Overview of Religious Liberty Law
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Thomas Jefferson once called America's new constitutional protections of religious freedom a "bold" and "novel experiment." These new state and federal guarantees, Jefferson declared, defied the millennium-old assumptions inherited from Western Europe — that one form of Christianity must be established in a community, and that the state must protect and support it against other religions. America would no longer suffer such prescriptions and proscriptions of religion by government. All forms of Christianity had to stand on their own feet and on an equal footing with all other faiths. Their survival and growth had to turn on the cogency of their word, not the coercion of the sword; on the faith of their members, not the force of the law.

That bold constitutional experiment in granting religious freedom to all remains in place, and in progress, in the United States. Before 1940, principal governance of the experiment lay with the states. The First Amendment, ratified in 1791, applied by its terms only to the federal government — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … ." The first application of the free-exercise clause came in Reynolds v. United States (1879), a Mormon challenge to federal laws against polygamy. The first application of the establishment clause came in Bradfield v. Roberts (1899), a taxpayer challenge to congressional funding of a Catholic hospital. In both these cases and in the 10 federal cases on religion to follow before 1940 — challenging federal immigration, education and military laws — the Supreme Court found no First Amendment violation. It held for Congress in each instance, offering mostly superficial readings of the First Amendment.

State constitutions

Before 1940, most legal issues respecting religion were left to the states to resolve, each in accordance with its own state constitution. By 1833, every state constitution guaranteed its citizens basic liberty of conscience, free exercise of religion, and freedom of religious worship and association. Every state also removed the most glaring vestiges of early religious establishments, notably the mandatory payment of tithes and compulsory participation in religious services. Most states accommodated citizens with religious scruples against serving in the military or swearing religious oaths. Most states also granted peaceable religious communities the right to have corporate charters and properties and to maintain their own religious schools, marriage ceremonies, charities, hospitals and cemeteries.

These basic guarantees of private religious freedom, however, did not prevent the states from patronizing a general form of public religion, and ostracizing those private parties who objected. Before 1940, only one state constitution — ironically, the Constitution of Utah (1896) — had a provision mandating "no union of Church and State." For much of the 19th century, state officials routinely acknowledged and supported common (usually Christian) beliefs and practices. "In God We Trust" and similar confessions appeared on currency, stamps, state seals and government stationery. The Ten Commandments and other Bible verses were inscribed on the walls of many courthouses, public schools and other public buildings. Crucifixes and other Christian symbols were erected in some state parks and on statehouse grounds. Flags flew at half staff on Good Friday. Easter, Christmas and other Christian holy days were state holidays. Sundays were official days of rest. Government-sponsored chaplains were appointed to state legislatures, asylums, prisons, and hospitals. Prayers were offered in Congress and in state legislatures. Thanksgiving Day prayers and proclamations were made by presidents, governors and mayors alike.

Government officials afforded various forms of aid to religious groups. State and federal subsidies were given to Christian missionaries, charities and schools on the American frontier. Tax exemptions were accorded to Christian churches, clerics and charities. Special criminal laws protected church properties from violation; special procedural laws protected church officials from discovery and testimony. Tax revenues supported the acquisition of religious art for state museums, the purchase of religious texts for public state schools, and the construction and maintenance of private religious schools.

Government officials predicated some of their laws and policies directly on Christian teachings. Many of the first state schools and universities had mandatory courses in religion and compulsory attendance at daily chapel and Sunday worship. State prisons, reformatories, orphanages and asylums taught basic Christian beliefs and values. Polygamy, prostitution, pornography and other sexual offenses against Christian morals were prohibited. State marriage and divorce laws generally followed Christian commonplaces. Blasphemy was still occasionally prosecuted. It was a commonplace of 19th-century American legal thought, made famous by Justice Joseph Story, that "Christianity is a part of the common law."

