

A Practical
Guide to

RELIGION IN THE PUBLIC SQUARE



INTERNATIONAL CENTER
FOR LAW AND
RELIGION STUDIES

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—THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

A Practical Guide to Religion in the Public Square: A Practical Guide answers some common questions about religion in public settings. There are many misconceptions about the religious rights of individuals and groups in public and the proper attitude of government toward religion. Our aim is to help everyone understand the scope of religious freedom guaranteed by the U.S. Constitution, and to offer suggestions on how to peacefully reconcile the rights of all.

This guide is not comprehensive. The law varies somewhat from state to state and is modified from time to time through legislation and court interpretation. Those with specific legal questions should seek advice from a competent lawyer.

1. What is religious freedom?

The Constitution of the United States, many state constitutions, and various state and federal laws provide special protections for fundamental rights of individuals. The First Amendment to the United States Constitution specifies rights that protect the vitality of our democracy. Among our First Amendment rights are freedom of religion, freedom of speech, freedom of the press, and freedom of assembly.

Religious freedom means more than just freedom to believe what you want. It is also freedom to talk about and act on your beliefs without coercion or interference, subject to certain narrow limitations discussed below.

2. What is the public square?

The “public square” refers to all settings outside private homes and houses of worship. These include public parks and sidewalks, government buildings and meetings, public schools and universities, private property that the owner opens to the general public, and many other similar settings. The public square may also include media—books, newspapers, magazines, the internet—and, in general, anything that is accessible and open to the public.

RELIGION IN THE U.S. CONSTITUTION AND LAWS

3. What laws protect religious freedom?

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-First Amendment to the U.S. Constitution

The First Amendment to the U.S. Constitution protects religious freedom in two ways:

- (1) The “Establishment Clause” prohibits the government from adopting an official religion, and
- (2) The “Free Exercise Clause” prohibits the government from interfering with people’s practice of religion.

The First Amendment applies to all levels of government: federal, state, and local. The government must provide at least as much protection for religious liberty as the Constitution requires, but they can choose to provide more. In fact, state constitutions and laws often provide greater protection for religious freedom than does the U.S. Constitution.

4. What is “separation of church and state”?

“Separation of church and state” does not appear in the Constitution, nor is it a legal term. Thomas Jefferson coined the phrase to describe religious freedom as including a healthy independence between government and religious organizations to protect the interests of both. However, the phrase is sometimes used to claim, incorrectly, that the Constitution requires government to be religion-free. In reality, government may actively cooperate with religious organizations in common causes, such as public health or social welfare. The government also has a duty to accommodate religion when necessary to guarantee the right to free exercise of religion. For example, police must protect religious communities or speakers from harassment or persecution, religious organizations must be allowed to use public facilities, and government employees must generally be allowed to wear religiously required clothing to work.

5. Is protecting religious freedom important?

Yes. Religious freedom is an essential protection allowing people with strong differences of opinion and belief to live together in peace. The people who wrote the Constitution knew that violent conflicts about religion had plagued Europe for hundreds of years, as rulers tried to control the religion of their subjects. Some of the early colonies also tried to regulate religion and experienced similar problems. The Founders sought to avoid these conflicts in the new nation by forbidding official religions and by protecting all religions from government interference.

The Founders also believed that government interference in religion was an assault on human rights. The Declaration of Independence states that people are “endowed by their Creator” with certain rights that the government has a duty to protect. The Constitution protects people from government attempts to deny people’s basic human rights, including the right to have and exercise one’s own religious beliefs.

Even though cases of religious bigotry persist, 250 years of relatively peaceful coexistence of diverse religions in our nation have proven the wisdom of the Constitution. Our nation benefits when people are free to hold sincere beliefs of many kinds that guide their actions in private and in public, and when people feel free to discuss and debate their beliefs and ideas publicly.

6. How do we know what is constitutional in specific situations?

The U.S. Supreme Court and other courts decide cases in which someone claims that a government action is unconstitutional. Reading court decisions helps us understand what the Constitution means in particular circumstances.

This pamphlet is based on real cases, but it does not provide detailed information about them.

7. Does religious freedom include more than belief?

Yes. The Constitution protects not only people’s right to believe as they choose, but also to worship, to share their beliefs, and to act according to their beliefs. All these rights apply to both individuals and groups.

8. Does religion have to be a private matter?

No. The Constitution protects religious liberty both in private and in the public square. The right to religious freedom does not disappear when a person enters a public setting such as a school or a government building, when he or she accepts government office or employment, or when he or she operates a business open to the public. In fact, the government is obliged to protect religious liberty in all these settings, with only very limited exceptions discussed below.

