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## The Domestic Establishment Clause

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# The Domestic Establishment Clause

## **Cover Page Footnote**

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Bans, Borders and New Americans: Immigration Law In the Trump Administration

# The Domestic Establishment Clause

Josh Blackman\*

## INTRODUCTION

Two decades ago, immigration scholar Enid F. Trucios-Haynes observed in the *Georgetown Immigration Law Journal* that applying the Supreme Court's Establishment Clause jurisprudence to long-standing immigration laws "is particularly awkward."<sup>1</sup> "Under either the *Lemon* test or the related 'endorsement' test, a facially neutral law with a non-secular purpose is constitutionally suspect. A law that prefers religion over non-religion is very likely unconstitutional. A law that overtly prefers certain religious sects over others is almost certainly unconstitutional."<sup>2</sup> Yet, immigration law routinely does all of the above, and the courts have not expressed even the slightest concern for the Establishment Clause—that was until 2017.

Over the past year, several courts have relied on the Establishment Clause to enjoin President Trump's entry bans.<sup>3</sup>

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\* Associate Professor, South Texas College of Law Houston. This Article, published as part of the Roger Williams University Law Review's 2017 symposium, *Borders, Bans, and New Americas: Immigration Law in the Trump Administration*, is based on my prior contributions to the *Lawfare* blog.

1. Enid Trucios-Haynes, *Religion and the Immigration and Nationality Act: Using Old Saws on New Bones*, 9 GEO. IMMIGR. L.J. 1, 40 (1995).

2. Josh Blackman, *The Legality of the 3/6/17 Executive Order, Part III: The Establishment Clause*, LAWFARE (Mar. 15, 2017, 7:28 PM), <https://lawfareblog.com/legality-3617-executive-order-part-iii-establishment-clause>.

3. See, e.g., *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.), *vacated and remanded*, 138 S. Ct. 353 (2017); *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1123 (D. Haw. 2017); *Int'l Refugee Assistance*

None of these decisions showed any hesitation before extending the Supreme Court's Establishment Clause jurisprudence to the foreign context, with respect to the denial of entry and visas to aliens abroad.<sup>4</sup> Judge Jay Bybee, dissenting from the denial of rehearing en banc in *Washington v. Trump*, challenged the "unreasoned assumption that courts should simply plow Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world."<sup>5</sup> Indeed, the Federal Government's brief stressed that Supreme Court case law "addressing domestic questions involving local religious displays, school subsidies, and the like . . . have no proper application to foreign-policy, national-security, and immigration judgments of the President."<sup>6</sup>

Judge Bybee and the government are correct. The Supreme Court's Establishment Clause precedents concerning domestic matters—such as school prayer and public displays of religion—have had no place in the realm of foreign affairs and national security. The lower courts should have hesitated before extending this doctrine to the immigration context. If the Supreme Court opts to extend this doctrine, the Justices will have to account for the myriad of other ways in which the government countenances the use of religion in the immigration context.

#### I. PREFERENCE FOR FOREIGN RELIGIOUS MINISTERS

A fitting starting point is a case many lawyers are familiar with: *Rector, Etc. of Holy Trinity Church v. United States*.<sup>7</sup> Justice Brewer's 1892 decision is still studied for the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the

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Project v. Trump, 241 F. Supp. 3d 539, 564 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir.), and *vacated and remanded*, 138 S. Ct. 353 (2017); *Aziz v. Trump*, 234 F. Supp. 3d 724, 738 (E.D. Va. 2017).

4. See Blackman, *The Legality of the 3/6/17 Executive Order, Part III: The Establishment Clause*, *supra* note 2.

5. *Washington v. Trump*, 858 F.3d 1168, 1178 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc).

6. Josh Blackman, *IRAP v. Trump: Applying the "Presumption of Regularity" in "Uncharted Territories"*, LAWFARE (May 9, 2017, 10:30 AM), <https://www.lawfareblog.com/irap-v-trump-applying-presumption-regularity-uncharted-territories>.

7. 143 U.S. 457 (1892).

intention of its makers.”<sup>8</sup> But the facts that gave rise to this canon of construction are far more relevant to our discussion of the Establishment Clause.

Congress had enacted a statute that prohibited any “corporation” from assisting immigrants in entering the United States to perform labor.<sup>9</sup> The plain text of the law would apply to an incorporated church.<sup>10</sup> Yet, the *Holy Trinity* Court concluded that Congress did not have in mind “any purpose of staying the coming into this country of ministers of the gospel,” because “preaching” is not “labor,” as the term was commonly understood.<sup>11</sup> Indeed, as a general matter, the Court found that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.”<sup>12</sup> The opinion cites the godly natures of Columbus’s voyage, the First Charter of Virginia, the Mayflower Compact, and the Declaration of Independence.<sup>13</sup> Under the Supreme Court’s modern jurisprudence, such a construction would raise Establishment Clause concerns, and so the statute should be read to avoid that outcome; indeed, when the plain text compels that result, the *Holy Trinity* Court’s decision becomes even less justifiable. But such concerns were nonexistent, as the Establishment Clause lacked any teeth in 1892.

