



Religious Freedom

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Background

The First Amendment to the U. S. Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The U. S. Supreme Court has interpreted this provision as guaranteeing two separate rights: (1) the right to live in a society where the government does not sponsor an official religion that dictates what God citizens must worship or what church they must attend; and (2) the right to exercise one's own religious faith in accordance with his or her conscience free from governmental intrusion. The first right is protected by the Establishment Clause of the First Amendment, while the second right is protected by the Free Exercise Clause of the First Amendment. Both clauses have their origins in American colonial history, and that history sheds light on the subsequent development of the First Amendment by state and federal courts.

The Establishment Clause

History Behind the Establishment Clause

Prior to the American Revolution, the English parliament designated the Anglican Church as the official church of the England and the American colonies. The church was supported by [TAXATION](#), and English citizens were required to attend services. No marriage or baptism was sanctioned outside the church. Religious minorities who failed to abide by the strictures of the church were forced to endure civil and criminal penalties, including banishment and death. Some American colonies were also ruled by theocrats, such as the Puritans in Massachusetts.

The English and colonial experiences influenced the Founding Fathers, including Thomas Jefferson and James Madison. Jefferson supported a high "wall of separation" between church and state and opposed religious interference with the affairs of government. Madison, conversely, opposed governmental interference with matters of religion. For Madison, the establishment of a national church differed from the Spanish Inquisition only in degree, and he vociferously attacked any legislation that would have led in this direction. For example, Madison fought against a Virginia bill that would have levied taxes to subsidize Christianity.

The Founding Fathers' concerns about the relationship between church and state found expression in the First Amendment. Despite the unequivocal nature of its language, the Supreme Court has never interpreted the First Amendment as an absolute prohibition against all laws concerning religious institutions, religious symbols, or the exercise of religious faith. Instead, the Court has turned for guidance to the thoughts and intentions of the

Founding Fathers when interpreting the First Amendment, in particular the thoughts and intentions of its primary architect, James Madison.

But Madison's views have not produced a uniform understanding of religious freedom among the Supreme Court's justices. Some justices, for example, have cited Madison's opposition to the Virginia bill subsidizing Christianity as [EVIDENCE](#) that he opposed only discriminatory governmental assistance to particular religious denominations but favored non-preferential aid to cultivate a diversity in faiths. Thus, the Framers of the First Amendment left posterity with three considerations regarding religious establishments: (1) a wall of separation that protects government from religion and religion from government; (2) a separation of church and state that permits non-discriminatory governmental assistance to religious groups; and (3) governmental assistance that preserves and promotes a diversity of religious beliefs.

Case Law Interpreting the Establishment Clause

The Supreme Court attempted to incorporate these three considerations under a single test in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In *Lemon* the Court held that state and federal governments may enact legislation that concerns religion or religious organizations so long as the legislation has a secular purpose, does not have the primary effect of advancing or inhibiting religion, and does not otherwise foster excessive entanglement between church and state. Under this test, the Supreme Court held that the First Amendment prohibits schools from beginning each day with a 22-word, non-denominational prayer. *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Such a prayer would be tantamount to the government sanctioning religion at the expense of agnosticism or atheism, the Court said, something not permitted by the Establishment Clause.

Similarly, the Supreme Court struck down a clergy-led prayer at a public school graduation ceremony as violative of the First Amendment. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). By contrast, lower federal courts are split over the issue of whether a student-led, non-denominational prayer at a graduation ceremony violates the Establishment Clause, with some cases finding the prayers unconstitutional because they are initiated on school grounds at a school-sponsored activities and other cases finding no constitutional violation because the prayers are initiated by students and not public employees. However, the Supreme Court has ruled that the First Amendment does permit state legislatures to open their sessions with a short prayer each day. *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). The Supreme Court concluded that history and tradition have secularized this otherwise religious act.

The Court has produced seemingly inconsistent results in other areas of First Amendment law as well. In one case the Court permitted a municipality to include a nativity scene in its annual Christmas display, *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), while in another case it prohibited a county courthouse from placing a cross on its staircase during the holiday season. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). In *Allegheny* the Court said that there was nothing in the county courthouse to indicate that the cross was anything other than a religious display, while in *Lynch* the Court said that the nativity scene was part of a wider celebration of the winter holidays.

