First Amendment – The Free Exercise Clause
Common Interpretation

Frederick Gedicks & Michael McConnell

Many settlers from Europe braved the hardships of immigration to the American colonies to escape religious persecution in their home countries and to secure the freedom to worship according to their own conscience and conviction. Although the colonists often understood freedom of religion more narrowly than we do today, support for protection of some conception of religious freedom was broad and deep. By the time of Independence and the construction of a new Constitution, freedom of religion was among the most widely recognized "inalienable rights," protected in some fashion by state bills of rights and judicial decisions. James Madison, for example, the principal author of the First Amendment, eloquently expressed his support for such a provision in Virginia: "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."

Although the original Constitution contained only a prohibition of religious tests for federal office (Article VI, Clause 3), the Free Exercise Clause was added as part of the First Amendment in 1791. In drafting the Clause, Congress considered several formulations, but ultimately settled on protecting the "free exercise of religion." This phrase makes plain the protection of actions as well as beliefs, but only those in some way connected to religion.

From the beginning, courts in the United States have struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or "exempted" from laws that

interfere with their religious practices, and the interests of society reflected in those very laws. Early state court decisions went both ways on this central question.

The Supreme Court first addressed the question in a series of cases involving nineteenth-century laws aimed at suppressing the practice of polygamy by members of the Church of Jesus Christ of Latter-day Saints (LDS), also known as Mormons. The Court unanimously rejected free exercise challenges to these laws, holding that the Free Exercise Clause protects beliefs but not conduct. “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” *Reynolds v. United States* (1878). What followed was perhaps the most extreme government assault on religious freedom in American history. Hundreds of church leaders were jailed, rank-and-file Mormons were deprived of their right to vote, and Congress dissolved the LDS Church and expropriated most of its property, until the church finally agreed to abandon polygamy.

The belief-action distinction ignored the Free Exercise Clause’s obvious protection of religious practice, but spoke to the concern that allowing believers to disobey laws that bind everyone else would undermine the value of a government of laws applied to all. Doing so, *Reynolds* warned, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

Reynolds influenced the meaning of the Free Exercise Clause well into the twentieth century. In 1940, for example, the Court extended the Clause—which by its terms constrains only the federal government—to limit state laws and other state actions that burden religious exercise.

Cantwell v. Connecticut (1940). Though it recognized that governments may not "unduly infringe" religious exercise, the Court reiterated that "[c]onduct remains subject to regulation for the protection of society," citing *Reynolds* as authority. Similarly, the Court held in 1961 that the Free Exercise Clause did not exempt an orthodox Jewish merchant from Sunday closing laws, again citing *Reynolds*.

In the 1960s and early 1970s, the Court shifted, strengthening protection for religious conduct by construing the Free Exercise Clause to protect a right of religious believers to exemption from generally applicable laws which burden religious exercise. The Court held that the government may not enforce even a religiously-neutral law that applies generally to all or most of society unless the public interest in enforcement is "compelling." *Wisconsin v. Yoder* (1972). *Yoder* thus held that Amish families could not be punished for refusing to send their children to school beyond the age of 14.

Although the language of this "compelling-interest" test suggested powerful protections for religion, these were never fully realized. The cases in which the Supreme Court denied exemptions outnumbered those in which it granted them. Aside from *Yoder*, the Court exempted believers from "availability for work" requirements, which denied unemployment benefits to workers terminated for prioritizing religious practices over job requirements. But it denied exemptions to believers and religious organizations which found their religious practices burdened by conditions for federal tax exemption, military uniform regulations, federal minimum wage laws, state prison regulations, state sales taxes, federal administration of public lands, and mandatory taxation and other requirements of the Social Security system. In all of these cases the Court found, often controversially, either that the

government's interest in enforcement was compelling, or that the law in question did not constitute a legally-recognizable burden on religious practice.