By all accounts, however, Justice Brewer had in fact ascertained Congress’s intent. Since 1952, when Congress codified the Immigration and Nationality Act, our law has afforded a “special immigrant” status to aliens that seek to enter the United States “solely for the purpose of carrying on the vocation of a minister of that religious denomination.”<sup>14</sup> Through this law, Congress bestows a benefit exclusively based on the fact that the alien is a minister. Atheists need not apply. One scholar observed that the “legislative history of the 1952 amendment to the Federal Immigration Act is replete with references to religious purpose and motivation,” referencing the

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8. *Id.* at 459.

9. *Id.* at 458.

10. *See id.*

11. *Id.* at 463.

12. *Id.* at 465.

13. *Id.* at 465–67.

14. 8 U.S.C. § 1101(a)(27)(C)(ii)(I) (2012).

role religion plays in “shaping American culture.”<sup>15</sup> The purpose and effect of this provision is unmistakable: advancing religion. This background is dispositive for purposes of the *Lemon* test, which requires that a statute must have a “secular legislative purpose.”<sup>16</sup>

Countless Board of Immigration Appeals decisions have construed this provision; none raise even the slightest Establishment Clause doubts. For example, the *In re Balbin* court had to determine whether, under an earlier version of the statute, the church in fact *needed* the minister’s services.<sup>17</sup> Such an analysis, which invites excessive entanglement, would be verboten under the *Lemon* test, which was decided the prior year. Yet, the case raised no constitutional objections.<sup>18</sup>

Were the constitutional doubts of the 1952 statute not strong enough, the implementing regulations that define “vocation” are even less neutral:

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of vocations include nuns, monks, and religious brothers and sisters.<sup>19</sup>

This regulation was deliberately framed to mirror religious structures similar to that of the Roman Catholic Church, where officials take a “lifetime commitment,” and not based on other faiths where spiritual leaders may have different, less-permanent approaches to devotion.<sup>20</sup> More importantly, Professor Trucios-Haynes observed, “[n]ontraditional religions, that are not

15. Brent Baker, *The Special Immigrant Exception for Religious Ministers: An Establishment Clause Analysis*, 7 B.C. THIRD WORLD L.J. 97, 101 (1987).

16. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). See Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351, 356 (2010).

17. 14 I&N Dec. 165, 166 (Reg. Comm. 1972).

18. See *In re Balbin*, 14 I&N Dec. 165.

19. 8 C.F.R. § 214.2(r)(3) (2017).

20. Trucios-Haynes, *supra* note 1, at 51.

similarly organized in comparison to religions containing nuns, monks, religious brothers, and sisters, must explain their religious doctrine.”<sup>21</sup> As a result, she noted, “[t]hese organizations are subject to a far more searching inquiry by bureaucratic decisionmakers.”<sup>22</sup> Non-Catholics, whose devotion need not be a lifelong commitment in the same sense as monks or nuns, are disadvantaged under our immigration laws. Indeed, Professor Trucios-Haynes’s study of the legislative history reveals a preference “to permit entry of members of certain religious denominations, i.e., Roman Catholic members, but to limit the entry of members of other religious denominations.”<sup>23</sup> In any other context, were Congress to so nakedly prefer religion over non-religion, and Catholics over non-Catholics, the law would have already been enjoined. Yet, these provisions have remained in effect for over half a century, without raising *any* judicial doubts. Indeed, recent decisions considering the regulation’s legality on other grounds did not even mention the Establishment Clause.<sup>24</sup>

Though the vocation statute favors religious aliens over non-religious aliens, it is facially non-denominational. That is, on its face, the law does not prefer Catholic priests over Jewish rabbis. The same cannot be said for the Lautenberg Amendment.<sup>25</sup>

## II. PREFERENCE FOR JEWISH AND CHRISTIAN REFUGEES

During the late 1980s, as more Jewish people were permitted to emigrate from the Soviet Union, there was a movement afoot in the Reagan Administration to “rethink[] the almost automatic granting of refugee status” to these aliens.<sup>26</sup> In 1989, Senator Frank Lautenberg (D-NJ) and Representative Bruce Morrison (D-CT) introduced a legislative response, that would become known as the Lautenberg Amendment.<sup>27</sup> Section 599D of the Foreign

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21. *Id.*

22. *Id.*

23. *Id.* at 52–53.

24. *See, e.g.*, *Shalom Pentecostal Church v. Acting Sec’y U.S. Dep’t of Homeland Sec.*, 783 F.3d 156, 159–60 (3d Cir. 2015).

25. Victor Rosenberg, *Refugee Status for Soviet Jewish Immigrants to the United States*, 19 *TUORO L. REV.* 419, 433–34 (2003).

26. *Id.* at 427.

27. *Id.* at 433.

