

A state law required vacant public school buildings to be sold at auction to the highest bidder. A church in a city located in the state wanted to acquire larger facilities for its school. The city's school board proposed a new state law that would authorize it to sell a vacant public school building, at a price below its fair market value, to the church for use as its school.

If enacted, would this law be constitutional?

- A. No, because a statute specially authorizing the sale of the building without competitive bidding would violate the equal protection clause of the Fourteenth Amendment.
- B. No, because the transfer of the building to the church under these circumstances would constitute an establishment of religion prohibited by the First and Fourteenth Amendments.
- C. Yes, because surplus government property is not subject to the limitations imposed by the establishment clause as incorporated into the Fourteenth Amendment.
- D. Yes, because the law would not primarily or substantially support the religious activities of the church.

Explanation:

Establishment clause tests

Test	Requirements	Applicability
Historical*	<ul style="list-style-type: none">Longstanding tradition & historical foundation	Default
Endorsement	<ul style="list-style-type: none">No appearance that government endorses religion	Public displays or monuments (eg, holiday displays)
Coercion	<ul style="list-style-type: none">No forced conformity with religious belief or practice	Public schools (eg, convocation prayer)

*Courts may apply strict scrutiny if government directly benefits/burdens religion.

The First Amendment **establishment clause**, applied to the states through the Fourteenth Amendment, compels government **neutrality toward religion**. Laws that purportedly favor (or disfavor) a particular religion are generally reviewed under the historical test. But courts may forego this test and apply the more stringent **strict scrutiny** test when the law **expressly impacts a religion**. Under strict scrutiny, the law is invalid unless the government proves that the law is **necessary** to achieve a **compelling government interest**.

Here, the proposed law expressly favors the church by allowing it (but no others) to purchase a vacant public school building at a below-market price. The state may have an interest in reusing vacant schools for educational purposes. But since there is no indication that the building must be transferred to the church at a lower price to achieve that interest, the proposed law would be an unconstitutional establishment of religion.

(Choice A) The state-authorized sale of the building without competitive bidding can be challenged under the **equal protection clause** since it discriminates against other buyers. But it would *not violate* that clause since it does not discriminate against a protected class or substantially impact a fundamental right.

(Choice C) The establishment clause does not contain an exception for surplus government property.

(Choice D) The primary or substantial effect of the law would be considered only if the court applied the *Lemon* test instead of strict scrutiny. But the *Lemon* test is no longer used in establishment clause challenges.

Educational objective:

Establishment clause challenges are generally reviewed under the historical test. But strict scrutiny can be used instead when a law expressly impacts a religion. In that case, the law is

invalid unless the government proves that the law is necessary to achieve a compelling government interest.

References

- Larson v. Valente, 456 U.S. 228, 246 (1982) (explaining that strict scrutiny applies to laws that aid or prefer one religion).
- Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2428 (2022) (holding that challenges based on the establishment clause "must be interpreted by reference to historical practices and understandings").

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