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ISSUE HIGHLIGHTS

The First Amendment's Free Exercise Clause:

Changes in Focus from the Collective to the Individual

By David J. Canupp

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What are the most important constitutional rights? Here's what a recent survey[1] from 2015 revealed:

Freedom of speech	30%
Due process	20%
Right to keep and bear arms	12%
Free exercise of religion	11%
Voting rights	10%
Cruel and unusual punishment	6%
Unreasonable searches and seizures	5%
Criminal trial rights	4%
Freedom of the press	2%

I doubt anyone is surprised to see freedom of speech at the top of the list, but I was impressed that my fellow Americans value due process enough to list it second — even though many may not fully understand all that it entails. In my view, it's not too far off to suggest that it could be the most important right in countering totalitarianism, though I concede that we are trying to do much more than just that in America.

In this article I discuss one of the rights that made it into the top five, but garnered a lot less support than you might have guessed. That right is freedom of religious expression.

The First Amendment reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The religion clauses of the First Amendment are often referred to as the "Establishment Clause" and the "Free Exercise Clause," and they have received judicial treatment over the years with this distinction in mind. This article addresses the Free Exercise Clause. I trace some of its history, discuss some of its interpretation, and bring you up to date on how our society and our courts continue to grapple with what the Free Exercise Clause means and how it can affect our lives.

One of the many predecessors to the First Amendment's Free Exercise Clause was the Virginia Statute of Religious Freedoms. It was written by Thomas Jefferson and adopted by the Virginia Legislature in 1786. Jefferson, despite his many accomplishments, considered the Virginia Statute of Religious Freedoms among the most important. If you've ever read his epitaph, which he himself composed, it states: "Here was buried Thomas Jefferson, Author of the Declaration of American Independence, of the Statute of Virginia for religious freedom & Father of the University of Virginia."[2]

He left a few things out, don't you think? In any event, Jefferson's Virginia statute[3] was quite important. Many have called it the "driving force" behind the religion clauses in the First Amendment. Notably, James Madison (later the author of the First Amendment) played a leading role[4] in getting Jefferson's statute on Religious Freedom passed by the Virginia Legislature while Jefferson was overseas in Paris.

The Virginia statute provided, in pertinent part, as follows:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.[5]

By the time of the First Amendment, Madison had honed Jefferson's sentiments down to a single sentence: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[6]

Why was religious freedom so important to the Founding Fathers? It was partially, but not entirely, due to the strength of their own religious beliefs.

Many described religious liberty as an inalienable right. In a 1789 letter to the Quakers, George Washington himself said: "The liberty enjoyed by the People of these States, of worshipping Almighty God agreable to their Consciences, is not only among the choicest of their *Blessings,* but also of their *Rights*—."[7]

But at the same time, there was a principled belief that religion was a choice that the government simply should have nothing to do with. In 1782, Thomas Jefferson wrote:

> The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.[8]

In 1816, years after the Constitution was adopted, John Adams wrote something similar: "Government has no Right to hurt a hair of the head of an Atheist, for his Opinions. Let him have a care of his Practices."[9]

The Founding Fathers recognized that however sophisticated and balanced their positions on religious liberty, government efforts to intercede in matters of religion resulted in very real consequences. They knew this from experience.

About 100 years before the American Revolution, the English had their own civil wars.[10] In part, Charles I was deposed and executed (1649) because of his attempting to force the Scots to worship in the same way as the English.[11] Then there was the Glorious Revolution in 1688 that resulted in the ouster of James II and the passage of the Toleration Act,[12] which granted freedom of religious worship to Protestants. Indeed, for roughly two centuries, from the beginning of the Protestant Reformation in 1517 until Toddenburg War in Switzerland in 1712, virtually every country in Europe was rocked by a war justified by religious differences.[13]

And there were cases of violent religious persecution and non-violent religious discrimination during this period in the American colonies as well.[14]

None of this is to diminish the fact that America was, to many, a land they approached in search of religious freedom.[15] After all, in 1620, Puritans founded the Plymouth Colony.[16] In 1632, Lord Baltimore founded Maryland as a place of refuge for Catholics.[17] In 1682, William Penn and the Quakers founded Pennsylvania.[18] The list could go on.

But a reason, fairly consistently cited, to support the constitutional recognition of a right to religious freedom was the need to maintain the peace and to keep the government largely out of it. In 1776, James Madison insisted upon Virginia adopting an amendment to its Declaration of Rights, proclaiming it "a fundamental and inalienable truth that religion and the manner of discharging it can be directed only by reason and conviction not by force and violence."[19] And when it came time to write the Bill of Rights, Madison borrowed from the concepts Jefferson laid down in the Virginia Statute of Religious Freedoms to enshrine these concepts in the law of the nation.