This pattern of granting freedom to all private religions while patronizing a common Christian religion worked well enough for the religiously homogeneous times and towns of the early republic — particularly when the frontier provided a place for religious minorities to escape and start their lives anew. As the American populace became more pluralized and the frontier more populated, however, this system became harder to maintain. The Second Great Awakening of 1810-1870 introduced a host of newly minted Christian faiths — Adventists, Mormons, Jehovah's Witnesses and many others. It also greatly expanded the populations of Baptists and Methodists, many of whom favored a stronger separation of church and state. The 13th, 14th and 15th amendments liberated a host of long-cloaked African and Muslim beliefs and rituals. The great waves of immigration from the 1870s onward brought vast new populations of Catholics, as well as smaller groups of Jews, Eastern Orthodox Christians, and the first substantial populations of Buddhists, Confucians and Hindus.

Some of these new or newly expanded religious communities refused to conform. Others refused to live quietly or leave quietly for the frontier. Still others began to crusade actively against the Protestant biases of the system — particularly in the public schools, which emerged as the major battleground among Protestants, Catholics and secularists over American identity. In response, a good number of states reformed their constitutions — at minimum outlawing direct state aid for religious education and other religious causes, sometimes taking more- aggressive steps of restricting religious tax exemptions and corporate charters. But other states and local communities continued traditional patterns aggressively and clamped down on religious dissenters. From the 1880s onward, some local authorities began to deny Roman Catholics their school charters, Mormons their corporate charters, Eastern Orthodox their canonical freedoms, Jehovah's Witnesses their preaching permits, Jews and Adventists their Sabbath-day observances. When state courts turned a largely blind eye to their plight, religious dissenters turned to the federal courts for relief.

Enter the Supreme Court

The U.S. Supreme Court, after some tepid interventions in the 1920s and 1930s, responded forcefully to the plight of religious dissenters. In the landmark cases of Cantwell v. Connecticut (1940) and Everson v. Board of Education (1947), the Court incorporated the First Amendment free-exercise and establishment clauses into the due-process clause of the 14th Amendment. On its face, the Court held, the First Amendment binds the federal government: "Congress shall make no law … ." As a general statement of religious liberty, however, the First Amendment also binds state governments. For religious liberty is part of the body, the corpus, of fundamental liberties guaranteed by the 14th Amendment: "No state shall deprive any person of ... liberty ... without due process of law."

By so incorporating the First Amendment religion clauses into the 14th Amendment due-process clause, the Supreme Court accomplished what the Blaine Amendment (1876) and 15 other proposed amendments to the Constitution could not accomplish. It created a national law on religious freedom enforceable by the federal courts against federal, state, and local governments alike. In 150-plus First Amendment cases decided after 1940, the Supreme Court took firm control of the American experiment in religious freedom, with lower federal courts and most state courts following its lead.

The First Amendment on its face holds complementary guarantees of religious freedom. The free-exercise clause outlaws government proscriptions of religion — actions that unduly burden the conscience, restrict religious expression, discriminate against religion or invade the autonomy of churches and other religious bodies. The establishment clause outlaws government prescriptions of religion — actions that coerce the conscience, mandate forms of religious expression, discriminate in favor of religion or improperly ally the state with churches or other religious bodies. The free exercise and establishment clauses thereby afford reciprocal protections to the principles of liberty of conscience, freedom of religious expression, religious equality and separation of church and state.

Despite their structural symmetry, the Supreme Court has generally treated these First Amendment religious freedoms in separate lines of cases. In more than 50 cases from 1940 to 1980, the Court created a strong free-exercise clause guarantee that protected both religious individuals and religious groups. This provided religious claimants with special protections from general laws that ran afoul of core claims of conscience or central commandments of faith. Since the mid-1980s, however, the Court has weakened the free-exercise clause, requiring only that laws be "neutral" and "generally applicable" to pass constitutional muster. Similarly, in more than 30 cases from 1947 to 1989, the Court created a strong establishment clause, emphasizing especially the principle of separation of church and state. This eradicated many traditional privileges and protections of public Christianity, particularly in the public schools. Beginning in the mid-1980s, however, the Court slowly weakened this separationist reading, allowing for the reintroduction of various types of state support for and cooperation with religion. While no coherent First Amendment theory has yet emerged to bring these two lines of cases together, the Court's most recent cases have experimented actively with principles of neutrality that are common to both religion clauses.

