

Video Transcript: First Amendment Religion Part II

[NARRATOR]

Now Religion Clause number two: The Free Exercise Clause. From the beginning, courts have struggled to strike a balance between the religious liberty of believers, who often claim the right to be excused from laws that interfere with their religious practices, and the interests of government. The Supreme Court has said repeatedly that the government may not compel or punish religious beliefs. In America, people are free to think and believe whatever they please according to the dictates of their conscience.

However, the Free Exercise Clause has never provided absolute protection for religiously motivated conduct. For example, the government is allowed to ban behavior that a certain religion requires like polygamy – that’s marrying more than one person – or the use of hallucinogenic drugs.

[KAGAN]

The Free Exercise Clause just says to every American that you have the right to freely exercise your own religion. Again, when that was created, it was mostly about different Christian sects. That's who mostly lived in the United States. And it said that an Episcopalian, or a Presbyterian, or a Baptist – each of those people had a right to practice religion as he or she saw fit. But of course it also extended to real minority religions, at that time and now. Muslims, or Jews, or Hindi, or anything that you can imagine – each of you has the right to worship your own god in your own way.

If I could be a little bit personal, that was something that was profoundly important to my own family. I'm Jewish, my family came from an area of the world which was deeply, deeply anti-Semitic, in which they couldn't practice their religion in the way they wanted. And they saw America as the golden land as the place that they wanted to live and to raise their children. In part because the streets were supposed to be paved with gold, but in large part because in that place they were going to be allowed to worship in the way that they wanted to, without fear of persecution, without fear of pogroms, without fear that they would be second-class citizens. And for so many generations of Americans of so

many faiths, that has been the dream. To find a place in which all religious ideas are, are viewed as equal, and are viewed as it's your business, and the government has no right to interfere, and the government has no right to prefer one over the other.

[NARRATOR]

The Supreme Court first addressed the Free Exercise Clause in a series of cases involving nineteenth-century laws that were aimed at suppressing the practice of polygamy among Mormons. The Court unanimously rejected free exercise challenges to these anti-polygamy laws, holding that the Free Exercise Clause protects belief but not conduct. The Court shifted towards strengthening protection for religious conduct in the 1960s and 70s, but since then, they've mostly shifted back. Jeff...

[JEFF]

Take *Sherbert v. Verner* for example. There, a state denied unemployment benefits to a member of the Seventh-Day Adventist Church who quit her job rather than working on the Sabbath. The Court concluded that the state's denial of benefit violated the worker's free exercise rights. And, in *Wisconsin against Yoder*, the Court held that Amish families couldn't be punished for refusing to send their children to school. Since then, the Court has done little to extend these protections. For the most part, the Court's free exercise cases have followed a familiar pattern: A law applies to everyone in a given jurisdiction; someone comes to court and claims a religious exemption from that law; and the court ultimately rejects the challenger's claim.

From *Yoder* through the 1980s, the bottom line was that, whether you were an Amish employer refusing to pay Social Security taxes or an army doctor wishing to wear a yarmulke while on duty, you were probably going to lose your free exercise claim.

This line of cases culminated in a really important case called *Employment Division v. Smith*. It was decided in 1990, it was written by the late Justice Antonin Scalia – and it involved Native Americans who were fired. They had ingested peyote during a religious ceremony. And because of this, the state of Oregon denied them unemployment benefits. The Native Americans challenged this action on free exercise grounds, and the Supreme Court rejected their claim.

The Court held that the Free Exercise Clause does not protect the sacramental use of peyote, which is a hallucinogenic drug. It held that you are not generally entitled to exemptions from generally applicable laws, and it expressly rejected the use of strict scrutiny – which is a kind of close review by the Supreme Court – for challenges to neutral laws that have the incidental effect of burdening religion. Smith proved to be highly controversial. It's been criticized by citizens, and legislatures, and even by Supreme Court Justices.

There's final line of cases that continues – even after the Smith case – to provide strong protection for believers against burdens from laws that target religious practices.

The key case here is called *Church of the Lukumi Bablu Aye v. the City of Hialeah*. There, the Supreme Court unanimously struck down a local law, in Florida, against the “unnecessary” killing of animals in a “ritual or ceremony.” This law was directed against the Santeria religion, which uses animal sacrifice as one of its principal forms of worship. The Supreme Court struck down the law, it reaffirmed the Smith test, but said that that test didn't apply when a law was drawn to apply only to a small and unpopular religious group. The problem here was that the law was specifically passed to target the Santeria religion, unlike in Smith where the drug law applied to everyone. In other words, the Court embedded a strong anti-discrimination principle in Free Exercise doctrine.

[NARRATOR]

So, where do we stand today? Many of these Supreme Court cases are relevant to your lives. The Court has held that government cannot force you to attend church, or jail you for preaching without a license. But many other topics are at the center of the constitutional debates in America today.

Can the government give aid to education conducted by religious institutions like Catholic schools? When if ever can the government carve out an exemption (or exception) to a law for religious dissenters? When if ever can the government sponsor or display religious symbols like the Ten Commandments or a nativity scene? Finally, can the government sponsor prayer, and if so, where and when? In public schools? On the 50-yard line? At a graduation? How about legislatures and town council meetings?

These issues force the Supreme Court – and they force all of us – to weigh the government's desire to promote a policy that the majority wants (sometimes religious majority, sometimes secular majority) against the burdens that government action places on religious dissenters.

[JEFF]

So we've thrown a lot of cases at you. We've talked about the Establishment Clause cases, which examine the conditions under which government action can make you feel coerced into praying or engaging in religious observance at school. We've talked about the Free Exercise cases and the question of when religious individuals are entitled to exemptions from generally applicable laws like anti-discrimination laws. I want you to learn more about the cases – study them yourselves and inspire yourselves to figure out what you think the right answer is. And the best way to do that is to go to the Interactive Constitution of the National Constitution Center. Check out the cases. Read the arguments on both sides, and make up your own mind.

[NARRATOR]

These cases are a part of who we are as Americans and they set-up a way for us to have complete freedom of our mind and ideas – freedom of conscience. For many people the right to think and be free means freedom of thought and opinion, and the freedom to worship, or not to worship, according to the dictates of our conscience – this, according to the framers was the quintessential unalienable right – the right that we cannot alienate or surrender to government under any circumstances. Why not? Because our beliefs, or lack of beliefs defines who we are as human beings and that can never be surrendered.