The desire to avoid excessive entanglement between church and state has also produced a body of law that often turns on subtle distinctions. On the one hand, the Supreme Court ruled that public school programs violate the Establishment Clause when they allow public school students to leave class early for religious training in classrooms located on taxpayer-supported school property. *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948). On the other hand, such programs pass constitutional muster if the students leave class early for religious training off school grounds, where all of the program's costs are paid by the religious organizations. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

The Free Exercise Clause

History Behind the Free Exercise Clause

The Establishment Clause and the Free Exercise Clause represent opposite sides of the same issue. Where the Establishment Clause focuses on governmental action that would create, support, or endorse an official national religion, the Free Exercise Clause focuses on the pernicious effects that governmental action may have on an individual's religious beliefs or practices. Like the Establishment Clause, the Free Exercise Clause was drafted in response to the Founding Fathers' desire to protect religious minorities from persecution.

The Founding Fathers' understanding of the Free Exercise Clause is illustrated in part by the New York Constitution of 1777, which provided that "the free exercise and enjoyment of religious . . . worship, without [DISCRIMINATION](#) or preference, shall forever . . . be allowed . . . to all mankind." (WEAL, v. 5, p. 37) However, the same constitution cautioned that "the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." The New Hampshire Constitution of 1784 similarly provided that "[e]very individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt . . . in his person, liberty or estate for worshipping God" in a manner "most agreeable" to those dictates, "provided he doth not disturb the public peace." (WEAL, v. 5, p.37).

Case Law Interpreting the Free Exercise Clause

These eighteenth-century state constitutional provisions not only provide insight into the Founding Fathers' original understanding of the Free Exercise Clause, they embody the fundamental tenants of modern First Amendment [JURISPRUDENCE](#). The Supreme Court has identified three principles underlying the Free Exercise Clause. First, no individual may be compelled by law to accept a particular religion or form of worship. Second, all individuals are constitutionally permitted to freely choose a religion and worship in accordance with their conscience and spirituality without interference from the government. Third, the government may enforce its criminal laws by prosecuting persons whose religious practices would thwart a compelling societal interest.

Only in rare instances is a law that infringes upon someone's religious beliefs or practices supported by a compelling state interest. The Supreme Court has held that no compelling societal interest would be served in offending someone's deeply held religious beliefs with a law coercing members of the Jehovah's Witnesses to salute the American flag in public schools (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)), a law denying unemployment benefits to Seventh Day Adventists who refuse to work on Saturdays (*Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)), or a law requiring Amish families to keep their children in state schools until the age of sixteen (*Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). However, a compelling governmental interest is served by the Internal Revenue System (**IRS**), such that no member of any religious sect can claim exemption from paying taxes. *U. S. v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

A different question is presented when the government disputes whether a particular belief or practice is actually religious in nature. In some instances the Supreme Court is required to determine what constitutes a "religion" for the purposes of the First Amendment. For example, this determination occurs when conscientious objectors resist the government's attempt to conscript them into military service during wartime. Some draft resisters object to war on moral or ethical grounds unrelated to orthodox or doctrinal religions. If a conscientious objector admits that he is atheistic or agnostic, the government asks, how can he or she rely on the First Amendment to avoid conscription when it protects the free exercise of religion?

In effort to answer this question, the Supreme Court has explained that the government cannot "aid all religions against non-believers" any more than it can aid one religion over another. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). So long as a non-believer holds a sincere and meaningful belief that occupies a place in that person's life parallel to the place held by God in a believer's life, then it qualifies as a religious belief under the First Amendment. As to conscientious objectors, the Court has ruled that the First Amendment will insulate them from criminal prosecution if they resist the draft based on "deeply and sincerely" held beliefs that "are purely ethical or moral in source and content but that nevertheless impose . . . a duty of conscience to refrain from participating in any war at any time." *Welsh v. U. S.*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970). However, a religious, moral, or ethical belief that manifests itself in a person's selective opposition to only certain wars or military conflicts is not protected by the Free Exercise Clause. The same holds true for a religious, moral, or ethical beliefs that are insincere.

