Commentaries on

First Amendment

Religion Clauses

(From First Amendment Center)

1. Overview – Charles Haynes

2. Establishment Clause

3. Free Exercise Clause – Claire Mullally

Summaries of Major Court Rulings on Religious Liberty

Overview >

By Charles C. Haynes
First Amendment Center senior scholar

Religious liberty in public life

One of America's continuing needs is to develop, out of our differences, a common vision for the common good. Today that common vision must embrace a shared understanding of the place of religion in public life and of the guiding principles by which people with deep religious differences can contend robustly but civilly with each other. — The Williamsburg Charter

First presented to the nation on June 25, 1988, the Williamsburg Charter has been recognized by many commentators as a powerful and timely restatement of the religious-liberty principles that undergird the First Amendment to the U.S. Constitution. Drafted by representatives of America's leading faiths and signed by nearly 200 leaders from every sector of American life, the charter calls for a national reaffirmation of religious liberty as an inalienable right — and for a renewed commitment to the universal duty to guard that right for all people. The charter is built on the conviction that the religious-liberty clauses of the First Amendment provide the democratic first principles that enable us to debate our differences, to understand one another, and to forge public policies that serve the common good.

Today, more than a dozen years after the signing of the charter and more than 200 years after the adoption of the First Amendment, America's need to articulate a "common vision for the common good" has never been more urgent — or more challenging. Our nation begins the 21st century as the most religiously diverse place on earth, and, among developed nations, the most religious. As the charter reminds us, the task of nation-building in our time requires a shared commitment to the core civic principles that bind us together as a people.

But how will Americans develop such an understanding and commitment across religious and ideological differences that are deep and abiding? It will not be easy. Our increasingly crowded public square is often a hostile place where citizens shout past one another across seemingly unbridged distances. Incendiary rhetoric and personal attacks characterize many "culture-war" debates over abortion, sex education, homosexuality, school prayer and other hot-button issues. Any notion of the common good frequently gets lost in the crossfire of charge and countercharge. And on the fringes, wars of words can sometimes escalate into outbursts of hate and violence.

In spite of these challenges, there are at least two reasons for optimism and hope about the ability of Americans to negotiate even our deepest differences and, in many instances, to find common ground. First, as the Williamsburg Charter reminds us, the religious-liberty clauses of the First Amendment — properly understood and fairly applied — provide an effective civic framework for sustaining our bold experiment in building one nation out of

many peoples and faiths. And second, a number of recent civic initiatives — many involving public education — are quietly, but successfully, staking out common ground on divisive culture-war issues.

In what follows, I explore these sources of optimism, and suggest how civil dialogue might be renewed and civic consensus reached without ignoring or compromising our diverse religious and philosophical commitments.

Religion and the public schools

This topic is thoroughly explored in a separate section on this site, but a few words here are in order. Public education has been the perennial battleground for religious and ideological differences since the earliest days of the public school movement. From the "Bible wars" of the 19th century to recent fights over the posting of the Ten Commandments, conflicts over the role of religion in public schools have long divided communities, sparked bitter lawsuits, and undermined the educational mission of schools.

The struggle over religion and values in public schools has never really been about the 60-second "to-whom-it-may-concern" prayer each morning or the Christmas tree in the school lobby. It is now and always has been a struggle over deeper questions such as "whose schools are these?" and "what kind of nation are we — will we be?" With so much at stake, it is inevitable that schools are seen as the microcosm of our public square, an arena where we debate and define who we are as a people. But when these debates degenerate into personal attacks, ridicule, false characterizations of opposing positions and similar tactics, they tear apart the fabric of our lives together and alienate large numbers of citizens from their local schools. If we cannot find ways to negotiate our differences in public schools without going for the jugular, then the schools — and the nation — face a difficult future.

Seeking common ground in the abortion conflict

The other public policy and moral issue that most defies "finding common ground" is, of course, abortion. Not since the battle over the abolition of slavery have Americans been so deeply divided and expressed their differences with so much hostility, anger and violence. The abolition debate helped ignite the bloodiest and most tragic chapter in our nation's history. Can we do better this time?

For the founders of the Common Ground Network for Life and Choice, the answer is an emphatic "yes." Since 1992, this organization has worked to establish dialogue between pro-life and pro-choice advocates. Leaders and members involved in the effort include activists from both sides.