In 1990, the Supreme Court changed course yet again, holding that the Free Exercise Clause "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)." *Employment Division v. Smith* (1990). Though it did not return to the belief-action distinction, the Court echoed *Reynolds*' concern that religious exemptions permit a person, "by virtue of his beliefs, to become a law unto himself," contradicting "both constitutional tradition and common sense." Any exceptions to religiously-neutral and generally-applicable laws, therefore, must come from the "political process." *Smith* went on to hold that the Free Exercise Clause does not protect the sacramental use of peyote, a hallucinogenic drug, by members of the Native American Church.

Smith proved to be controversial. In 1993, overwhelming majorities in Congress voted to reinstate the pre-*Smith* compelling-interest test by statute with the Religious Freedom Restoration Act (RFRA). RFRA authorizes courts to exempt a person from any law that imposes a substantial burden on sincere religious beliefs or actions, unless the government can show that the law is the "least restrictive means" of furthering a "compelling governmental interest." Almost half of the states have passed similar laws—"state RFRAs"—applicable to their own laws. In 1997 the Supreme Court held that Congress had constitutional authority only to apply RFRA to federal laws, and not to state or local laws. Congress then enacted a narrower law, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies the compelling-

interest test to state laws affecting prisoners and land use. RFRA and RLUIPA have afforded exemptions in a wide range of federal and state contexts—from kosher and halal diets for prisoners, to relief from zoning and landmark regulations on churches and ministries, to exemptions from jury service.

Although some exemption claims brought under these religious freedom statutes have been relatively uncontroversial—the Supreme Court unanimously protected the right of a tiny religious sect to use a hallucinogenic drug prohibited by federal law and the right of a Muslim prisoner to wear a half-inch beard prohibited by state prison rules—some touch on highly contested moral questions. For example, the Court by a 5-4 vote excused a commercial family-owned corporation from complying with the "contraception mandate," a regulation which required the corporation's health insurance plan to cover what its owners believe are abortion-inducing drugs. *Burwell v. Hobby Lobby Stores Inc.* (2014). In the wake of *Hobby Lobby* and the Court's subsequent determination that states may not deny gays and lesbians the right to civil marriage, state RFRAs have become a flashpoint in conflicts over whether commercial vendors with religious objections may refuse their products and services to same-sex weddings.

Besides RFRA and other exemption statutes, the Free Exercise Clause itself, even after *Smith*, continues to provide protection for believers against burdens on religious exercise from laws that target religious practices, or that disadvantage religion in discretionary, case-by-case decision making. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), for example, the Court unanimously struck down a local ordinance against the "unnecessary" killing of animals in a "ritual or ceremony"—a law that was drawn to apply only to a small and unpopular

religious sect whose worship includes animal sacrifice.

The Court recently recognized that the Free Exercise Clause (along with the Establishment Clause) required a religious exemption from a neutral and general federal antidiscrimination law that interfered with a church's freedom to select its own ministers. The Court distinguished *Smith* on the ground that it "involved government regulation of only outward physical acts," while this case "concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.* (2012).

It remains unclear whether *Lukumi* and *Hosanna-Tabor* are narrow exceptions to *Smith*'s general presumption against religious exemptions, or foreshadow yet another shift towards a more exemption-friendly free exercise doctrine.

First Amendment – The Free Exercise Clause
Matters of Debate
"Religious Liberty Is Equal Liberty"

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At the time the United States adopted the First Amendment to the Constitution, other nations routinely imposed disabilities on religious minorities within their borders, depriving them of legal rights, making it difficult or impossible to practice their faith, and often enabling violent persecution. The Free Exercise Clause was thus an exceptional political achievement, imposing a constitutional norm of civic equality by prohibiting the federal government from interfering with *all* religious exercise—regardless of affiliation.

Only a few years before the First Amendment was ratified, James Madison wrote that all people naturally retain "equal title to the free exercise of Religion according to the dictates of conscience" without the government's "subjecting some to peculiar burdens" or "granting to others peculiar exemptions." *A Memorial and Remonstrance against Religious Assessments* (1785). As Madison suggested, at the time the Constitution and Bill of Rights were ratified, the guarantee of religious free exercise was understood to protect against government discrimination or abuse on the basis of religion, but not to require favorable government treatment of believers. In particular, there is little evidence that the Founders understood the Free Exercise Clause to mandate "religious exemptions" that would excuse believers from complying with neutral and general laws that constrain the rest of society.

