

GREAT AMERICAN COURT CASES

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FREEDOM OF RELIGION

Religious Belief

Among the unique characteristics of being human is the ability to create and communicate abstract thoughts such as religious beliefs. For much of human history religion has served as a means to socially unify individuals into groups. Early in the human experience, religion likely served to explain natural events and create order out of the world. The doctrine of salvation evolved based on the belief that individuals are in danger, either physically or spiritually, from which they must be saved. Religion thus served to order and regulate peoples' lives in addition to defining their place in the natural world. Religion has also served as an expression of a community's moral values and collective beliefs. Religious doctrines explain how the world is and how it should be.

Through the Constitution the country's founders created a world in which religion could flourish, but not dominate social order. But, at the time the Constitution was drafted, this country had a relatively homogeneous, mostly Protestant Christian population. Religion was primarily a set of beliefs and practices associated with a divine being, and was thereby theistic in nature. In the increasingly secular (non-religious) world of twentieth century Western Society, freedom of religion gained a different meaning than in eighteenth century America. The eight major religions practiced to various degrees in the United States by the late twentieth century were Christianity, Judaism, Islam, Buddhism, Confucianism, Hinduism, and Taoism. Though state and federal laws cannot interfere with such diverse religious beliefs and opinions, laws can restrict actual practice. Deciding what specific circumstances allow governmental interference with religious conduct has formed the basis for much confusion and debate.

Growth of Religious Tolerance

Religious intolerance of seventeenth century England, in which religious strife precipitated political turmoil, greatly influenced the colonists. However, the various colonies treated religious toleration differently. The Puritans, greatly persecuted in England, imposed their own religious values in Massachusetts and became the persecutors. Maryland, in an effort to attract settlers,

passed the Religion Toleration Act in 1649 marking an early recognition of the freedom of belief. However, the act primarily addressed the freedom of Christians. John Locke, famed English philosopher and early proponent of freedom of thought, wrote the Carolina constitution in 1669. Possibly the most influential action in the colonies regarding religious toleration was the adoption of the 1663 Charter of Rhode Island. The charter, actually created in reaction to persecution by the Puritans, marked the first inclusion of religious liberty in a colony charter.

Across the ocean in the mother country, the adoption of the English Bill of Rights of 1689, though addressing social classes rather than individuals, planted more seeds for the recognition of human rights. The document built on the much earlier 1215 Magna Carta of feudal England which initiated the idea certain fundamental rights existed upon which states could not infringe.

By the 1740s a religious revival movement known as the Great Awakening swept through the colonies spurred by evangelical ministers. The Anglican Church of England became a chief target of dissatisfaction while broader support for various minority sects found in the colonies grew. Consequently, ties with England eroded and the expansion of the free exercise to worship spurred an increasing mood of independence.

By the late 1700s colonial leaders were well under the influence of the Enlightenment, a philosophical movement primarily in Europe promoting freedom of the mind and a more individual approach to religious, social, political, and economic issues through reason and science. Previously unquestioned authority was no longer blindly followed by many. More specifically to religion, the Enlightenment brought skepticism about many Christian beliefs. The right of people to revolt against oppressive authority rose from the movement.

Framers of the Constitution captured this mood in the First Amendment which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thus was born two key constitutional clauses on religious freedom to guide the new nation: the Establishment Clause and

the Free Exercise Clause. However, the idea of religious freedom in early U.S. history consisted of government support and approval of Judeo-Christian faiths and toleration of others. But as James Madison pointed out, toleration is not the same as full liberty.

Religion and the Courts

The earliest court cases addressing free exercise of religion focused on the issue of polygamy practiced among the Mormons (members of the Church of Jesus Christ of Latter-Day Saints). Federal territorial laws in Utah and Idaho prohibited plural marriages and denied the right to vote to those who advocated such lifestyles, respectively. Perhaps largely influenced by the overwhelming Protestant majority in the nation at the time, the Court in *Reynolds v. United States* (1879) and *Davis v. Beason* (1890) upheld the restrictive laws against polygamist marriages and ruled the free exercise of religion "must be subordinate to the criminal laws of the country." Similarly, in *Jacobson v. Massachusetts* (1905) the Court upheld state law requiring mandatory vaccination opposed by Seventh-Day Adventists based on religious convictions. Like criminal laws, public safety took precedence over religious belief.

Major changes in the American population occurred around the beginning of the twentieth century. Protestant domination further dwindled as immigration from eastern and southern Europe increased the numbers of Catholics and Jews. The United States was becoming more pluralistic (multiple religious traditions) just as it was becoming more secular driven by new Darwinian scientific ideas and increasing interest in socialism. The Court overturned an Oregon state law enacted during a wave of anti-Catholic sentiment requiring all children to attend public schools in *Pierce v. Society of Sisters* (1925).