9. Are there limits on the free exercise of religion?

Yes. As with any right, religious freedom is not absolute. While the government may never tell people or communities what to believe, in a few circumstances it may restrict the way they exercise those beliefs, such as to protect public safety or the fundamental rights of others. To take an obvious example, the government could forbid human sacrifice even if a religion's teaching approved of or required it.

The Supreme Court has developed a test for when the government is allowed to restrict religious practices under the Constitution. In addition, Congress and many states have adopted legislation providing even greater protections than are provided in the Constitution.

The Supreme Court has held that government action restricting the exercise of religion can be valid if it is a “neutral law of general applicability” that doesn't specifically target religion. Federal and many state laws also require that there be a “compelling government interest” and that the government use the “least restrictive means” to achieve that interest.

For example, a law prohibiting the use of the drug peyote was found to be constitutional even though the drug is important in some Native American religious rituals, because the law applied to everyone equally and did not single out a particular religious practice. However, similar laws might be invalid under state or federal legislation if they don't include appropriate exemptions for religious use.

RELIGION IN POLITICS AND LAWMAKING

10. May religious groups and people of faith participate in politics?

Yes. Religious groups and individuals have the right to take positions and influence public opinion on all public and political matters. Religious leaders and organizations frequently do so.

Some types of political involvement, while constitutional, may affect a religious organization's ability to keep its federal tax-exempt status. Religious organizations should consult qualified tax attorneys about their political activities.

11. May religious beliefs influence public policy?

Yes. All kinds of beliefs influence the policy preferences of voters and legislators, including religious ones. The simple fact that a policy coincides with a religious teaching or grows out of religious values concerning right and wrong does not make it unconstitutional, so long as the policy itself has a secular purpose, does not advance or inhibit religion, and avoids excessive government involvement with religion. For example, just because many religious teachings oppose violence does not mean that laws prohibiting assault are unconstitutional. To take a more controversial example, some types of laws restricting abortion are constitutional even though they coincide with certain religious beliefs, because they have secular justifications, are neutral regarding religion, and don't unduly involve the government in religion.

As a practical matter, when debating controversial policies it can be helpful for those with religious views to also identify moral, legal, practical, or other principles underlying their views that people with diverse religious backgrounds and agendas can relate to.

12. May elected officials speak about God?

Yes. Elected officials have a First Amendment right to express their religious beliefs. However, they may not use their official capacity to establish religion, such as by favoring, promoting, or discriminating against a particular religion.

13. May government meetings open with prayer?

Yes, so long as the prayers are not used to proselytize or advance any particular faith or belief. Good practice is to invite chaplains or representatives of various faiths, including non-Christian denominations, to take turns offering the prayers, and to make the prayers generic in content.

14. May the government require that government officials or employees belong to a certain religion or believe in God?

No, The government cannot require any kind of religious test as a condition for public office or employment. The government may require people to take an oath of office or make a similar affirmation, but it may not require them to place their hand on the Bible or any other religious book or to use the phrase "so help me God," although the person can do these things if they wish. The government also cannot prohibit ministers from holding public office.



15. May local governments use zoning laws or other means to keep religious groups out of their communities?

No. Local land use laws, such as zoning ordinances, may not target religious organizations for exclusion, discriminate against them, or place unreasonable burdens on them. Examples of government actions that are not allowed include:

- Zoning ordinances that prohibit places of worship, while allowing non-religious places of assembly for clubs or other associations.
- Denying a permit to a religious group simply because they are religious or because they belong to a specific religious group.
- Forbidding new church buildings or other tax-exempt houses of worship for the purpose of maximizing tax revenue.
- Having no zones that permit houses of worship, such that the only way a church can be built is by expensive and lengthy proceedings to rezone a parcel or receive a zoning variance.

16. Do tax exemptions for religious organizations violate the Constitution?

No. Religious organizations are tax-exempt under all state and federal tax codes. In fact, the Constitution may require this, as the Supreme Court has suggested that taxing churches would cause excessive involvement between church and state.

As with other kinds of tax exemptions for non-profit organizations, religious tax exemptions respect people's right to organize with others to further common interests free from government coercion or control through taxation.

17. May the government favor one religion over another?

No. The government may not give special privileges or place special penalties on any specific religion or religious group, or show preference for one religion over another or for atheism.