The Supreme Court has historically left the question of religious exemptions to Congress and the state legislatures. The first judicially-ordered exemptions arose in the 1960s and early 1970s,

when the Supreme Court held the Free Exercise Clause required religious exemptions for Amish families who objected to sending their children to high school, and for employees who were denied unemployment benefits when they lost their jobs for refusing to work on their Sabbath. This doctrine of judicially-ordered exemptions, however, was an historical aberration. In *Employment Division v. Smith* (1990), the Court considered a claim by members of a Native American religion who lost their jobs as drug counselors for using an illegal drug in a religious ritual. The Court abandoned its new doctrine of religious exemptions, ruling that the Free Exercise Clause did not grant believers a right to exemptions from religiously neutral, generally applicable laws, though legislatures were free to grant such exemptions if they wished. This relegation of exemptions to the political process in most circumstances returned the Free Exercise Clause to its historical baseline. Notwithstanding the narrow ministerial exception recognized in *Hosanna-Tabor Evangelical Church & School v. EEOC* (2012), the Court has repeatedly affirmed *Smith* and the century of precedent cited in that case, and has shown no inclination to overturn its basic principle that neutral and general laws should apply equally to all, regardless of religious belief or unbelief.

The growth of social welfare entitlements and religious diversity in the United States has underscored the wisdom of the *Smith* rule. Exempting believers from social welfare laws may give them a competitive advantage, and also may harm those whom the law was designed to protect or benefit.

For example, the Court refused to exempt an Amish employer from paying Social Security taxes for his employees, reasoning that doing so would "impose the employer's religious faith on the employees" by reducing their social security

benefits regardless of whether they shared their employer's religious objection to government entitlement programs. *United States v. Lee* (1982). Similarly, the Court refused to exempt a religious employer from federal minimum wage laws, because doing so would give the employer an advantage over competitors and depress the wages of all employees in local labor markets. *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985).

The Court seems poised to adopt this "third-party burden" principle in decisions interpreting the 1993 Religious Freedom Restoration Act (RFRA) as well. Five Justices in *Burwell v. Hobby Lobby Stores, Inc.* (2014), expressly stated that RFRA exemptions imposing significant costs on others are not allowed. The majority opinion likewise acknowledged that courts must take "adequate account" of third-party burdens before ordering a RFRA exemption.

The growth of religious diversity makes a religious exemption regime doubly impractical. The vast range of religious beliefs and practices in the United States means that there is a potential religious objector to almost any law the government might enact. If religious objectors were presumptively entitled to exemption from any burdensome law, religious exemptions would threaten to swallow the rule of law, which presupposes its equal application to everyone. As the Court observed in *Lee*, a religiously diverse social welfare state cannot shield "every person . . . from all the burdens incident to exercising every aspect of the right to practice religious beliefs."

Even under the equal-liberty regime contemplated by the Founders and restored by *Smith,* government remains subject to important constraints that protect religious liberty. "Religious gerrymanders," or laws that single out particular religions for burdens not imposed on

other religions or on comparable secular conduct, must satisfy strict scrutiny under the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993); *Sherbert v. Verner* (1963). Under RFRA and the related Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), the federal government and often the state governments are prohibited from burdening religious exercise without adequate justification. *Holt v. Hobbs* (2015); *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (2005). And, like judicially-ordered exemptions, legislative exemptions that impose material costs on others in order to protect believers' free exercise interests may be invalid under the Establishment Clause, which protects believers and unbelievers alike from bearing the burdens of practicing someone else's religion. *Estate of Thornton v. Caldor* (1985).

If exemptions are to be afforded to those whose religious practices are burdened by neutral and general laws, they should generally not be granted by courts, but by the politically accountable branches of the federal and state governments. These branches are better situated to weigh and balance the competing interests of believers and others in a complex and religiously-diverse society.

