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# Faith, Freedom, and the First Amendment: The Guarantee of Religious Liberty

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**Abstract**

*Freedom of religion is at the heart of the American understanding of liberty. Under our constitutional order, the free exercise of religion is not a mere matter of toleration but an inalienable natural right. As George Washington explained in his famous letter to the Hebrew Congregation at Newport: "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." There are, of course, some limits to the free exercise of religion. Citizens cannot invoke the First Amendment to break general laws (although exemptions may be granted). But within the confines of the law, all citizens have the same right of conscience. This essay is adapted from* The Heritage Guide to the Constitution *for a series providing constitutional guidance for lawmakers.*

Establishing freedom of religion as both constitutional principle and social reality is among America's greatest contributions to the world. Nevertheless, the concept of free exercise of religion is not self-defining. The boundaries of free exercise, like those of other rights, must be delineated as against the claims of society and of other individuals. The history of the Free Exercise of Religion Clause, in both its original understanding and modern interpretations, reveals two recurring impulses, one giving free exercise a broad scope, the other a narrow scope. The narrower view sometimes collapses free exercise into other constitutional rights—for example, treating religious activity as no more than a variety of speech or expression—whereas the broader view sees the right of choice in religious practice as independently valuable. The tension between broad and narrow rights has played out in four sets of issues under the Free Exercise of Religion Clause.

**CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF.... (AMENDMENT I)**

One key issue concerns the meaning of the protected "exercise" of religion: Does it encompass only the belief and profession of a religion, or does it also protect conduct that stems from religious tenets or

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motivations; for example, wearing a head covering or religious garb, or refusing to accept blood transfusions or other medical treatment?

The weight of the original understanding controverts the narrowest interpretation of the right, that belief alone is protected. At the Founding, as today, "exercise" connoted action, not just internal belief. Thomas Jefferson, in his famous 1802 "wall of separation" letter to the Danbury Baptist Association, did draw a sharp distinction between protected belief and unprotected action: "the legislative powers of government reach actions only, and not opinions, [and] [m]an has no natural right in opposition to his social duties." But a number of statements from other leading figures support the broader view—from James Madison's statement that religion includes "the manner of discharging" duties to God, to William Penn's statement that "liberty of conscience [means] not only a meer liberty of the mind, in believing or disbelieving . ..but the exercise of ourselves in a visible way of worship."

The significance of the Free Exercise of Religion Clause lay less in its legal effect than in its affirmation of the value of religion in American culture. Until the middle of the twentieth century, the Free Exercise of Religion Clause applied only to actions by the federal government. In 1940, however, in *Cantwell v. State of Connecticut*, the Court "incorporated" the Free Exercise of Religion Clause into the Due Process Clause of the Fourteenth Amendment and applied it to the states. Subsequently, most contests over free exercise have involved state statutes.

In its first interpretation of the Free Exercise of Religion Clause, *Reynolds v. United States* (1879), the Supreme Court confronted a federal law banning polygamy in the territories, thereby limiting the practice then required by the Mormon religion. The Court adopted the narrower reading of the right, protecting belief only and not action, relying on Jefferson's letter to the Danbury Baptists. Since then, however, the Court has ruled more frequently in line with the original meaning, protecting religiously motivated actions such as proselytization, *Cantwell*, refusing work on one's sabbath, *Sherbert v. Verner* (1963), choosing the education of one's children, *Wisconsin v. Yoder* (1972), and sacrificing animals at a worship service, *Church of Lukumi Babalu Aye v. City of Hialeah* (1993).

**AT THE FOUNDING, AS TODAY, "EXERCISE" CONNOTED ACTION, NOT JUST INTERNAL BELIEF.**

Because it is now accepted that the Free Exercise of Religion Clause protects religiously motivated conduct as well as belief, the most important modern issue has been whether the protection only runs against laws that target religion itself for restriction, or, more broadly, whether the clause sometimes requires an exemption from a generally applicable law. To take just one of many examples, must an Orthodox Jewish military officer, who is religiously obligated to wear a yarmulke, be exempted from a general rule forbidding all servicemen to wear anything other than official headgear?

The text of the clause can support either the narrow or the broad reading on this issue. A law could well be said to be "prohibiting the free exercise [of religion]" if it in fact prohibits a religious practice, even if it does so incidentally, rather than overtly or intentionally. On the other hand, one might argue that the legislature does not "make [a] law prohibiting the free exercise" unless the prohibition or restriction on religion is part of the law's very terms or is the legislature's intent, as opposed to simply the effect of the law in a particular application.

