



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Constitutional Law, and specifically the Establishment Clause and the Free Exercise Clause. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast. Today, we’re discussing Constitutional Law, and specifically the Establishment Clause and the Free Exercise Clause of the First Amendment. The First Amendment provides for several affirmative rights, including the right to freedom of religion. This right contains two elements – the Establishment Clause and the Free Exercise Clause.

Lee Burgess: First the Establishment Clause prohibits the government from establishing a national religion, or from endorsing or supporting any one religion. In other words, the government cannot prioritize or elevate any one religion over others.

Lee Burgess: When analyzing a law to determine whether it violates the Establishment Clause, the first question to ask is whether the law discriminates against a religion. If it does, the law must satisfy strict scrutiny. The government must show, (1) the law is narrowly tailored; (2) to achieve a compelling government interest; and (3) that the least restrictive means was used.

Lee Burgess: If, on the other hand, the law does not discriminate – but it does nonetheless have some relationship to religion – it’s still not out of the woods. The court in these cases will apply the Lemon Test – which comes from a 1971 Supreme Court case called *Lemon v. Kurtzman*. The Lemon Test has three prongs. A law will be upheld under the test if, (1) it has a secular purpose; (2) its primary effect does not advance or inhibit religion; and (3) it does not excessively entangle the government with religion.

Lee Burgess: While the Establishment Clause prohibits the government from establishing or endorsing a particular religion, the Free Exercise Clause prohibits the government from interfering with the exercise of religion.



- Lee Burgess: Just as with discriminatory laws under the Establishment Clause, laws that are designed to interfere with religion are subject to strict scrutiny. Again, that means that in order for the law to be upheld, the government must show, (1) the law is narrowly tailored; (2) to achieve a compelling government interest; and (3) that the least restrictive means was used.
- Lee Burgess: On the other hand, laws of general applicability that cause unintentional burdens on religion are okay under the Constitution, and do not violate the Free Exercise Clause. For example, the court has found that there's no free exercise problem with laws prohibiting use of certain drugs, even when those laws unintentionally burden religious groups for whom those drugs are a part of their religious practices. That's because those laws apply generally, and their effects on the religious groups are unintentional.
- Lee Burgess: So, let's get to our first hypo to start seeing how this First Amendment analysis works in practice. This question is adapted from the [February 2014 California bar exam](#):
- Lee Burgess: "For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City Hall during the week surrounding the Winter Solstice. The display was accompanied by a sign stating: 'Old Ways Fellowship wishes you a happy Winter Solstice.'
- Lee Burgess: Last year the Building Authority adopted a new 'Policy on Seasonal Displays', which states: 'Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.'
- Lee Burgess: Based on the new policy, the Building Authority denied the Old Ways Fellowship a permit for the sun display. The Fellowship offered to put up a disclaimer sign explaining that the display is not endorsed by the City, but the Building Authority turned down this offer.
- Lee Burgess: In the winter, because it believed that Christmas trees were considered secular symbols, and not religious ones, the Building Authority decided to erect a Christmas tree in the lobby of City Hall. The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution."
- Lee Burgess: Let's evaluate the strength of Old Ways' claims under both the Establishment Clause and the Free Exercise Clause. Let's start with the Establishment Clause.



Remember, the first question under the Establishment Clause is whether the law discriminates against a religion. If so, strict scrutiny applies. In this case, the policy as written does not discriminate against any particular religion, as it applies to all religious displays and symbols.

Lee Burgess: Even if the court finds that the policy is not discriminatory, however, that alone is not enough to protect the Building Authority from an Establishment Clause claim. The court will next apply the Lemon Test. Remember, the Lemon Test has three prongs. A law will be upheld under the Lemon Test if, (1) it has a secular purpose; (2) its primary effect does not advance or inhibit religion; and (3) it does not excessively entangle the government with religion.

Lee Burgess: Let's look at each of these elements. First, the Building Authority will argue that the policy has a secular purpose. The policy was expressly enacted to prevent against the appearance of government endorsement of religion. A court would likely agree that that was a valid secular purpose.

Lee Burgess: On the other hand, the Old Ways Fellowship may be able to make a persuasive argument that the effect of the policy – part 2 of the Lemon Test – does in fact inhibit Old Ways' religion while promoting Christianity. This is because the effect of the policy is to allow for a prominent Christian display – a Christmas tree – in City Hall, while prohibiting a similar display representing Old Ways' religion. A court might conclude that the policy's primary effect does in fact advance or inhibit religion.

Lee Burgess: Finally, the Building Authority will argue that the policy does not excessively entangle the government with religion. In fact, the very purpose of the policy is to avoid the government's entanglement in religion. However, the Building Authority has weakened its position here by allowing a Christmas tree display. There is a stronger case for religious entanglement when the government starts making decisions about which religious displays to allow, and which to forbid. A court therefore could find excessive government entanglement with religion.