In 1993 Congress attempted to add to the body of law protecting the free exercise of religion by enacting the Religious Freedom Restoration Act (RFRA), which provided that the "[g]overnment shall not substantially burden a person's exercise of religion," unless in doing so it furthers "a compelling governmental interest" and "is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(a). Congress enacted RFRA in response to *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, (1990), a Supreme Court decision that upheld the denial of [UNEMPLOYMENT COMPENSATION](#) claims made by two employees who had been fired for ingesting an illegal drug during a religious ceremony. In passing the law Congress made a specific finding that the Supreme Court in *Smith* "virtually eliminated" any requirement that the government provide a compelling justification for the burdens it places on the exercise of religion. 42 USCA § 2000bb. Congress hoped that RFRA would restore that requirement.

The constitutionality of RFRA was immediately challenged in a flurry of cases, one of which eventually made its way to the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Acknowledging that section 5 of the Fourteenth Amendment grants Congress the authority to enforce the First Amendment through measures that "remedy" or "deter" constitutional violations, the Supreme Court said that this authority did not include the power to define "what constitutes a constitutional violation." Yet this is exactly what Congress attempted to do by enacting RFRA, the Court said. Congress cannot effectively overrule Supreme Court precedent, the Court continued, without violating the separation of powers and other constitutional principles vital to maintaining the balance of power between the state and federal governments. The powers of the legislative branch are "defined and limited," the Court concluded, and only the judicial branch of government is constitutionally endowed with the authority to interpret and apply the First Amendment or any other provision of the federal Constitution. Thus, RFRA was declared unconstitutional and the precedential value of *Smith* was restored.

State Laws Protecting Religious Freedom

The Free Exercise and Establishment Clauses of the First Amendment have been made applicable to the states through the Fourteenth Amendment. In a series of cases the Supreme Court has ruled that the rights guaranteed by the First Amendment establish the minimum amount of religious freedom that must be afforded to individuals in state or federal court. States may provide more religious freedom under their own constitutions, but not less. Below is a sampling of state court decisions decided at least in part based on their own state constitution's guarantee of religious freedom.

ALABAMA: The state's constitutional provision guaranteeing freedom of religion did not bar the court from resolving a dispute between congregational factions over the title to church property, even though spiritual issues arguably prompted the congregation's dispute, since the case involved civil conflicts of trusteeship and property ownership and required the court to review church records and incorporation documents without

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delving into spiritual matters. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 3. *Murphy v. Green*, 794 So.2d 325 (Ala. 2000).

ARIZONA: A residential picketing [STATUTE](#) did not facially infringe upon the religious freedom guaranteed by the state and federal constitutions as they were applied to an [ABORTION](#) protestor who was convicted for protesting abortion in a residential neighborhood. Even though her protest was motivated by a deeply held religious belief, the statute did not single out religious picketing or religious demonstrations for prohibition. U.S.C.A. Const.Amend. 1; A.R.S. Const. Art. 20, par. 1; A.R.S. § 13-2909. *State v. Baldwin*, 184 Ariz. 267, 908 P.2d 483 (Ariz.App. Div. 1 1995)

CALIFORNIA: In guaranteeing the free exercise of religion "without discrimination or preference," the plain language of the state constitution ensures that the state neither favor nor discriminate against religion. West's Ann.Cal. Const. Art. 1, § 4. *East Bay Asian Local Development Corp. v. California*, 24 Cal.4th 693, 13 P.3d 1122, 102 Cal.Rptr.2d 280 (Cal. 2000).

FLORIDA: Inherent in parents' authority over their unemancipated children living in their parents' household is the parents' right to require their children to attend church with them as part of the children's religious training, and neither the state nor federal constitutions entitle unemancipated minors to prevent such parent-mandated religious training on grounds that it violates the minors' religious freedom. U.S.C.A. Const.Amend. 1; West's F.S.A. Const. Art. 1, § 3. *L.M. v. State*, 610 So.2d 1314 (Fla.App. 1 Dist. 1992).

ILLINOIS: A state statute permitting certain burials on Sundays and legal holidays did not abridge the union members' freedom to contract. Nor did it violate the federal and state constitutional prohibitions against impairment of contractual obligations, since the statute's provisions were narrowly drawn to permit free exercise of religious rights guaranteed by the state constitution while allowing labor to restrict its working schedules accordingly. S.H.A. ch. 21, ¶ 101 et seq. *Heckmann v. Cemeteries Ass'n of Greater Chicago*, 127 Ill.App.3d 451, 468 N.E.2d 1354, 82 Ill.Dec. 574 (Ill.App. 1 Dist. 1984).