First Amendment – The Free Exercise Clause
Matter of Debate
"Free Exercise: A Vital Protection for Diversity and Freedom"

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One of this nation's deepest commitments is to the full, equal, and free exercise of religion – a right that protects not only believers, but unbelievers as well. The government cannot use its authority to forbid Americans to conduct their lives in accordance with their religious beliefs or to require them to engage in actions contrary to religious conscience – even when the vast majority of their countrymen regard those beliefs as backward, mistaken, or even immoral.

Unfortunately, in the last few years – and especially since the Supreme Court's decision requiring states to recognize same-sex marriage – this consensus in favor of tolerance has been slipping. All too often, we hear demands that religious people and religious institutions such as colleges or adoption agencies must join the state in recognizing same-sex marriages (or performing abortions or supplying contraceptives, or whatever the issues happen to be), or lose their right to operate.

That has not been the American way. When this country severed its ties with the British Empire, one thing that went with it was the established church. To an unprecedented degree, the young United States not only tolerated but actively welcomed people of all faiths. For example, despite his annoyance with the Quakers for their refusal to support the revolutionary war effort, Washington wrote to a Quaker Society to express his "wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

Letter to the Annual Meeting of Quakers (1789).

What would it mean to have a regime of free exercise of religion? No one knew; there had been no such thing before. It quickly became clear that it was not enough just to cease persecution or discrimination against religious minorities. Just two years after the ink was dry on the First Amendment, the leader of the Jewish community in Philadelphia went to court and asked, under authority of his state's free exercise clause, to be excused from complying with a subpoena to appear in court on his day of sabbath. He did not ask that the state cease to do official business on Saturday, but he did ask the court to make an exception – an accommodation – that would enable him to be faithful to the Jewish law.

This would become the central interpretive question under the Free Exercise Clause: Does it give Americans whose religions conflict with government practices the right to ask for special accommodation, assuming an accommodation can be made without great harm to the public interest or the rights of others?

In the early years, some religious claimants won and some lost. The Mormon Church lost in a big way, in the first such case to reach the United States Supreme Court. *Reynolds v. United States* (1878). In 1963, the Supreme Court held that the Free Exercise Clause of the First Amendment *does* require the government to make accommodations for religious exercise, subject as always to limitations based on the public interest and the rights of others. *Sherbert v. Verner* (1963). In 1990, the Court shifted to the opposite view, in a case involving the sacramental use of peyote by members of the Native American Church. *Employment Division v. Smith* (1990).

Today we have a patchwork of rules. When the federal government is involved, legislation called

the Religious Freedom Restoration Act grants us the right to seek appropriate accommodation when our religious practices conflict with government policy. About half the states have similar rules, and a similar rule protects prisoners like the Muslim prisoner who recently won the right to wear a half-inch beard in accordance with Islamic law, by a 9-0 vote in the Supreme Court. *Holt v. Hobbs* (2015).

The range of claims has been as diverse as the religious demography of the country. A small Brazilian sect won the right to use a hallucinogenic drug in worship ceremonies; Amish farmers have won exceptions from traffic rules; Muslim soldiers have been given special accommodation when fasting for Ramadan; Orthodox Jewish boys won the right to wear their skullcaps when playing high school basketball; a Jehovah's Witness won the right to unemployment compensation after he quit rather than working to produce tank turrets; a Mormon acting student won the right to refuse roles involving nudity or profanity; and in the most controversial recent case, a family-owned business with religious objections to paying for abortion-inducing drugs persuaded the Supreme Court that the government should make those contraceptives available without forcing them to be involved.

In all these cases, courts or agencies came to the conclusion that religious exercise could be accommodated with little or no harm to the public interest or to others. As Justice Sandra Day O'Connor (joined by liberal lions Brennan, Marshall, and Blackmun) wrote: "courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Employment Division v. Smith* (1989) (concurring opinion).

At a time when the Supreme Court's same-sex marriage decision has allowed many millions of Americans to live their lives in accordance with their own identity, it would be tragic if we turned our backs on the right to live in accordance with our religious conviction, which is also part of who we are. A robust protection for free exercise of religion is not only part of the American tradition, it is vital to our protection for diversity and freedom.	