RELIGION ON GOVERNMENT PROPERTY

18. Does government property have to be religion-free?

No. Government property need not be free of religious references, symbols, or messages, so long as the government does not appear to endorse any specific religion. Whether a particular display is constitutional depends heavily on the particular circumstances.

Temporary displays (such as holiday displays) may contain religious elements if the display, taken as a whole, does not promote a religious message or indicate government endorsement of religion. For example, a

Nativity scene together with non-religious holiday symbols, such as Santa Claus and candy canes, would probably be allowed, but a Nativity scene standing alone would not be.

Permanent displays (such as monuments) may contain religious elements if the purpose and primary effect of the display are secular—in other words, if a reasonable observer would not believe the government means to endorse a particular religion. Factors include the overall content, the circumstances of its creation, and how long the display has existed. For example, a statue depicting the Ten Commandments along with several non-religious symbols of justice, erected many years ago and reflecting the community’s historical heritage would probably be allowed under the Constitution. But a carving of the Ten Commandments recently donated by a religious organization and placed in a prominent location could be unconstitutional.

19. May individuals and religious organizations use government property for religious expressions and activities?

Yes. In general, the government must provide religious groups the same access to public facilities that it provides for other types of groups. For example, a state university that hosts a variety of student activities may not exclude a religious student group simply because it is religious, although certain other restrictions may apply. If a government building is opened for after-hours use by community groups for educational, social, recreational, or entertainment purposes, it must allow religious groups the same kind of access for similar purposes.

The government is allowed to impose reasonable restrictions on when, where, and how a religious group uses government property (“time, place, and manner restrictions”). For example, the government may set time limits for events, restrict the location to prevent traffic obstruction, or limit the size of displays.

20. May government employees wear religious dress or symbols to work?

Yes. All employees generally have the ability to believe and act consistently with deeply held religious beliefs while in the workplace, subject to some narrow limitations. Government employees enjoy these rights as well. The government, for example, must allow employees to wear religious clothing or symbols even while engaged in official government work, unless doing so would cause a reasonable observer to interpret it as a government endorsement of religion or if doing so would present a significant burden, such as a safety hazard.

For detailed information on the religious freedom rights of employees, see *Religious Freedom in the Workplace: An Employee’s Guide*.

21. Do public schools have to be religion-free?

No. Public schools and universities must be neutral toward religion; they can’t favor it or be hostile to it. Schools have a duty to accommodate a student’s exercise of religion unless it is disruptive to discipline or interferes with the rights of others. Schools may teach about religion in an academic, neutral,

non-denominational way. Schools may not sponsor “religious speech.” For example, school-sponsored prayers or devotional scripture readings during the school day or at school events are inappropriate.

For detailed information on religion in education, see *A Parent’s Guide to Religion in the Public Schools* and *A Teacher’s Guide to Religion in the Public Schools*.

RELIGION SPEECH AND EXPRESSION

22. What laws protect religious speech?

The First Amendment provides extremely broad protection for freedom of speech of all kinds, including religious speech. The government cannot forbid speech because of its content, religious or otherwise, even if it is extremely offensive to others. This is subject only to very narrow exceptions, such as speech that poses a clear and present danger by inciting imminent violence. This strong protection of speech safeguards the free public exchange of ideas that is essential in a democracy. It keeps government from limiting criticism, unpopular speech, and the expression of ideas with which it does not agree.

In addition to the near-absolute protection of speech under the First Amendment, the religious freedom guarantees of the First Amendment add yet another layer of protection for religious speech.

23. Does freedom of speech include more than speaking?

Yes. Freedom of speech, religious or otherwise, includes not only speech but other forms of expression such as displaying, publishing, and distributing signs, banners, pamphlets, books, magazines, websites, or other materials. The government may regulate some aspects of these activities, such as solicitation of donations or commercial agreements between religious groups and publishers or distributors, but it may not control the content.

24. May privately owned newspapers, magazines, television stations, and other media outlets publish religious (or anti-religious) speech?

Yes. The First Amendment guarantees the right to freedom of the press. With very limited exceptions, people and groups have the right to publish any views in any media available to them. These views may be religious, non-religious, or even anti-religious. For example, laws against blasphemy would be unconstitutional. However, the government does not have to provide the means for publishing these messages.

25. May a privately owned media outlet such as a newspaper, magazine, or television station refuse to publish religious speech?

Yes. Private media outlets have the right to decide whether to publish or broadcast any materials. Individuals or groups may not demand that a private media outlet publish or broadcast their speech, religious or otherwise.