In the twentieth century, freedom of religion became integrally related to the other protected freedoms in the First Amendment—speech, press, and association. What good are one's views, if they cannot be freely expressed and practiced jointly with others? Such relationships were highlighted in the 1938 *Lovell v. City of Griffin* case involving Jehovah's Witnesses. A local ordinance prohibited distribution of leaflets on public property, but the Court ruled the ordinance was too broad a restraint on the press, and hence was unconstitutional.

The 1940s brought a series of important free exercise rulings. In *Cantwell v. Connecticut* (1940) the Court extended the Free Exercise Clause to the states by overturning a Connecticut state law that prohibited solicitation for religious causes without a license certifying the religion as *bona fide*. The Court held that the entire First Amendment had been incorporated into the Fourteenth Amendment, and thus were included in one's right to due process of law. Freedom of religion became

an assumed fundamental right, free of any level of governmental intervention. In 1943 the Court in *Murdock v. Pennsylvania* held that a peddler's license fee applied to door-to-door sales of religious literature constituted a tax on the free exercise of religion, and thus was unconstitutional. Also in 1943 in *West Virginia State Board of Education v. Barnette*, the Court broke from a standard weighing the secular purpose of a rule by holding that a requirement that school children must salute the flag on a daily basis was unconstitutional when conflicting with their Jehovah Witness religious beliefs. Justice Robert H. Jackson wrote, "we apply the . . . Constitution with no fear that freedom to be intellectually and spiritually diverse . . . will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." In the 1944 *United States v. Ballard* case, the Court also held that the government cannot question the truth of religious beliefs, even if fraud may be involved.

The secular purpose test commonly applied by the Court in the 1940s and 1950s was exemplified in a 1961 case. In *Braunfeld v. Brown* the Court upheld a state Sunday-closing law challenged by an Orthodox Jewish store-owner. The owner argued he needed to be open for business on Sundays due to his closure on Saturdays for religious observances. The Court found no violation of the Free Exercise Clause because the closing law only made his religious practice more expensive, but did not restrict it. The Court found the goals sufficiently secular with no other practical means to avoid the indirect burden on religious practice.

The 1960s and 1970s brought tougher restrictions on government involvement in religious matters. In 1963 in *Sherbert v. Verner* the Court established the stricter "compelling interest" test. Only a compelling state interest could justify restrictions on religious liberty. The Court reinstated unemployment compensation benefits to a Seventh-Day Adventist fired for refusing to work Saturdays, her Sabbath. The *Sherbert* test was later applied when Amish parents refused to send their children to high school because the values taught were contrary to Amish beliefs (*Wisconsin v. Yoder* [1972]). The Court in *Yoder* found no compelling reason for enforcement of the state law against Amish citizens.

The Changing Concept of Religion

After World War II and the inception of the Cold War, a revival of religion grew again but this time more integrally, including Catholics and Jews into a new Judeo-Christian tradition reflecting the ever increasing pluralism. Although Congress amended the Pledge of Allegiance by adding "under God" after "One nation,"

belief systems not based on the belief in a divine being gained prominence in the United States, including Buddhism, Taoism, and "Secular Humanism." In *Torcaso v. Watkins* (1961), the Court wrote that "those religions based on a belief in the existence of God as against those religions founded on different beliefs" may not be favored. Military draft cases of the 1960s broadened the view of religion to include non-traditional belief systems. The Court held in 1965 that a person did not have to believe in a Supreme Being, a theistic belief, to claim conscientious objector status to military service. In 1970 the Court held this status applied to persons objecting to war simply on moral grounds. Theistic religions could not be favored over non-theistic beliefs.

With the continually changing perception of what religion was, in 1981 a circuit court in *Africa v. Pennsylvania* attempted to define religion in a new expanded form. For a belief to be religious it must address fundamental questions about deep and imponderable matters, and be comprehensive rather than narrow in scope. It may commonly involve tangible symbols such as clergy or texts. These traits would tend to distinguish religions from personal philosophical views.

Debates over what religion is in constitutional law persisted as religious values and beliefs became increasingly important in U.S. politics. The concept must be broad and inclusive enough to recognize a variety of faiths, yet not so broad as to hinder government in supporting moral goals. Some suggested using different definitions for the two religious clauses with a narrower perception of traditional religions under the Free Exercise Clause, and more broadly belief systems of all types under the Establishment Clause. Proponents of narrower definitions fell back to what the framers considered religion, which was theistic and not just moral views on subjects. To them belief in a superior power distinguished religion from moral beliefs. Such would not necessarily be the case with the narrower interpretation.

