed suit seven years later. *Everson v. Board of Education*, 330 U.S. 1 (1947).

In *Everson* the Court applied the religion clauses in terms of a strict separation between church and state. Quoting Jefferson’s letter to the Danbury Baptists, the Court emphasized that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” *Everson v. Board of Education*, 330 U.S. at 16. Moreover, it applied this separation as strictly to the states as it did to the federal government.

“Thus, this Court has given the Amendment a ‘broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . .’ It has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church.” *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961) (quoting *Everson v. Board of Education*, 330 U.S. at 14-15)

The Court's initial response made clear that the establishment clause means more than simply prohibiting the creation of a state church; it forbade all laws respecting an establishment of religion.

Over the course of more than a half century and the adoption of a series of heuristic tests, the Court has struggled in finding both the correct level of separation between church and state as well as its proper relationship to the states through incorporation. The Court eventually seemed to settle on neutrality as a proper compromise:

“The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” *Walz v. Tax Commission of City of New York*, 397 U.S. 664 at 669

However, this standard has recently been abandoned in favor of greater deference to legislatures as well as local and state governments.

In order to best understand how similar cases will be decided in the future it is instructive to cover the history of the establishment and free-exercise clauses and then see how the Court has utilized the concept of “play in the joints” in its most recent cases.

II. Location of the joints

a. Establishment clause

As mentioned earlier, *Everson*, the first modern establishment-clause case, applied a strict-separationist stance, inferring a “wall of separation” between church and state. The opinion suggested, among a list of minimum requirements, that federal and state governments were prohibited from passing laws that “aid one religion, aid all religions, or prefer one religion over another.” *Everson v. Board of Education*, 330 U.S. at 15. Moreover, “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” *Id.* at 16. However, the Court failed to strictly comply with this standard. Within the same case, the Court permitted public funding for bus transportation to parochial schools that clearly aided religion. This led the

dissent to point out that the Court's supposed dedication to strict separation seemed "utterly discordant with its conclusion." *Id.* at 19.

The Court continually found this standard difficult to apply and a number of cases began chipping away at its harsh stance. "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. ... Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The Court went on to provide support for some accommodation of religion. "We are a religious people whose institutions presuppose a Supreme Being.... For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 313-314.

By 1971 the Court acknowledged problems with the strict-separation metaphor:

"The metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis ..., but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." *Gillette v. United States*, 401 U.S. 437, 450 (1971)

In the same year in *Lemon v. Kurtzman*, the Court established a three-part test that became the hallmark for establishment-clause cases. The opinion reiterated the inevitability of some relationship between church and state and decided to focus on three main evils: sponsorship, financial support and active involvement of the government in the religious activity. Under the resulting test a statute would be valid only if it (1) had a "secular legislative purpose," (2) had a principle effect that neither "advances nor inhibits religion," and (3) did not "foster an excessive government entanglement with religion" *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

The Court later emphasized the point that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). In the same year in *Walz*, the Court for the first time brought up the concept of a "play in the joints," echoing the concept of "benevolent neutrality" mentioned earlier as

appropriate government interaction with religion. *Walz v. Tax Commission of City of New York*, 397 U.S. at 669.

Walz was a case challenging New York property-tax exemptions for religious organizations. Though the exemption was not required by the free-exercise clause, the Court held that the tax exemption was not an establishment of religion. The Legislature had a secular legislative purpose in granting the exemption because it had “not singled out one particular church or religious group or even churches as such.” *Id.* at 672-673. The exemption was granted “to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.” *Id.* at 673. Moreover, following the lines of the *Lemon* test, the exemption helped to prevent entanglement that could result from government taxation of religious groups.

Following its decisions to move away from strict separation, the Court became increasingly willing to accommodate religion, and it developed new tests to reflect this tolerance. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of giving a prayer at the opening of a state legislative session. It based its decision on the fact that the practice was deeply embedded in the history and tradition of the country. *See also Van Orden v. Perry*, 545 U.S. 677 (2005).

In *Lynch v. Donnelly* the Court ruled on the constitutionality of a city including a crèche in its Christmas display in the heart of its shopping district. For this case Justice O’Connor in a concurring opinion suggested an endorsement test. The danger of endorsement comes from the fact that it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). She points out that the proper inquiry for establishment-clause purposes should be on the meaning conveyed by government actions:

“Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion What is crucial is that a government practice not have the effect of communicating a message of

government endorsement or disapproval of religion.” *Lynch v. Donnelly*, 465 U.S. 668 at 692

The Court’s move towards accommodation peaked with a series of cases surrounding *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). The case involved a challenge brought by an employee who was fired by the church on the basis of his religion, in violation of federal discrimination rules. The Court ruled in favor of the church, finding that it was not subject to the federal rules. “This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” *Id.* at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987)).

While the generous standard of accommodation shown in *Amos* was reined in by subsequent cases – see e.g. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) – the Court’s next test, the coercion test, showed an increased willingness to rule in favor of free exercise rights compared to the *Lemon* and endorsement tests.