Operations, Export Financing, and Related Programs Appropriations Act stated that “[a]liens who are (or were) nationals and residents of the Soviet Union and who are Jews or Evangelical Christians shall be deemed” to be subject to persecution, unless there was sufficient evidence to the contrary.<sup>28</sup> In other words, the law established that by virtue of a Soviet’s religion—Judaism or Evangelical Christianity—courts should presume the alien’s claim of persecution. In such cases, the burden is on the government to establish that no such persecution is present.<sup>29</sup> The Amendment reverses the usual framework, whereby in most cases, the burden is on the applicant to establish a claim of persecution.<sup>30</sup> Several members of Congress opposed the bill because it granted preferential treatment to Soviet Jews; but none objected that favoring Soviet Jews and Evangelicals would run afoul of the Establishment Clause.<sup>31</sup> Ultimately, the Amendment passed 97–0 in the Senate and 358–44 in the House.<sup>32</sup>

As a general matter, many core aspects of refugee law raise Establishment Clause problems under the *Lemon* test.<sup>33</sup> For example, “determinations of whether an alien faces a ‘well-founded fear of prosecution’ based on religion unnecessarily entangles the government in deciding the contours of spiritual doctrines.”<sup>34</sup> The Lautenberg Amendment, however, does not merely prefer claims of religious-alien over non-religious aliens, but instead grants preferential treatment to two specific sects within the Soviet Union: Jews and Evangelicals.<sup>35</sup> There is no mistaking the purpose of the law. And its effect was patent. As a result of the Amendment, the rate of applicants interviewed in

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28. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101–167, § 599D(b)(2)(A), 103 Stat. 1195, 1262 (1989).

29. *See id.* § 599D(b)(1), 103 Stat. at 1262.

30. *See Rosenberg, supra* note 25, at 434.

31. *See id.* at 434–35.

32. *Id.* at 435.

33. *See Blackman, This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose, supra* note 16.

34. Blackman, *The Legality of the 3/6/17 Executive Order, Part III: The Establishment Clause, supra* note 2.

35. Foreign Operations, Export Financing, and Related Programs Appropriation Act, 1990, Pub. L. No. 101–167, § 599D(b)(2)(A), 103 Stat. 1195, 1262 (1989).



Moscow that were approved for refugee status increased from under 78% to 90%, which in effect, raised the prospects of Jews and Evangelicals to seek refugee status.<sup>36</sup> This policy is facially invalid under the *Lemon* test.<sup>37</sup> Yet, I could not locate even the slightest suggestion that the Lautenberg Amendment was unconstitutional.

### III. THE DOMESTIC ESTABLISHMENT CLAUSE HAS NOT APPLIED IN FOREIGN CONTEXTS

The Establishment Clause has not applied with full force to immigration law. This observation is buttressed by the now-familiar 8 U.S.C. § 1152(a)(1)(A).<sup>38</sup> Enacted as part of the landmark 1965 Immigration and Nationality Act (INA), this provision was designed to root out discriminatory quotas in immigration policy.<sup>39</sup> It provides:

Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.<sup>40</sup>

If you read it quickly, you may gloss over the fact that there is a critical element missing from the list of protected classes: religion. That choice was deliberate. It is perfectly permissible under the statute to discriminate on the basis of religion when deciding whether to issue immigrant visas. (Non-immigrant visas *can* be restricted based on nationality, or any other basis for that matter).

Admittedly, no court has ever confronted this question. However, this uninterrupted, uncontroverted practice,<sup>41</sup> should at least make courts pause before extending *Lemon* to this context

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36. Rosenberg, *supra* note 25, at 440.

37. See Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose*, *supra* note 16, at 356–57.

38. 8 U.S.C. § 1152(a)(1)(A) (2012).

39. *Id.*

40. *Id.*

41. The Pocket Veto Case, 279 U.S. 655, 689 (1929); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014).

over which Congress has plenary power over naturalization, and the President has heightened concerns over foreign affairs. The courts that have invalidated the travel ban have shown no awareness of this limitation on the domestic Establishment Clause.<sup>42</sup>

#### CONCLUSION

It is not surprising that Establishment Clause challenges to immigration clauses have not arisen. Imagine if an American citizen, who was related to a Buddhist living in the Soviet Union, challenged the Lautenberg Amendment as an unconstitutional establishment of religion because it deprived his relative of the opportunity to receive one of the statutorily-limited number of refugee slots. Such a suit would have been tossed out of court. Or, a minister who was denied a visa brings suit because the vocational statute impermissibly favors Catholic priests. Likewise, that suit would have no legs to stand on. But, at bottom, this is the gravamen of the latest round of litigation concerning the travel ban.

Courts should be very hesitant to apply the *Lemon* or endorsement test to the travel bans. Doing so would open the door to future constitutional challenges to countless provisions of the INA that grant preferential treatment to aliens of certain religious sects. And, if the Supreme Court opts to extend this doctrine, the Justices will have to account for the myriad other ways in which the government countenances the use of religion in the immigration context.

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42. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594 (4th Cir.), *vacated and remanded*, 138 S. Ct. 353 (2017); *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724, 727 (E.D. Va. 2017).