Toward a More Neutral Government

In the late 1970s, social backlash to a series of Court cases, primarily concerning the Establishment Clause, led to fundamental changes in American politics and, eventually, the makeup of the Court. Some saw the backlash as a response to free exercise concepts posing a threat to the declining white Judeo-Christian dominance as the character of the U.S. population changed. Importantly, in 1990 the Court backed away from the strict *Sherbert* compelling interest test in *Employment Division v. Smith*. The Court held that Oregon state law could prohibit sacramental use of peyote without violating free exercise. The Court created a neutrality test in which a law could be upheld if it were determined "a valid and neutral law of general applicability" that happens to infringe on religious practices.

By the late 1990s the role of free exercise still meant government could not: (1) interfere with religious belief; (2) restrict religious expression without passing the strict standards of free speech; and, (3) treat religious activities in a discriminatory manner. In regard to the third element, *Smith* more clearly established that government could restrict religious activity no matter how minimal government interest may be if the law is neutral. Neutral meant restrictions apply to all citizens equally regardless of their religious beliefs. By significantly increasing the ability of states to interfere with religious practice, the *Smith* case held that protection of religious practices often falls more into the political realm of legal accommodation rather than being constitutionally required.

Dropping the compelling interest test in *Smith* spurred proponents of broad free exercise rights to seek other avenues for legal protection, including federal and state laws and state constitutions. In the 1993 book *The Culture of Disbelief*, author Stephen Carter argued that for religious exercise to be truly free, people must be free to engage in practices the larger society condemns. Also in 1993 Congress passed the Religious Freedom Restoration Act which reinstated the compelling interest standard. However, in 1997 the Court ruled against the constitutionality of the act in *City of Boerne v. Flores* as it applied to state and local governments. The decision was based on Congress overstepping its constitutional separation of powers authority and impinging on Supreme Court responsibilities.

After four centuries in a progression toward greater freedom of religion, the public debate over the role of religion in society highlighted a major feature of American life. Balancing between protection of individuals' religious beliefs, their social duties, and the protection of the rights of others continued to be at the core of discourse.

See also: Establishment of Religion

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TENNESSEE V. SCOPES

Legal Citation: 278 S.W. 57 (1925)

Rarely has the American psyche been so at odds with itself as in the early 1920s. In the cities, Americans were dancing to the opening bars of the Jazz Age, debating Sigmund Freud's theories and swigging bootleg liquor in defiance of Prohibition. In the rural heartland, particularly in the South, believers in old-fashioned values were caught up in a wave of religious revivalism. Preachers damned modern scientific rationalism in all its guises and upheld a strict and literal interpretation of the Bible as the only source of truth. A showdown between modernists and traditionalists to decide which would dominate American culture seemed inevitable. Both sides itched for a decisive battle.

Fundamentalists were particularly galled by the gains modernism had made in public schools, where the teaching of Charles Darwin's theory of evolution by natural selection had supplanted the Biblical story of creation. To them, it seemed their tax dollars were being spent to turn their own children against—even to scoff at—the religion of their parents. Led by William Jennings Bryan, the thrice-defeated presidential candidate of populism, the Fundamentalists tried to drive the Darwinian "heresy" out of the schools by legislative fiat.

In Tennessee a bill sponsored by John Washington Butler was enacted in February of 1925, declaring it unlawful for a teacher in any school supported by state funds "to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Fearful that if the Tennessee law went unchallenged other states would soon pass similar bills, the American Civil Liberties Union (ACLU) immediately announced it would defend any teacher charged with violating the Butler Act.

A few weeks later, in the little town of Dayton, a transplanted New Yorker with Darwinian views got into a debate at the local drugstore soda fountain with two Fundamentalist lawyers. However much they fought over evolution and whether mankind and monkeys were close relatives, they quickly agreed that a trial to test the law would do wonders for Dayton's commerce. The 24-year-old science teacher of the local high school, John Thomas Scopes, was recruited that very afternoon



Plaintiff

State of Tennessee

Defendant

John Thomas Scopes

Chief Prosecutors

William Jennings Bryan; A.T. Stewart, Attorney General of Tennessee

Chief Defense Lawyers

Clarence Darrow, Arthur Garfield Hays, Dudley Field Malone

Judge

John T. Raulston

Place

Dayton, Tennessee

Date of Decision

21 July 1925

Decision

Guilty; however, neither side won the case because the decision was reversed on a technicality involving the judge's error in imposing a fine that legally could only be set by the jury.

Significance

The trial checked the influence of Fundamentalism in public education and stripped William Jennings Bryan of his dignity as a key figure in American political history. It also marked the displacement of religious faith and rural values by scientific skepticism and cosmopolitanism as the dominant strains in American thought.