26. May the government forbid religious speech or expression on government property?

No. The government may not forbid or restrict speech on government property simply because it is religious or because of its particular religious content. In fact, the government has a duty to accommodate such speech, for example by providing police protection if needed.

The types of restrictions the government may place on speech, including religious speech, on government property depends on the type of property. The government has only limited ability to restrict speech in public places, such as sidewalks, parks, and civic centers, for example, by requiring speakers to stay on sidewalks or placing time limits on events. The government can place more restrictions in places not

usually open for public speech, such as military bases and jails. Even where such restrictions are allowed, they must have a legitimate aim and be viewpoint neutral (not designed to suppress a particular opinion).

27. May the government prohibit religious speech because it offends others?

No. The government cannot restrict speech because it is unpopular or offensive, even if it is extremely offensive or likely to provoke protests. On the contrary, police have a duty to protect speakers by controlling crowds and hecklers.

28. May the government prohibit religious speech on private property?

No. Individuals and organizations have the right to express their religious faith or views on their own property, including displaying religious symbols or messages. Certain land use or zoning restrictions may limit religious and non-religious displays alike, but they may not single out religious speech or unreasonably limit it.

If private property is open to the public, such as shopping centers or medical clinics, owners may have to obey certain anti-discrimination laws that prohibit certain messages, even if the owner considers the messages religious. Owners of such property should consult with qualified attorneys in their state for specific guidelines.

29. Is there a constitutional right to religious speech on the private property of others?

No. Even if the private property is open to the public, such as retail stores or shopping centers, permission must be obtained from the owner.

30. Can the government require permits for door-to-door proselytizing or advocacy?

No. However, the government may impose reasonable regulations on the time, place, and manner of door-to-door advocacy, so long as they apply equally to everyone who engages in this kind of activity. For example, a city may prohibit door-to-door advocacy during nighttime hours, and cities may have greater leeway to restrict such activities if they involve sales or solicitation of money.

31. May the government control the content of religious sermons?

No. Even if anti-discrimination laws were to prohibit messages that might offend certain groups of people, applying these laws to church sermons would be unconstitutional, as would any law prohibiting churches from preaching their own views on social and moral issues.

RELIGION AND ANTI-DISCRIMINATION LAWS

32. Can professionals (such as bakers, florists, and doctors) refuse to provide services that violate their conscience or religious beliefs?

It depends. Each state has its own anti-discrimination laws applying to businesses and professionals providing goods or services to the public. Some of these explicitly allow exemptions when providing a service that would violate a provider's religious beliefs. Others do not. Similarly, some states have conscience laws that affirm the right of doctors or other professionals to refuse to provide services they oppose. While it is clear that government enforcement of anti-discrimination laws must not be hostile to religion or to religious believers, this area of the law is still in development. Cases will depend on the law in question and a variety of other circumstances. When considering the constitutionality of such laws, courts may seek to balance the government's interest in limiting discrimination against individual freedoms of speech and religion. Businesses and professionals should consult attorneys in their state for specific information and guidance.

33. Can a religious organization that rents its facilities to the public for events refuse certain types of events?

It depends. Some states have laws that specifically protect religious organizations' right to refuse to rent their facilities for events contrary to their beliefs. But as with the issue of businesses or professionals refusing to provide services discussed above, the answer is not always clear. Religious organizations should consult with local attorneys for information and advice.

34. Can employers discriminate based on religion?

Generally, no. Most employers may not hire or fire employees on the basis of their religion or their need for religious accommodations in the workplace (such as an exception to a dress code for a religious head covering, or reasonable excuse for religious holiday observances), and must generally accommodate their employees' religious practices, unless doing so would place an undue burden on the business or other employees.

One major exception is that a religious organization has the right to require its ministers and many other kinds of employees to be members of that religion and to live by the religion's standards of conduct even outside the workplace.

For detailed information on an employer's rights and duties concerning religion, see *Religious Freedom in the Workplace—An Employer's Guide*.

RELIGION IN FEDERALLY FUNDED PROGRAMS AND SERVICES

35. May religious organizations receive federal funding for social programs and services, such as health care or education?

Yes. Religious organizations may apply for and receive federal funding for such programs on the same basis as non-religious organizations, and often do so. The federally funded activities must be offered in separate rooms or at separate times than religious activities. For example, a church offering federally funded job training at the same time as a Bible study must offer the activities in separate rooms.