Lee Burgess: Taking these three factors together, it appears that while the policy has a secular purpose, it may nonetheless have the effect of advancing or inhibiting religion, and it may excessively entangle the government in religion. A court could therefore plausibly conclude that the Building Authority was in violation of the Establishment Clause of the Constitution.

Lee Burgess: Next, let's consider the strength of Old Ways' claim under the Free Exercise clause. Old Ways will argue that the Building Authority's policy infringes on its



freedom to exercise its religion. When a law is designed to interfere with the exercise of religion, the court will apply the strict scrutiny analysis. On the other hand, laws of general applicability that unintentionally burden religion do not raise Free Exercise concerns.

Lee Burgess: The Building Authority could try and argue that its policy is one of general applicability, and any burden on the Old Ways Fellowship is unintentional. This is not likely to be persuasive, however, because the law explicitly bars religious displays and symbols. On its face, the law is designed to interfere with the exercise of religion – that is, the sharing of religious symbols and messages. A court would therefore apply strict scrutiny to determine if the law violates the Free Exercise Clause.

Lee Burgess: Remember, under a strict scrutiny analysis the government must show, (1) the law is narrowly tailored; (2) to achieve a compelling government interest; and (3) that the least restrictive means was used. The stated purpose of the policy is to avoid the appearance of government endorsement of religion. The Building Authority will argue that this is a compelling government interest, and a court is likely to agree. However, it is not clear that the policy is narrowly tailored, nor that it uses the least restrictive means to achieve that compelling government interest.

Lee Burgess: The Building Authority may argue that the law is narrowly tailored, because any religious display or symbol on government property might suggest government endorsement of that religion. However, we know that the Old Ways Fellowship offered to put up a disclaimer saying that the display was not endorsed by the government. The Building Authority's rejection of this proposal is a strong indication that it did not use the least restrictive means to achieve its stated interest. Because the Building Authority did not use the least restrictive means possible, it will fail the strict scrutiny test, and a court will likely find it is in violation of the Free Exercise Clause of the Constitution.

Lee Burgess: Now let's try one more example. This question is modified from the [February 2011 California bar exam](#):

Lee Burgess: "Charles enlisted in the United States Army and had risen to the rank of Captain. Shortly after that promotion, however, Charles began to rethink his previous religious, philosophical, and political views.



- Lee Burgess: He had previously listed his religious preference on his Army records as 'Christian'. Now he changed that to 'Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You'.
- Lee Burgess: Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B. Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy.
- Lee Burgess: Charles wishes to raise a defense against the refusal to deploy charge based solely on, (1) the Free Exercise Clause; and (2) the Establishment Clause of the First Amendment to the United States Constitution."
- Lee Burgess: So, let's start with the Establishment Clause. Remember, the first question is whether the law discriminates against one religion over another. If so, strict scrutiny applies. In this case, there is no evidence suggesting that the law requiring military personnel to accept any assignment is discriminating against any one religion.
- Lee Burgess: Next, then, the court will apply the Lemon Test. The first question is whether the law has a secular purpose. The purpose of this law does not appear to have anything to do with religion, and instead seems intended to maintain order in the military by ensuring military personnel go where they are instructed. Therefore, there is a secular purpose and the government clears the first prong of the test.
- Lee Burgess: The second element of the test is whether the primary effect is to advance or inhibit religion. The effect of the law is to require someone in the military to accept any assignment, regardless of religious preferences. An individual's religious beliefs about a particular assignment are irrelevant. Again, the primary effect of the law seems to be to maintain order and ensure the smooth functioning of the military. The government will therefore likely succeed on this prong as well.
- Lee Burgess: Finally, there must not be excessive government entanglement with religion. Charles may point out that the military maintains a list of the religious preferences of its members, suggesting some degree of entanglement. However, there does not appear to be any connection between this law and religion. On the contrary, as already mentioned, this law very much does not take religion into account – all military personnel must accept any assignment,



regardless of their religion. Therefore a court would likely conclude that there is not excessive government entanglement.

Lee Burgess: A court would likely hold that the federal law clears the Lemon Test, meaning Charles will be unlikely to succeed on his Establishment Clause claim.

Lee Burgess: Let's turn next to Free Exercise. Remember, when a law is designed to interfere with the exercise of religion, the court will apply a strict scrutiny analysis. On the other hand, laws of general applicability that unintentionally burden religion do not raise Free Exercise concerns.

Lee Burgess: In this case, the government has a strong argument that this law is one of general applicability. The law requires all military personnel to accept any assignment. It is not designed to interfere with, or indeed have anything to do with religion. While application of the law may have interfered with Charles's religious beliefs, that burden was unintentional. Because this was a law of general applicability, Charles is unlikely to succeed on his Free Exercise claim.

Lee Burgess: Well, that's all we have for you today. Hopefully you found these hypos to be helpful examples of how to work through the Establishment Clause and the Free Exercise Clause on an exam. Oftentimes, there is a lot of ambiguity in these questions! So, make sure on any exam, you argue both sides.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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