MICHIGAN: The Michigan CIVIL RIGHTS Act's prohibition on housing discrimination based on marital status did not violate the state constitution's guarantee of religious freedom, and thus the act was violated when two landlords refused to rent their apartments to unmarried couples, even though their refusal was based on religious grounds. M.C.L.A. Const. Art. 1, § 4; M.C.L.A. § 37.2502(1). *McCready v. Hoffius*, 459 Mich. 131, 586 N.W.2d 723 (Mich. 1998).

MISSOURI: State and federal constitutions guarantee of religious freedom entitled a taxpayer to delete every reference to God on the state's tax form before taking the oath or affirmation required by the form. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, §§ 5, 7; V.A.M.S. § 137.155. *Oliver v. State Tax Commissioner of Missouri*, 37 S.W.3d 243 (Mo. 2001).

MONTANA: The freedom of religion provisions set forth in the state constitution protect the freedom to accept or reject any religious doctrine, including religious doctrines relating to abortion, and the right to express one's faith in all lawful ways and forums. Const. Art. 2, §§ 5, 7. *Armstrong v. State*, 296 Mont. 361, 989 P.2d 364 (Mont. 1999).

NEBRASKA: Ex parte communications in which a trial judge during a capital murder case asked the jurors to join hands, bow their heads, and say words to the effect of "God be with us" did not infringe on the defendant's religious rights under the state or federal constitutions, since the defendant's rights to freedom of religion and to worship as he pleased did not suffer in any way. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 4. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (Neb. 2000).

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NEW HAMPSHIRE: The state's constitutional provision guaranteeing freedom of religion prohibited the state from revoking a psychologist's license for his religious views but did not prohibit revocation for acts that otherwise constituted unprofessional conduct, regardless of their religious character. Thus, the court upheld the state's revocation of the psychologist's license on the grounds that he had provided incompetent therapy to a patient, even though part of the therapy involved reading the Bible. Const. Pt. 1, Art. 5. Appeal of Trotzer, 143 N.H. 64, 719 A.2d 584 (N.H. 1998).

NEW YORK: The state constitution's guarantee of religious freedom entitled a state correctional facility inmate to participate in all Jewish religious observances open and available to any other inmate, even though the inmate was not recognized as Jewish by the Jewish chaplain at the facility. McKinney's Const. Art. 1, § 3; McKinney's Correction Law § 610. Thomas v. Lord, 174 Misc.2d 461, 664 N.Y.S.2d 973, 1997 N.Y. Slip Op. 97576 (N.Y.Sup., 1997).

OHIO: A court order requiring that a noncustodial parent pay 40 percent of his child's tuition at a private Catholic school did not violate the Establishment Clause of the First Amendment or the religious freedom provision of the state constitution. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 7. Smith v. Null, — Ohio App.3d —, — N.E.2d —, 2001 WL 243419 (Ohio App. 4 Dist. 2001).

TEXAS: A state court could not hear a lawsuit alleging that a church minister and his wife negligently or intentionally misapplied the church's doctrine in attempting to drive out demons from plaintiff's minor daughter, since the lawsuit would involve a searching inquiry into the church's beliefs and the validity of those beliefs, an inquiry that would infringe up the defendants' religious freedom. **IN RE** Pleasant Glade Assembly of God, 991 S.W.2d 85 (Tex.App.-Fort Worth 1998).

VERMONT: The state's constitution expresses two related, but different, concepts about the nature of religious liberty: no governmental power may interfere with or control an individual's free exercise of religious worship, and no person can be compelled to attend or support religious worship against that person's conscience. Const. C. 1, Art. 3. Chittenden Town School Dist. v. Department of Educ., 169 Vt. 310, 738 A.2d 539 (Vt. 1999).

WASHINGTON: Requiring a church to apply for a conditional use permit in a rural estate **ZONING** district, while requiring a county to reduce or waive the application fee following a showing of the church's inability to pay, was not an impermissible burden on the free exercise of religion guaranteed by the state and federal constitutions. Open Door Baptist Church v. Clark County, 140 Wash.2d 143, 995 P.2d 33 (Wash. 2000). U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 11.

Additional Resources

American Jurisprudence. West Group, 1998.

West's Encyclopedia of American Law. West Group, 1998.

U.S. Constitution: First Amendment. Available at:
<http://caselaw.lp.findlaw.com/data/constitution/amendment01>

Organizations

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