All this resulted in a constitutional clause proclaiming, quite briefly, that Congress shall make no law prohibiting the free exercise of religion.

Of course, the First Amendment worked quite well in preventing religious civil wars in the United States. But the other implications of the Free Exercise Clause continue to play out to this day. Let's take a look at how the U.S. Supreme Court has interpreted this provision over time.

I divide my analysis into four periods:

1. Early decisions.
2. Cases from 1960 to 1990.
3. Cases during the 1990s.
4. Most recent decisions, many involving COVID-19.

I would argue that the principal theme of the Supreme Court's Free Exercise jurisprudence is fundamental and deep-seated disagreement about the meaning and breadth of the clause. The Supreme Court initially adopted a fairly narrow interpretation of the law, which first expanded, before contracting again; and now, my thesis is that we are currently returning to a period of expanded free-exercise rights, as you will see.

Early Decisions

The first Supreme Court case substantively addressing the Free Exercise Clause arose in 1878 and involved the Mormon Church. The case was *Reynolds v. United States*.[20] Congress had prohibited the practice of polygamy, which members of the Mormon Church practiced in the Utah Territory.

Reynolds married a second woman as authorized by the church. He was indicted for polygamy, and claimed he was protected from indictment by his religion. The Court stated as follows:

> [T]he question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.[21]

So here we have a criminal law, which by its nature assumes that the conduct outlawed is injurious to others in some way. Remember what Thomas Jefferson wrote about how "the legitimate powers of government extend to such as only as are injurious to others." Yet Jefferson also wrote that religion should never diminish or enlarge a citizen's civil capacities.[22]

The Court quoted Jefferson extensively in its opinion. It also observed that a marriage is a civil contract, perhaps in reference to Jefferson's idea of not enlarging civil capacities. It held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or

subversive of good order."[23] Without saying that Jefferson would necessarily have agreed with the result in *Reynolds*, to a large extent the Court's analysis perfectly tracked Jefferson's writings.

The Court extensively remarked on the fact that Reynolds sought an exception to a general criminal law embodying a prohibition of a general nature — an exception that even existed in Virginia after its famous statute on religious freedoms. The Court said:

> [T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[24]

Obviously, the Court was skeptical of any religious exemption to a broad and general criminal law, and it ruled that Reynolds was not subject to the law just like any other individual.

Another early case about religious exemptions — much discussed lately — was *Jacobson v. Massachusetts*,[25] in which the Supreme Court upheld a state's mandatory compulsory smallpox vaccination law over the challenge of a pastor who alleged that it violated his religious liberty rights (without mentioning the First Amendment). In rejecting Jacobson's request for an exemption from the law, the Court held:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.[26]

What followed *Jacobson* were a series of decisions upholding state restrictions that arguably impinged on religious liberties by limiting the abilities of religious individuals to distribute items into the stream of commerce. In *Cantwell v. Connecticut*,[27] the Court upheld a solicitation statute that required a permit from the state before religious groups could solicit funds. In *Prince v. Massachusetts*,[28] the Court upheld a child welfare rule of neutral applicability that was applied to prevent a Jehovah's Witness from having her 9-year-old child distributing literature. In *Prince,* the Court reasoned as follows:

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty…. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control….Thus, he [the parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.[29]

By the time *Prince* was handed down, the Court robustly endorsed neutral laws that interfered with religious exercise, even when such laws penetrated the home and regulated the family — and, yes, definitely when such laws required mandatory vaccination. The trend continued. As of 1960, the Supreme Court had never ruled an exercise of police power was unconstitutional because it interfered with free exercise of religion.[30]

Cases from 1960 to 1990

The 1960s began with a bang, when the Court held in *Torcaso v. Watkins* that Maryland could not require notaries to swear to a belief in God as a condition of certification.[31] *Torcaso*, however, was decided under the Establishment Clause, and the Court eschewed any reliance on the Free Exercise Clause or the no-religious-test clause of Article VI.

In most Free Exercise cases during this period, the Court appeared to introduce a two-step balancing test. A law was generally held unconstitutional if—

1. The plaintiff demonstrated that state placed a substantial burden on plaintiff's exercise of religion.

And if—

2. State could *not* demonstrate that it had a compelling or overriding state interest that justified the law.

Under this test, government won almost every case that did not involve the punishment of religious belief.[32]

In 1961, the Court ruled in *Braunfeld v. Brown*[33] that a state could require businesses to be closed on Sundays, despite the burden on people who already closed on Saturday (which they considered the sabbath).

