

Religion and the First Amendment

International Municipal Lawyers Association
2023 Mid-Year Seminar

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Regulating in the public square

Restrictions on speech

- Content-based restrictions in public fora are unconstitutional
- Unless they pass strict scrutiny
  - Compelling government interest, and
  - Narrowly tailored to that interest
- "Strict in theory, fatal in fact"

Limited Public Forum



Freedom from Religion Found. v. Abbott

- Capitol Exhibit Rule: members of the public may submit an exhibit for display at the Capitol, subject to relatively few requirements.
- FFRF submitted a display with several figures around a copy of the Bill of Rights in a manger.
- Fifth Circuit ordered district court to consider injunctive relief, but Preservation Board amended the Capitol Exhibit Rule.
- 58 F.4th 824 (5th Cir. 2023)

Restrictions on expressive conduct

- Time – Place – Manner Restrictions
- Intermediate Scrutiny
- "No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning; the sentiment may not provoke, but being blasted out of sleep does."

Restrictions on religious exercise

- Is the law neutral and of general applicability?

- If **no**, then it must pass strict scrutiny.
  1. Must serve a compelling governmental interest; and
  2. Be narrowly tailored to advance that interest.

- If **yes**, then it only need be rational.

If *Smith* is overturned…

- Impose strict scrutiny (i.e., generally constitutionalize the federal Religious Freedom Restoration Act)?

1. Compelling governmental interest; and

2. Narrowly tailored.

- Impose some level of intermediate scrutiny?
- Maybe a version of the time, place, manner test?
- Maybe ---

Government in the public square

The government speech doctrine

- Whether the type of speech has traditionally communicated messages on behalf of the government?
- Whether the kind of speech is often closely identified in the public mind with the government?
- Whether the relevant government unit maintains direct control over the messages conveyed through the speech?

Gundy v. City of Jacksonville, Florida

- The Webb Policy
- "The City Council 'has long maintained a tradition of solemnizing its proceedings by allowing for an opening invocation before each meeting, for the benefit and blessing of the Council."
- 50 F.4th 60 (11th Cir. 2022)
- Reginald Gundy was invited to give the invocation at the March 12, 2019, City Council meeting.
- "Mr. Gundy started with a direct appeal to a higher power. When Mr. Gundy transitioned to levying criticisms against the City's executive and legislative branches, …."
- Council President turned off his mike.

Government endorsement of religion

- The *Lemon* test

1. Purposes;
2. Effects (Endorsement); and
3. Entanglement.



The end of *Lemon*

Kennedy v. Bremerton Sch. Dist.

"What the District and the Ninth Circuit overlooked, however, is that the shortcomings associated with this ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement offshoot."

"[T]he Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers."



Justice Court Chaplaincy Program



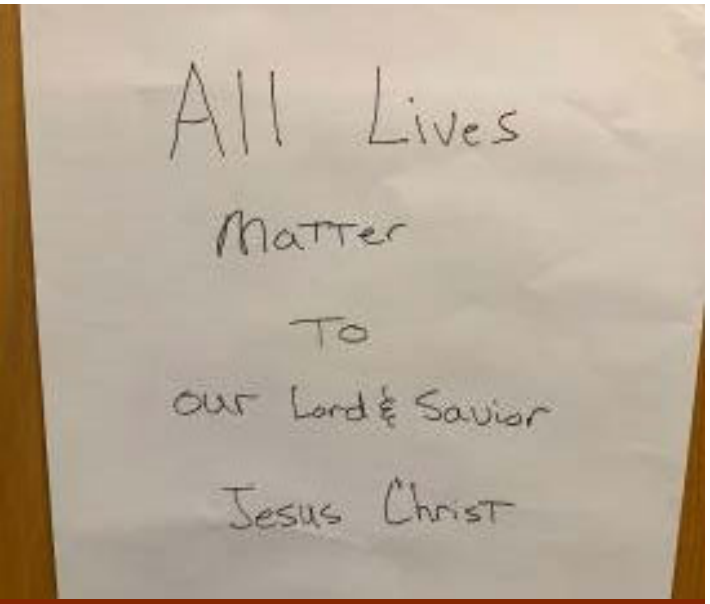
Freedom from Religion Found. v. Mack

- "It is the tradition of this court to have a brief opening ceremony that includes a brief invocation by one of our volunteer chaplains and pledges to the United States flag and Texas state flag."
- "You are not required to be present or participate. The bailiff will notify the lobby when court is in session."
- 49 F.4th 941 (5th Cir. 2022)

Employees and religion

Pickering to *Kennedy*

- Should the employee's speech be characterized as speech by a citizen on a matter of public concern?
- Should the employee's speech be characterized as "government speech"?



Replacement Poster

Beathard v. Lyons

Beathard was a football coach at Illinois State University.

The ISU Athletic Department printed posters for the BLM Movement, and pasted them on various office doors, including Beathard's.

Beathard replaced his poster, and was fired.

No Dismissal

"Plaintiff was not acting in his official job duties when he placed the poster on his door, and therefore, his was private speech protected by the First Amendment."

-- F. Supp. 3d –,
2022 WL 3327753 (C.D. Ill. 2022)



Questions