Free-exercise law

In the landmark 1940 case of Cantwell v. Connecticut, the Court not only applied the free-exercise clause to state and local law for the first time, it also established a heightened level of scrutiny for application of the free-exercise clause. The Cantwell Court foreclosed regulation of religious belief, worship and assembly, unless the conduct was patently criminal. Regulation of other religious exercises by individuals or groups was permissible as long as it was done by general and non-discriminatory legislation that served an important or significant governmental interest.

From 1940 to 1963, the Court applied this heightened level of scrutiny in nearly 40 free- exercise cases (and related free-speech cases) that came before it. The Court held repeatedly that Jehovah's Witnesses and other religious groups could not be discriminatorily denied the right to preach, parade or pamphleteer in public streets, parks or company towns. Nor could they be taxed for the privilege of proselytizing door-to-door. Nor could local officials be given discretion to withhold or qualify permits and licenses to preach. Religious groups could be subject only to general and non-discretionary time, place and manner regulations of the public square that applied equally to all religious or non-religious groups. These early precedents have informed First Amendment doctrine (particularly free-speech doctrine) ever since, and were cited approvingly by the Supreme Court as recently as Watchtower Bible Society v. Stratton (2002).

In these early cases, the Court also accorded ample protections to liberty of conscience. In West Virginia State Board of Education v. Barnette (1943), the Court held that public school students could not be compelled to salute the flag or recite the pledge if they were conscientiously opposed. In several later cases, the Court held further that parties with scruples of conscience could not be forced to swear oaths before receiving citizenship status, property-tax exemptions, state bureaucratic positions or social-welfare benefits.

The Court recognized not only individual but also corporate rights. Kedroff v. St. Nicholas Cathedral (1952) and four succeeding cases mandated that, in adjudicating intrachurch disputes, courts must defer to the judgment of the highest religious authority rather than seek to resolve the religious dispute before it, as state courts had traditionally done. These cases became important precedents for courts and the Congress to defer to a religious group’s rights to control its own internal polity and property with only modest state oversight. In Corporation of Presiding Bishop v. Amos (1987), the Court upheld Congress’ extension of this deference to the point of allowing a religious employer to engage in religious discrimination in its employment decisions, an exception to the Civil Rights Act.

The Cantwell intermediate-scrutiny standard brought no automatic victory to free exercise claimants, particularly in matters of great public concern. In Prince v. Massachusetts (1944), for example, the Court upheld the conviction under a new child-labor law of a Jehovah’s Witness adherent who insisted that a minor child under her care could sell and distribute religious literature on the street at night. In a quartet of cases, most famously Braunfeld v. Brown (1961), the Court upheld Sunday Sabbath-day restrictions against the free exercise objections of Orthodox Jewish merchants, even Jewish kosher shop owners, who were forced to close on both Saturday and Sunday.

It was perhaps the bluntness of these 1961 Sabbath-day cases that induced the Supreme Court in 1963 to introduce a strict-scrutiny standard of review in applying the free-exercise clause. In Sherbert v. Verner (1963), and its progeny, the Supreme Court held that if a general non-discriminatory law imposes a substantial burden on the exercise of a sincere good-faith belief, government could prevail only if it could show that the regulation:

1. Served a compelling state interest.
2. Was narrowly tailored to achieve that interest with the least possible intrusion on free-exercise rights.

Laws that failed this test could require an exemption from the law for a free-exercise claimant or the law could be struck down altogether. Using this test, Sherbert and three cases thereafter granted exemptions from general unemployment-compensation rules to religious claimants who were discharged or quit work because of their conscientious objection to working in violation of their religious scruples. While states could properly deny unemployment compensation benefits to parties dismissed “for cause,” they could not deny benefits to parties dismissed for religious causes.