However, in *Wisconsin v. Yoder,*[34] the Court overruled Wisconsin's efforts to require Amish children to attend public schools. The Court did so based upon this conclusion:

> [A] state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment…."[35]

Yoder seems, of course, quite far afield from the Court's holding in *Prince* years prior.

Cases During the 1990s

In 1990, the Supreme Court rejected the balancing test and ruled in *Employment Division v. Smith*,[36] that the Free Exercise Clause didn't prevent a state from banning the use of peyote even when it was part of a religious ceremony.

In *Smith,* the plaintiffs were terminated by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. The state of Oregon denied unemployment because they were terminated for "misconduct." The native Americans argued that their right to free exercise of religion meant that they could engage in the religious conduct without being penalized by the state.

Critically, the Court held that a neutral law of general applicability is not unconstitutional merely because it presents a burden on a religious group, so long as the religious group is not specifically targeted by the law. In many ways, the Court's decision was consistent with *Reynolds,* the Court's seminal case regarding polygamy, but it has been very controversial, and many justices on our current Court seem to have a fundamental disagreement with the rule in *Smith*.

In the 1993 case of *Church of Lukumi Babalu Ave., Inc. v. Hialeah*,[37] the Court followed up with a decision addressing whether animal sacrifices in Santeria religious services could be banned. Years prior in *Reynolds,* the Court had discussed hypothetically whether a human sacrifice would pass muster under the Free Exercise Clause and found it laughable. But in *Hiahleah,* the Court held that the law prohibiting animal sacrifices appeared particularly and especially targeted at this religion, and, therefore, held that it was not a neutral law of general applicability, but a law specifically designed to target and shut down a religion. The Court overturned it.

Most Recent Decisions

In the 2014 case of *Burwell v. Hobby Lobby Stores, Inc.*,[38] the Supreme Court addressed a case in which the corporation argued that it was entitled to an exception to the Affordable Care Act's mandate that group health plans provide contraceptive coverage because it was a closely held business that religiously disagreed with the mandate. The Court ultimately granted the exemption, but not under the Free Exercise Clause. Instead, it relied upon the Religious Freedom Restoration Act, a federal law. Still, the decision caused many to question whether a new era of Free Exercise jurisprudence was on the horizon.

In 2018, that question was seemingly answered in the affirmative when the Supreme Court ruled in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*[39] that a baker didn't have to make a wedding cake for a gay male couple. Colorado had passed what had appeared to be a neutral law that prohibited discriminating against gay people, which was enforced by Colorado Civil Rights Commission. The Supreme Court struck down the enforcement action against the baker. The decision appears to be based on the specific facts of the case in which members of the commission expressed hostility to religious belief that being gay was wrong. Again, however, many began to question whether the rule in *Smith* regarding neutral laws of general applicability was in the Court's crosshairs.

Earlier this year, in *Fulton v. City of Philadelphia*,[40] the Supreme Court ruled that Philadelphia could not refuse to let Catholic Social Services (CSS) provide foster-care services when it refused to certify same-sex partners as foster parents. The Court was asked by the petitioners to overrule *Smith*, and five justices seemed poised to do so. In the end, the Court purported to apply the test from *Smith*, but seemed to modify and strengthen it significantly. The Court cited *Masterpiece Cakeshop* for the principle that a law is not "neutral" where the government proceeds in a manner intolerant of religious beliefs — a principle that seems to contract rather than flow from the *Smith* decision. Ultimately, the Court avoided any major ruling on the "neutrality" test and bottomed its ruling upon a finding that Philadelphia's law was not "generally applicable" as required by *Smith*. The Court found that the City retained for itself the right to give exemptions to its rules, potentially even including the same-sex rule, and that was enough to take the case outside of *Smith*'s parameters.

Although the Court technically applied *Smith*, the tea leaves it left behind made clear that *Smith* is not likely to survive another direct attack. Justice Barrett wrote in a concurrence that she could not believe the Free Exercise Clause "offers nothing more than protection from discrimination" — *i.e.*, she believes that the clause at least includes a mandate for tolerance toward religious beliefs even when they contradict societal norms, and perhaps even mandatory laws applicable to all others. If this becomes the law, it certainly will be a significant change from where the Court started so many years back in *Reynolds*, and it could represent a major reordering of the Bill of Rights, potentially placing religious liberty chief among rights.

The Court has continued to apply *Smith* even following *Fulton*, though occasionally expressing continued qualms over the rule. During 2020 and 2021, the Supreme Court struck down numerous restrictions on religious activities banned because of the COVID-19 pandemic.