“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. at 678)

Because none of these tests have been directly overruled, they all remain available for the Court to justify its decisions. The Court may use accepted precedent to justify going any direction in difficult establishment-clause cases. Nonetheless, Justice O’Connor expressed the general belief held by many judges and commentators that the *Lemon* test, at least, had outlasted its usefulness: “As the Court’s opinion today shows, the slide away from *Lemon*’s unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions.” *Board of Ed. Of Kiryas Joel Village School Dist. V. Grumet*, 512 U.S. 687, 721 (1994).

b. Free-exercise clause

In *Cantwell*, the Court made clear that while the free-exercise clause will always protect an individual's right to hold religious belief, the right to act upon those beliefs is not absolute.

“The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Cantwell v. Connecticut*, 310 U.S. at 303-304

However, the case did not indicate precisely what types of religious actions would be allowed under the free-exercise clause. The Court sought to address this question in *Sherbert v. Verner*, 374 U.S. 398, (1963). The opinion hinted at the possibility of some accommodation of religion: “The constitutional obligation of ‘neutrality’ is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.” *Id.* at 422. Moreover, the opinion suggested that when a regulation infringes upon free-exercise liberties it must be weighed with strict scrutiny. Therefore, the regulation must serve a compelling state interest and be narrowly tailored to achieve that interest.

The compelling-interest test proved relatively robust and saved the free-exercise clause much of the schizophrenia suffered by establishment-clause cases. The free-exercise clause was intended to remove burdens to religious exercise, and strict scrutiny provided a useful standard for weighing that burden against free exercise rights. However, the standard was bound to not survive as the Court made its general progression towards neutrality for the both the religion clauses.

III. Settling on neutrality

There is an inherent discordance when the Court tries to resolve questions dealing with the relationship between the religion clauses. As shown in earlier establishment-clause cases, the Court found great difficulty in applying strict separation. This method seemed to produce unreasonable results and worked against the desires and rights of the people to act based on their

freedom of conscience. Accommodation cases, on the other hand, also created difficulties in that the state, in accommodating religious practices, arguably established religion, in violation of the establishment clause. Moreover, increased government accommodation led to the possibility that each person would become a law unto himself and religious practices could totally overwhelm the public sphere.

These issues likely led to the modern approach of neutrality toward religion. Whereas strict separation and accommodation both assume there is overlap between the religion clauses, neutrality allowed space between the two provisions. Its prevalence increased the opportunity for “play in the joints” in later religion-clause cases. The first case to establish neutrality for the religion clauses was *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, (1990).

Smith established the principle that neutral government regulations cannot be overridden by accommodation of free exercise rights. The opinion noted, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). Before this decision, a regulation prohibiting or burdening religion required justification by a compelling state interest. *Smith*, on the other hand, held that if religion is neutral – i.e. not targeted at religion – there is no free exercise claim. Holding otherwise, the Court warned, permitted an individual “to become a law unto himself.” *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

The *Smith* decision, which upheld a law prohibiting the smoking of peyote, was complemented by the decision in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), which overturned a law barring animal sacrifices. The difference between the two laws, according to the Court, was that the law in *Lukumi* impermissibly targeted religion by seeking to suppress religious practice. The Court set out two methods for determining impermissible targeting of religion: (1) facial invalidity or (2) a search for facts and circumstances evidencing government hostility.

The two decisions in tandem set out neutrality as the standard for laws that do not directly target religion in free exercise cases. The establishment clause moved to the same

neutrality standard in *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Mitchell* spoke to the principle that religion and nonreligion must be treated equally under the establishment clause. Moreover, the combination of neutrality and private choice breaks the chain between government and religion for purposes of the establishment clause. In other words, religious entities may be involved in government aid programs as long as those programs use “neutral, secular” criteria in apportioning funding. *Mitchell v. Helms*, 530 U.S. at 832.

Two years later *Zelman* extended this neutrality concept to school voucher programs. The Court stated that the establishment clause is not offended if (1) benefits are made available to a wide spectrum of individuals, (2) individuals are allowed true private choice, and (3) the program is neutral with respect to religion. The Court reasoned these factors provide appropriate separation between government and religion:

“[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.” *Id.* at 652.

Mitchell and *Zelman*, therefore, mirror the neutrality principle for the establishment clause that *Smith* and *Lukumi* instituted for the free-exercise clause. The Court establishing equality principles for both of the religion clauses demonstrated a dramatic weakening of both clauses from the overlapping principles of accommodation and strict separation embraced in earlier cases. The extra space opened up between the two clauses ushered in greater opportunity for “play in the joints.” With neutrality firmly established as the standard for both provisions, the Court seemed settled on the issue before the case of *Locke v. Davey*, 540 U.S. 712 (2004).

IV. Stretching the joints

According to the neutrality doctrine religion had to be treated equally with secular activities. However, before *Davey* it was unclear whether this precedent meant state and federal governments would be forced to take affirmative efforts to ensure religious activities would be

given the same privileges as those that are nonreligious. *Davey* involved a scholarship program offered by the state of Washington. The program offered financial assistance to underprivileged, academically gifted students pursuing degrees at eligible post-secondary institutions, including religious institutions. However, the scholarship excluded any student seeking a degree in devotional theology.