The Supreme Court used this Sherbert strict-scrutiny test of free exercise in 10 cases after 1963, holding for the government only in free-exercise challenges to federal taxation and military laws. The most aggressive application of the Sherbert test came in Wisconsin v. Yoder (1972), where the Court exempted Amish parents from full compliance with state compulsory

school-attendance laws. The Yoder Court would hear nothing of an argument that such a judicially created exemption was religious favoritism that violated the establishment clause.

In Employment Division v. Smith (1990), the Court formally rejected the strict-scrutiny test of free exercise, and adopted a lower-level scrutiny test. Building on a trio of Native American cases in the mid-1980s that had avoided application of the Sherbert test, the Smith Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." If a law is neutral and generally applicable, it is constitutional, even if it burdens, harms or jeopardizes the claimant's religion. But if a law is not neutral or not generally applicable, it must be justified by a compelling government interest and narrowly tailored to achieve that interest. Even with this weakening, the Court still recognized a modicum of protection as in its last free-exercise case, Church of the Lukumi Babalu Aye v. Hialeah (1993). In Hialeah, the Supreme Court used the Smith test to strike down discriminatory laws that transparently targeted the slaughtering practices of Santerians.

The abrupt weakening of the free-exercise clause introduced by Smith was widely denounced. In reaction, Congress passed the Religious Freedom Restoration Act (1993) (RFRA). The stated purpose of RFRA was to "restore the compelling state interest test" of Sherbert and its progeny. In City of Boerne v. Flores (1997), however, the Supreme Court declared RFRA unconstitutional, at least as applied to the states. In free-exercise claims against state and local laws, the lower level Smith test is the law. But in free-exercise claims against federal laws, the strict-scrutiny standard of RFRA can still apply. Today, however, most parties seeking protection for religious exercise sue under the free-speech clause or under the many new religious-exemption provisions that now pepper state and federal statutes.

Establishment law

Part of the reason for the recent emergence of these special statutory protections for religion is the recent weakening of the establishment law. This was a notable departure from the Court's original posture.

In Everson v. Board of Education (1947), the Supreme Court applied the establishment clause to the states for the first time. It also imbued this guarantee with a firm separationist reading. Justice Hugo Black's words for the Everson majority proved a prophetic distillation of the establishment cases for the next four decades:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" (citing Reynolds v. United States)
The Everson case was an open invitation to lawsuits. A long tradition of state and local policies that patronized a public religion was now open to challenge. The new application of the establishment clause to the states encouraged litigation. The Everson Court's mandate of strict separation of church and state demanded it. Hundreds of establishment-clause cases poured into the lower federal courts after the 1940s.

Most of the Supreme Court cases involved challenges to the traditional state patronage of religious education. On the one hand, the Court removed state-sponsored religious practices from the public school. In a long line of cases, beginning with McCollum v. Board of Education (1948) and Engel v. Vitale (1962), the Court held that public schools could not offer prayers or moments of silence, could not read Scripture or religious texts, could not house Bibles or prayer books, could not teach theology or creationism, could not display the Ten Commandments or Bible verses, could not use the services or facilities of religious schools or religious officials. On the other hand, the Court removed religious schools from most state aid and support. States could not provide salary and service supplements to religious schools, could not reimburse them for administering standardized tests, could not lend them state-prescribed textbooks, supplies, films or counseling services, could not allow tax deductions or credits for religious school tuition.

Then in Lemon v. Kurtzman (1971), the Court distilled some of these early holdings into a general test to be used in all establishment-clause cases. Henceforth every law challenged under the establishment clause would pass constitutional muster only if it:

- Had a secular purpose.
- Had a primary effect that neither advanced nor inhibited religion.
- Fostered no excessive entanglement between church and state.

Incidental religious “effects” or modest “entanglements” of church and state could be tolerated. But defiance of any of these criteria would be constitutionally fatal.