In the 2020 case of *Roman Catholic Diocese of Brooklyn v. Cuomo*,[41] the Court overruled the New

York governor's COVID-19 restrictions on churches. A church and synagogue filed §1983 actions alleging that governor's emergency executive order imposing occupancy restrictions on houses of worship during the COVID-19 pandemic violated the Free Exercise Clause. No evidence demonstrated that the church or synagogue had contributed to the spread of COVID-19. Perhaps more important, the occupancy restrictions for religious services were more limited than those for non-religious pursuits.

In 2021, the Court decided *Tandon v. Newsom*,[42] holding the plaintiffs were constitutionally permitted to gather for at-home religious services despite violating state-issued bans on such meetings. The key to this decision was that the state failed to adequately explain why it could not safely permit at-home worshipers to gather in larger numbers while using the same precautions as used in secular activities for the same-sized secular groups. The Court reached its result in much the same way as *Fulton*, holding that even under *Employment Division v. Smith*:

> [G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise…. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.[43]

Suffice it to say, our jurisprudence on the Free Exercise Clause has become much more complex since Madison penned that simple amendment and the Court in *Reynolds* cited Jefferson to support a narrow construction of its intent. Certainly, one can expect the Supreme Court to continue hashing out a current understanding of the clause and its meaning; and if history is any guide, one can likewise expect future Courts to clean the slate and begin a new understanding as well.

Conclusion

In 1782, Thomas Jefferson wrote that "the legitimate powers of government extend to such as only as are injurious to others." Originally, and for many years, the courts have understood that concept to permit regulation of religious activities that violated the law, notwithstanding the Free Exercise Clause. These most recent decisions suggest the Supreme Court may be prepared to rule that freedom of religious expression actually does give rise to specific exceptions to otherwise generally applicable laws — that our country must not merely tolerate religion but affirmatively accommodate it, even when that means that religious individuals have rights that others do not. We are not there yet, but it appears to be the general direction of the Court's jurisprudence.

Perhaps the best ending for a long lecture on such a complicated and controversial subject is the simplest one. Let me just share with you the wisdom imparted by the comedian George Carlin: "Religion is like a pair of shoes: Find one that fits for you, but don't make me wear your shoes."[44]

Endnotes

1. Alex Cook, *Americans Say Freedom of Speech is the Most Important Constitutional Right, According to FindLaw.com Survey for Law Day, May 1* (May 15, 2015), https://www.thomsonreuters.com/en/press-releases/ 2015/may/americans-say-freedom-of-speech-is-the-most-important-constitutional-right.html (last visited Sept. 21, 2021).

2. Thomas Jefferson, Library of Congress, https://www.loc.gov/exhibits/jefferson/jeffleg.html (last visited Sept. 21, 2021).

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4. James H. Read, *James Madison*, The First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/1220/james-madison (last visited Sept. 21, 2021).

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6. Any lecture on the religion clauses should point out the word "Congress" in the First Amendment. It is well established that the First Amendment, when it was initially enacted, did not apply to the states. Both before and after its ratification, various states did favor certain denominations and faiths; and while no state had an official religion, the First Amendment left open that possibility. *Religion and the Founding of the American Republic: Religion and the State Governments*, https://www.loc.gov/exhibits/religion/rel05.html (last visited Sept. 21, 2021). In any event, with the adoption of the 14th Amendment in 1868, the First Amendment was rendered applicable to the states. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

7. George Washington, *From George Washington to the Society of Quakers, 13 October 1789*, https://founders. archives.gov/documents/Washington/05-04-02-0188 (last visited Sept. 22, 2021).

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12. *Toleration Act*, Encyclopedia Britannica https://library.eb.com/levels/referencecenter/article/Toleration-Act/72799 (last visited Sept. 21, 2021).

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18. Alvin K. Benson, *William Penn*, First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/1224/william-penn (last visited Sept. 21, 2021).

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23. *Id*. at 164.

24. *Id*. at 166.

25. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

26. *Id*. at 26.

27. Cantwell v. Connecticut, 310 U.S. 296 (1940).

28. Prince v. Massachusetts, 321 U.S. 158 (1944).

29. *Id*. at 166.

30. Ronald Rotunda and John Nowack, Treatise on Constitutional Law — Substance and Procedure, § 21.7 (5th edition, May 2021).

31. Torcaso v. Watkins, 367 U.S. 488 (1961).

32. Rotunda and Nowack at § 21.8(a).

33. Braunfeld v. Brown, 366 U.S. 599 (1961).

34. Wisconsin v. Yoder, 406 U.S. 205 (1972).

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38. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

39. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S.Ct. 1719 (2018).

40. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868 (2021).

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44. *125 George Carlin Quotes to Make You Laugh, Smile and Think*, Parade (February 10, 2021), https://parade.com/1080754/jessicasager/george-carlin-quotes/ (last visited Sept. 21, 2021).

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