36. May an organization include religious activities as part of federally funded programs or services?

No. An organization that receives direct federal funds can't engage in inherently religious activities such as religious teaching, worship, or proselytizing as part of such programs or services. Religious activities must be (a) offered separately in time or location, and (b) voluntary—in other words, participants can't be required to attend religious activities in order to receive federally funded assistance. For example, a homeless shelter receiving federal funds may not require participants to pray before meals or attend scripture study, although it may invite them to do so.

37. May a religious organization limit federally funded programs and services to its own members?

No. Religious organizations that accept federal funds for social service programs may not refuse such services based on religion.

FINDING COMMON GROUND

38. How can individuals, religious organizations, and local officials resolve differences peacefully?

- **Value democratic principles above politics and agendas.** Our nation's system of democratic lawmaking, government checks and balances, and constitutional guarantees protects everyone's rights, including those with whom we deeply disagree. Respecting these processes and guarantees, no matter how much we may dislike the outcome, protects our own rights and our democratic system of government. Developing consensus through dialogue and persuasion requires patience, but it is the only way a healthy democracy functions.
- **Identify common values.** Expressing shared commitment to core values can help those with very different policy preferences to understand and respect one another. Religious individuals and communities should identify principles that people with diverse backgrounds and agendas can relate to. Explaining how their views reflect these common values can build trust and understanding better than insisting on a claim of religious freedom alone. Likewise, people of all faiths or no faith can respect religious freedom as one part of a broader freedom from government control that benefits everyone.
- **Listen to all sides.** We live in a diverse society in which people of goodwill can have widely differing views. All parties should acknowledge and try to understand others' positions.

Public officials should be mindful of the deeply held religious beliefs of members of the community, especially if those beliefs are unpopular. Similarly, people of faith can start with the assumption that most public officials do not intend to be hostile towards religion and want to be fair to everyone.

- **Commit to civil debate.** Differences of opinion and open debate are vital in a democracy. But how we debate, and not just what we debate, is critical. Personal attacks, ridicule, and vilification of those holding opposing views can fracture communities and undermine the democratic process. All parties should strive to be accurate and fair and should treat one another with civility and genuine respect, which is the only way to learn from one another and build consensus.
- **Find and share relevant information.** Seek all relevant information and share it with all involved. Lack of information often leads to unnecessary restrictions on religion in public spaces. For example, a local government might deny use of public facilities to a religious group because it mistakenly thinks there has to be separation of church and state, or a school music teacher might avoid teaching religious music because he isn't sure it is allowed. Understanding relevant laws and how they apply, and sharing this information with those it affects, can avoid uncertainty and help ensure that people's rights are respected and government obligations met.
- **Be proactive.** Many communities unintentionally contribute to confusion and distrust by having no policies on these issues. Communities can nurture a climate of openness and trust and demonstrate their commitment to the fundamental principles of our democracy if they work with people of faith, religious organizations, and appropriate legal counsel. Such collaboration can help avoid or lessen conflict. It can lead to the development of comprehensive policies on issues affecting religion—for example, a school district-wide policy on religion in schools. Communities should also make sure those policies are widely known and enjoy broad support.

ABOUT US

The International Center for Law and Religion Studies is a global leader in comparative and international law concerning religion. The Center's mission is to help secure the blessings of freedom of religion and belief for all people by 1) expanding knowledge and expertise, 2) building networks of experts, and 3) contributing to law reform. As an academic institution at J. Reuben Clark Law School, Brigham Young University, the Center partners with leading universities, NGO's, and governments around the world to organize conferences, training seminars, and workshops. Since its inception in 2000, the Center has helped organize more than 350 educational events in more than 50 countries; worked with more than 1,000 scholars, government officials, judges, and community and religious leaders; consulted on proposed legislation in 55 countries; produced numerous scholarly works and training materials; and educated thousands of students. To learn more visit www.iclrs.org



ANSWERS TO COMMON QUESTIONS

Religious freedom is an essential protection allowing people with strong differences of opinion and belief to live together in peace. These protections, however, are relatively meaningless if confined to private observances at home or in places of worship. Deeply-held beliefs affect all aspects of people's lives and link them in community to other believers.

What are the religious freedom rights of individuals and groups in public settings? *A Practical Guide to Religion in the Public Square* sheds light on this somewhat complicated and often-misunderstood topic in an easy-to-understand Q&A format.

Additionally, this brochure offers suggestions on how to find common ground so that individuals, religious groups, and government officials can resolve differences peacefully and fairly.



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