The Lemon test rendered the establishment clause a formidable obstacle to many traditional forms of state patronage of public religion. Lower courts, especially, used this test to outlaw all manner of government subsidies for religious charities, social services and mission works; government use of religious services, facilities and publications; government protections of Sundays and holy days; government enforcement of blasphemy and sacrilege laws; and government participation in religious rituals and religious displays. The Supreme Court condoned and encouraged this ambitious extension of the Lemon test well into the 1980s. In Larkin v. Grendel's Den (1982), for example, the Court struck down a state zoning law that gave churches power to prevent the awarding of liquor licenses to neighboring restaurants. In Texas Monthly v. Bullock (1989), the Court struck down state tax exemptions on the sale of religious periodicals.

With these kinds of precedents, it often did not take lawsuits, let alone Supreme court cases, to effectuate these reforms. Particularly local governments, sensitive to the political and fiscal costs of constitutional litigation, often voluntarily ended their prayers, removed their religious plaques and closed their coffers to religion long before any case was filed against them.

Signposts of a new way?

While many officials and citizens have remained faithful to this separationist logic, the Supreme Court of late has been quietly defying it. The Court has not yet crafted a coherent new logic, let alone consistent new test, to resolve establishment-clause cases. But in several recent cases, beginning in the 1980s, the Court relaxed its separationist logic — often qualifying and sometimes abandoning the Lemon test altogether.

In one case, the Court used an argument from tradition to uphold government use of clerical services. The Court had used arguments from tradition before, in Walz v. Tax Commission (1970) and McGowan v. Maryland (1961), as part of a broader rationale to uphold religious property tax exemptions and Sabbath Day laws. In Marsh v. Chambers (1983), however, the argument from tradition became the exclusive basis for upholding a state legislature's practice of funding a chaplain, housing him in the state Capitol, and opening its sessions with his prayers. The following year in Lynch v. Donnelly (1984), the Court extended this argument from tradition to uphold a town's sponsorship of a Christmas crèche display.

These cases marked only the beginning of the Court’s gradual abandonment of its strong separationist reasoning and precedents. In a series of cases from Widmar v. Vincent (1981) to Good News Club v. Milford (2001), the Court upheld government policies that supported the equal access of religious student groups to public forums, facilities, and even funding that was made generally available to non-religious students groups. In Bowen v. Kendrick (1988), the Court held that church-affiliated pregnancy counseling centers could be funded as part of a broader federal family counseling program — a key precedent for recent programs of government funding for faith-based charities. In Lamb's Chapel v. Moriches (1993) and its progeny, the Court held that church groups must have equal access to public school facilities that were already open to other civic groups. In a series of cases from Witters v. Washington (1986) to Agostini v. Felton (1997), the Court held that religious students were just as entitled to state remedial and disability services as non-religious students, and such services could be administered in religious schools. In Mitchell v. Helms (2000), the Court upheld a state policy of lending educational materials directly to both public and private schools, even though in application religious schools were substantial beneficiaries. Most recently, in Zelman v. Simmons-Harris et al. (2002), the Court upheld a city program that allowed parents to use state-funded vouchers to opt out of public schools and attend private religious schools among others.

These and other recent Supreme Court cases have been highly controversial, and have often yielded deeply fractured plurality opinions and strong dissents. The rulings have been predicated on a wide range of constitutional grounds — as a proper accommodation of religion under the establishment clause, as a necessary protection of religion under the free-speech clause,

as a simple application of the equal-protection clause, among other arguments. No single principle, and no single test, has yet consistently captured a majority of the Court.

In its last two establishment-clause cases, the Mitchell plurality and the Zelman majority, however, defended these holdings on grounds of neutrality. Laws that are religiously neutral on their face and in application will pass constitutional muster under the establishment clause. This recent establishment test bears striking resemblance to the free-exercise test of Smith: that neutral laws of general applicability will pass muster under the free-exercise clause. The Court has not yet linked these two neutrality readings of the First Amendment religion clauses. But they suggest one way that the Court might create a more integrated law of religious freedom, albeit one less protective than in decades past.