The plaintiff in the case brought suit arguing that the exclusion of devotional theology was a denial of his free exercise rights. Despite the Ninth Circuit's ruling the program unconstitutional, the Supreme Court upheld the program in a 7-2 decision. The Ninth Circuit based its ruling on the standard of neutrality set forth in the Supreme Court's neutrality precedent. In particular, it followed the opinion in *Lukumi*, stating, "the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 533.

In *Davey*, however, the Supreme Court indicated the tests used in *Lukumi* were not appropriate because their application "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Locke v. Davey*, 540 U.S. at 545. The Court also dismissed potentially applicable cases involving political rights, viewpoint discrimination, and the choice between practicing religion and receiving public benefits. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Hobbie v. Unemployment Appeals Com'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The Court seemed to avoid all of these federal precedents in favor of the state scholarship program. Nevertheless, the Court made clear that the inclusion of devotional theology majors would not have violated the establishment clause. "[T]he Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director." *Agostini v. Felton*, 521 U.S. 203, 225 (1997).

Despite the fact that state sponsorship of theology majors does not violate the establishment clause, the Court further insisted the state of Washington was not required to

include theology majors under the free-exercise clause. Hence, this case was a “play in the joints.” “Without a presumption of unconstitutionality, Davey’s claim must fail. 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. If any room exists between the two religion clauses, it must be here.” *Locke v. Davey*, 540 U.S. at 725.

However, there was an important requirement articulated in *Walz* that was not applied to the “play in the joints” articulated in Justice Rehnquist’s opinion in *Davey*. *Walz* said government may freely choose to extend or deny a public benefit only if it has not “gerrymandered” on the basis of religious considerations. *Walz v. Tax Commission of City of New York*, 397 U.S. at 696. This meant the creation of the classification and the decision to include or deny religion must be made based on secular criteria. However, the scholarship in *Davey* explicitly excluded religion from the scholarship program. Therefore, it is a different sort of “play in the joints” than that described by the Court in *Walz*.

While the decision in *Davey* was explicitly limited to the scholarship program in question, the decision might have deeper implications. The result demonstrates the Court’s willingness to forgo its neutral, equality positions on the establishment and free-exercise clauses in order sometimes to defer religious questions to the political branches and state governments. In *Davey*, the Court demonstrated its willingness to accept the constitutionality not only of neutral programs, but also those that directly targeted religion. In other words, differential treatment of religion, according to *Davey*’s reasoning, does not equate to hostility towards religion. Seemingly, the “play in the joints” was further stretched.

V. Future of free play

Whenever the Court finds room for a “play in the joints” it indicates its willingness to respect the regulation or activity in place. As the cases from *Smith* to *Davey* have shown, the Court is increasingly willing to defer religious questions to state governments and both state and federal legislatures. This may be representative of the Court’s hesitancy to get involved on either side of the debate after more than half a century of confusion on how to apply the religion clauses,

or it may represent an increased deference to political branches and the traditions and laws of state and local governments to define how far to accommodate or restrict religious liberty.

The most recent “play in the joints” case supports this proposition. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court considered whether or not the Religious Land Use and Institutionalized Persons Act (RLUIPA) allowed prison inmates to exercise their non-mainstream religions. While the Sixth Circuit held that RLUIPA impermissibly advanced religion, in violation of the establishment clause, the Supreme Court reversed, upholding the legislation as a permissible accommodation of religion.

While the Court explicitly limited its opinion in *Davey* to the scholarship program in question, the decision may have deeper implications – particularly for K-12 school voucher cases. Most states have constitutional provisions precluding the use of public funds for religious purposes. Many of these provisions are commonly known as “little Blaine Amendments” because they emulate the language of a failed 19th century amendment to the U.S. Constitution proposed by Congressman James G. Blaine.

The proponents of this amendment were motivated by anti-Catholic bigotry. Advocates favored restricting funding to the predominantly Catholic private schools in favor of the public schools that still reflected Protestant-style prayers and Bible reading. Prior to *Davey* it appeared these sorts of state antiestablishment restrictions were vulnerable to challenges. However, *Davey* demonstrated a willingness by the Court to rule in favor of state authority to restrict church-state interaction over federal free exercise concerns. While the Court indicated legislation reflecting animus should be removed, it did not overturn a similar Washington constitutional restriction, simply stating, “the provision in question is not a Blaine Amendment.” *Locke v. Davey*, 540 U.S. at 723.

If *Davey* had been decided differently, any remaining obstacles to school vouchers in state constitutions likely would have been removed. While *Zelman* provided the precedent making school vouchers acceptable under the establishment clause, if individuals had the right under free exercise, free speech, or equal protection grounds to use government aid for religious schools, states would be required to fund religious groups whenever private secular groups

received similar benefits. Conversely, the decision reached in *Davey* has the potential to chill school voucher movements across the country.

Regardless of which way the state courts rule, the decision in *Davey* is likely to open the gates to a flood of litigation and political activity regarding the religion clauses at the state level. The Supreme Court's gradual stretching of the joints has allowed a great deal of room for states to define for themselves how to treat issues with the religion clauses. This may be the most significant consequence of the Court's modern interpretation of the "play in the joints."

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