This issue therefore requires examination of the legal background and the Founding generation's attitude toward conflicts between law and religious conscience. By 1789, all but one of the states had free exercise type provisions in their constitutions, many with very similar phrasing. Many of these state grants of religious freedom included provisos that such freedom would not justify, or could be denied for, practices that "disturb[ed] the public peace" or were "inconsistent with the peace and safety of the State." In the leading modern discussion of the original understanding, Michael McConnell has argued that the provisos reflect the broader, pro-exemptions conception of free exercise, because if religious practices were subject to all general laws, there would be no reason to identify a subset of laws that protected the peace of the state. In response, Philip Hamburger has asserted that the provisos stated the conditions, not for denying freedom to particular religious practices, but for denying religious freedom altogether to persons or groups engaging in such practices. Thus, a congregation whose members handled poisonous snakes at certain worship services could presumably have their worship services outlawed altogether. Hamburger's second and more significant argument is that in eighteenth-century legal terminology, "every breach of law [was] against the peace [of the state]," so that the provisos would have been triggered by any secular law of general applicability.

The legal background also includes accommodations made by colonial and state legislatures for specific religious practices. Virtually all states by 1789 allowed Quakers to testify or vote by an affirmation rather than an oath; several colonies had exempted Quakers and Mennonites from service in the militia; and there was a patchwork of other exemptions throughout the states. Supporters of the narrower view of the Free Exercise of Religion Clause, such as Professor Hamburger, argue that these examples imply only that specific statutory exemptions may be granted by legislative grace. But advocates of the broader interpretation, such as Professor McConnell, infer that the Founding generation thought that exemption from the law was the appropriate response to conflicts between legal and religious duties, that is, that exemption was part of the meaning of "free exercise" so long as the religious activity did not harm public peace or others' rights.

Even more deeply, the question of exemptions from generally applicable laws implicates ideological differences over the relationship between civil government and religion. One important philosophical influence on the Founders, the Enlightenment liberalism stemming from the writings of John Locke, does not lend itself easily to exempting religious practice from general secular laws. In his famous *Letter Concerning Toleration* (1689), Locke argued that the proper domains of government and religion were largely separate; "the power of civil government ... is confined to the care of this world," whereas "churches have [no] jurisdiction in worldly matters." Although this limit on government control over belief and doctrine was liberal for its time, just as central to Locke's understanding was the limit on religion's role in worldly matters. And in those cases where both religion and government claimed jurisdiction—that is where religious duties clashed with general laws, and an exemption is sought—Locke gave the nod to the government on the ground that "the private judgment of any person concerning a law enacted in political matters ... does not take away the obligation of that law, nor deserve a dispensation."

**WHETHER RELIGIOUS EXEMPTIONS FROM GENERALLY APPLICABLE LAWS ARE EVER MANDATED BY THE FREE EXERCISE CONCEPT HAS BEEN THE CENTRAL QUESTION ... FOR MANY YEARS.**

The Enlightenment view, however, was not the dominant, or even the most important, impetus for religious freedom in America. Popular support for religious freedom came heavily from the newer evangelical Protestant sects, especially the Baptists and Presbyterians. These religious "enthusiasts," who helped defeat religious taxes in Virginia and elect James Madison to Congress, began from a different premise: that religion was a matter of duties to God, and that God, in the words of Massachusetts Baptist leader Isaac Backus, "is to be obeyed rather than any man." Madison echoed these ideas in his *Memorial and Remonstrance Against Religious Assessments* (1785), arguing that the duty to the Creator "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." Everyone who joins a civil society must "do it with a saving of his allegiance to the Universal Sovereign." This view logically suggests that the proper governmental response to conflicts between legal and religious duties is, at least sometimes, exemption from legal duties. Whether the governmental response should be legislatively enacted exemptions, or judicial-enforced prohibitions against the government, remains the problem.

Whether religious exemptions from generally applicable laws are ever mandated by the free exercise concept has been the central question in this area for many years. After rejecting constitutionally mandated exemptions for many years, the Supreme Court switched course and exempted religious claimants from generally applicable laws in *Sherbert v. Verner* and *Wisconsin v. Yoder*. In *Sherbert*, the Court struck down a state law that denied unemployment benefits to a Seventh-Day Adventist whose religion forbade her from working or being available for work on Saturday. In *Yoder*, the Court held that the Free Exercise of Religion Clause protected members of the Amish faith from having to abide by a compulsory school attendance law.

