Law for Librarians

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Religious Issues and Libraries

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I. OVERVIEW: THE RELIGION CLAUSES OF THE FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

A. The Establishment Clause

1. Origins

— "Neither a state nor the Federal Government can . . . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' . . . The wall must be kept high and impregnable. We could not approve the slightest breach."

Everson v. Board of Educ., 330 U.S. 1 (1947)

2. Modern Test

— Laws and government actions violate the Establishment Clause if they (a) have a predominantly religious purpose, or (b) have the principal or primary effect of advancing or inhibiting religion.

Lemon v. Kurtzman, 403 U.S. 602 (1971); *Agostini v. Felton*, 521 U.S. 203 (1997)

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B. The Free Exercise Clause

1. Neutral, Generally Applicable Laws

— "[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."

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

2. Non-Neutral Laws

— If a law that burdens a religious practice is not neutral or generally applicable – that is, if the law was motivated by religious animus or was selectively or discriminatorily applied – it is subject to strict scrutiny and violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest.

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

II. USE OF LIBRARY MEETING ROOMS BY RELIGIOUS ORGANIZATIONS

A. Constitutional Requirements

1. Supreme Court Rule

— Once government property is opened for public use, excluding groups on the basis of their religious character or activity violates the Free Speech Clause of the First Amendment.

— No Establishment Clause violation exists as long as there is no danger that the community would think the government endorses the religious group or activity – e.g., if meetings are held after school hours, meetings are not sponsored by the school, and are open generally to public.

Good News Club v. Milford Central Sch., 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)

2. Lower Court Decisions on Libraries and Religious Groups

a. *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989):
-Based on widespread use of public library auditorium by a variety of groups and individuals, library created a public forum and could not exclude group wishing to hold a prayer meeting in auditorium.

b. *Faith Center Church Evangelistic Ministries v. Glover*, No. C 04-03111 JSW, 2005 WL 1220947 (N.D. Cal. May, 23 2005)
-Library may not exclude religious group from public meeting room, even where group engages in "quintessentially religious" activities that could be categorized as religious services.

B. Statutory Requirements – School Libraries and the Federal Equal Access Act (EAA), 20 USC § 4071-74

— EAA makes it unlawful for federally funded public high schools that have "limited open forum" to deny student groups the ability to "meet on school premises during non-instructional time" on the basis of the "religious, political, philosophical, or other content of the speech at such meetings."

— "Limited open forum" interpreted broadly by the courts to cover any situation in which the school previously allowed meetings by noncurricular groups.
Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990)

III. RELIGIOUS DISPLAYS IN LIBRARIES

A. Private Use of Display Space

— Private religious expression on government property is entitled to full First Amendment protection, and creates no Establishment Clause problems, if the forum is open to all groups equally, the state actors exercise no control over the content of the speech, and the government administers the forum in an evenhanded way that does not favor certain religious speakers or suggest government endorsement of a particular message.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995)

B. Displays of Government Speech

— Religious displays by the government violate the Establishment Clause if they have either the purpose or effect of promoting or endorsing religion. This test looks to the perceptions of "an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute." Government's stated "secular purpose" must be "genuine, not a sham, and not merely secondary to a religious objective."

McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005)

— Certain religious displays by government may be permissible, depending on the longevity of the display, the physical setting of the display (*e.g.*, whether it is placed among other items to convey a secular message), and the historical context in which the display emerged.

Van Orden v. Perry, 125 S. Ct. 2854 (2005)

IV. LABELING OF RELIGIOUS LIBRARY MATERIALS

Return to the basic concepts of "purpose" and "effect": Labeling of religious materials is constitutionally problematic if, in so doing, the

library seeks to, or actually does, promote religion generally, or favor one religion over others.

— "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2733 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also*, *e.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985).

— When it favors particular religious beliefs, the government unconstitutionally "sends the . . . 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.'"

Santa Fe Independent Sch. Dist. V. Doe, 530 U.S. 290, 309-310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring))

Update on Faith Center Church v. Glover (No. 05-16132)

On September 20, 2006, the Ninth Circuit Court of Appeals issued a 2 – 1 decision in *Faith Center Church v. Glover* that reversed the district court's finding of unconstitutionality. The majority concluded that:

- "the County's decision to exclude Faith Center's religious worship services from the meeting room is reasonable in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship." (Slip Opinion, at 11647);

- "the County has a legitimate interest in screening applications and excluding meeting room activities that may interfere with the library's primary function as a sanctuary for reading, writing and quiet contemplation" and that it "reasonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community." (Slip Opinion, at 11648);

- Faith Center Church was not excluded on the basis of viewpoint discrimination, holding that the library had not "excluded a perspective on a subject matter otherwise permitted in the forum." (Slip Opinion, at 11652);

- Faith Center Church cannot be prohibited from engaging in the following activities in the library meeting room: workshops on how to communicate with God, Bible discussions, teaching the Bible, praying, singing, sharing testimonies and discussing political or social issues;

- Faith Center Church's self-described worship service is "not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter," but rather an exclusion based on "content" rather than "viewpoint." (Slip Opinion, at 11654-55);

- the library could prohibit an entire subject from the meeting room;

- it would be “challenging” for the county or even courts to draw a line between religious speech that is permissible (praying, Bible study, religious singing) and "religious worship." but relying on Faith Center Church's own description of its meeting as a forum for "praise and worship," concluded that "[t]he County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did." (Slip Opinion, at 11660).

Theresa Chmara has pointed out that it is important to note that:

- the decision differs from the interpretation of other courts on the use of meeting rooms by religious groups;

- the decision is limited to the Ninth Circuit and the Faith Center Church has announced it will be petitioning the U.S. Supreme Court to hear the case;

- the court relied on the church’s own description of its meeting as a worship service and failed to address the concerns of the dissenting judge:

"How can a County librarian validly parse religious worship from allowable religious speech when the librarian does not have the proper guidelines which he or she may recognize the offending conduct?" (Slip Opinion, at 11676) and

[the policy to exclude] "religious services" requires the library to draft a policy that will allow librarians to "define what constitutes mere religious worship, as well as how many secular topics are required to be discussed or contemplated before mere religious worship becomes something more" and that he wishes the County "the best of luck in that drafting endeavor." (Slip Opinion, at 11675).