The pro-exemptions approach, however, was often applied half-heartedly in the next two decades, and in *Employment Division, Oregon Department of Human Resources v. Smith* (1990), the Court declared that the Free Exercise of Religion Clause did not grant an exemption from generally applicable drug law to members of a Native American religion that used peyote in its religious services. The Court abandoned the pro-exemptions approach in most cases, holding that exemptions are not required from a "neutral law of general applicability." Because most restrictions on religious conduct today come from the application of general laws rather than from laws targeting religion, *Smith* potentially could greatly shrink the protections

accorded religiously motivated actions.

In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), reinstating the *Sherbert-Yoder* test that laws that "substantially burden" religion, even if they are generally applicable, must be justified as the "least restrictive means" of achieving a "compelling governmental interest." Nonetheless in *City of Boerne v. Flores* (1997), the Supreme Court struck down RFRA as applied to state and local laws, on the ground that Congress exceeded its power in attempting to define the constitutional parameters of the Free Exercise of Religion Clause. RFRA may remain applicable to federal laws, and a number of states have passed their own versions of RFRA. Thus, the rule concerning exemptions from general laws remains divided under modern law, just as there is division and ambivalence in the original understanding of the Free Exercise of Religion Clause.

Related to the question whether religious exercise should be exempted from generally applicable laws is the question whether the exercise "of religion" extends to behavior motivated by norms of secular conscience, as opposed to beliefs in God or other traditional features of religion. For example, should the exemption from school-attendance laws for the Amish in *Yoder* extend to followers of Henry Thoreau who rejected traditional schooling for their children?

The word "religion" might be understood in direct contrast to a broader idea of "conscience" that includes secular-based norms. Both terms were used during the Founding period—indeed, during the debates on the language of the First Amendment, which began with Madison's proposal to protect "the full and equal rights of conscience" but eventually changed to "the free exercise of religion." The change may have meant little substantively, because during the Founding period "conscience" was often used as synonymous with "religion." Or possibly the change may have meant a narrowing from all deep moral convictions to theistic ones.

In a pair of cases involving challenges to military conscription during the Vietnam War, the Supreme Court read the statutory phrase "religious training and belief" to encompass objections based on any secular conscientious belief "which occupies in the life of its possessor a place parallel to that filled by the God of those" who are traditionally religious. *United States v. Seeger* (1965); *Welsh v. United States* (1970). Those expansive cases, however, were decided under the language of the draft-exemption statute. The Court has been more cautious in construing "religion" under the Free Exercise of Religion Clause itself.

The final question to bedevil courts in Free Exercise of Religion Clause cases has been just what sort of effect on religious exercise triggers protection. Are Free Exercise rights violated only when one is put in jail or fined for religious practice, or are some less serious burdens also unconstitutional?

The term "prohibiting" in the Free Exercise of Religion Clause may suggest the narrower scope of the right, covering only the affirmative imposition of sanctions such as imprisonment or a fine. Indeed, "prohibiting" might be contrasted directly with "infringing," the term used in an earlier draft, and with its broader counterpart in other First Amendment Clauses: "no law *abridging*" the freedom of speech, press, assembly, or petition. Madison rejected a parallel argument during the 1798 debate over the Alien and Sedition Acts. In response to the claim that Congress could regulate freedom of the press without "abridging" it, he argued against such a semantic distinction because "the liberty of conscience and the freedom of the press were equally and completely exempted from all [congressional] authority whatever."

In *Sherbert*, the Court adopted a broad understanding of unconstitutional "burdens" on religion, holding that the state violated Free Exercise by withholding unemployment benefits on the basis of the claimant's religiously motivated refusal to work on Saturdays. Later, however, the Court took a more narrow approach, pointing to the term "prohibiting" in holding that the government did not violate Free Exercise by building a road that disrupted forest areas sacred to Native American believers, because the project did not "coerce individuals into acting contrary to their religious beliefs." *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988). *Sherbert*, however, though now limited in its application, has never been directly overruled by the Court. The Court has never questioned *Sherbert's* holding that the government can "prohibit" free exercise by withholding important benefits from the individual because of a religious practice, not only by imprisoning or fining him.

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