In striking contrast to the bitter and polarized public debate over abortion, the Common Ground Network has created quiet but effective "common-ground groups" in Cleveland, Denver, Dallas, Washington, D.C. and many other cities throughout the country. A key starting point is that no participant is asked to compromise his or her convictions about abortion. Rather than seeking agreement on the core issue, the dialogue focuses on building mutual understanding.

Honest dialogue is, of course, valuable in and of itself. But the network pushes beyond talk to action. Participants engage in the difficult work of setting an agenda that people on both sides can support. In this process, most groups discover that they have shared goals concerning teenage pregnancy, the availability of adoption, the need for adequate day care and other related issues. As a result, they are able to work together to change public policy in ways intended to reduce the number of abortions.

Will these common-ground efforts succeed in recasting the abortion debate? That remains to

be seen. But even the modest accomplishments thus far demonstrate that the network is not a quixotic quest by a few idealists, but a practical exercise in civic responsibility with potential for broad support on all sides.

All Americans have a stake in the success of the Common Ground Network and similar initiatives. Charles Colson put it best when he warned (after the killing of an abortion doctor in Florida) that the crime "was not only senseless, it was symbolic — its message that a democracy poisoned by hatred and division can be as dangerous as the streets of Sarajevo... . Our public square threatens to become Matthew Arnold's darkling plain, where ignorant armies clash by night."

Protecting religious liberty in the workplace

Unlike public policy debates about abortion or homosexuality, there appears to be considerable agreement among religious and civil libertarian groups on the question of religious freedom in the workplace. In 1997 representatives from many diverse groups, ranging from the Southern Baptist Convention and the Christian Legal Society to the American Jewish Congress and People for the American Way, stood with President Clinton to endorse a presidential directive on religion in the federal workplace. The president acted in response to widespread confusion about when and how government employees may express their faith while at work.

Citing the principles of fairness quite similar to those articulated in Clinton's guidelines on student religious expression in public schools, the workplace directive makes clear that "neutrality" under the establishment clause does not mean hostility. The fact that the White House sees a need to remind supervisors that federal workers may read their scriptures during breaks or share their faith with coworkers is a sad indication of how widely "separation of church and state" is misunderstood and wrongly applied.

Evangelical Christians, Jewish leaders, civil libertarians and others who participated in the drafting of these guidelines agree on equal treatment for religious expression, an interpretation of establishment-clause neutrality that is of growing importance in Supreme Court decisions. Simply put, this means that religious expression will be treated in the same way as nonreligious expression. Of course, harassment and coercion are prohibited in matters concerning religion, as in other matters. But disagreement about religion doesn't in and of itself create a hostile environment.

President Clinton's directive also specifies that federal agencies should accommodate religious exercise by an employee "unless such accommodation would impose an undue hardship on the conduct of the agency's operations." This would mean, for example, that a worker may have the day off for religious reasons as long as the absence doesn't make it impossible to carry out the functions of the department. Or that a worker who must wear a head covering for religious reasons should be allowed to do so as long as the covering doesn't interfere with the safe functioning of the workplace.

The successful agreement on federal guidelines led a similar coalition of religious and civil liberties groups to draft congressional legislation intended to protect religious expression in the private workplace. While the aim of Title VII of the 1964 Civil Rights Act was to require employers to accommodate the religious practices of their employees whenever possible, the courts have interpreted the act so narrowly that little protection remains for religious liberty.

In 1998 a bipartisan coalition led by Sens. John Kerry, D-Mass., and Dan Coats, R-Ind., proposed an amendment to Title VII called the Workplace Religious Freedom Act. Although the bill has yet to reach a vote, strong support from a broad range of religious and civil rights groups gives it a good chance of eventual passage. (This bill has since been

reintroduced in the succeeding congressional sessions, but has failed to pass.)

WFRA would require employers to make reasonable accommodation for an employee's religious observance, unless the accommodation would impose "undue hardship" on the employer. The key issue, of course, is the meaning of "undue hardship." The act defines the term much in the same way it is defined in the Americans with Disabilities Act. Thus undue hardship would involve imposing "significant difficulty or expense" on the employer. Such factors as the size of the business and operating costs would be taken into account.

In a nation founded on religious freedom, it is unfortunate that legislation is needed to get employers to accommodate claims of conscience. But in some places Muslim women are told to take off their scarves, Orthodox Jews and Seventh-day Adventists are told to work on Saturday, and Christians are told to come in on Good Friday and Christmas. In a recent survey conducted by the Tanenbaum Center of 675 workers (in a pool that included Christians, Muslims, Jews, Hindus, Buddhists and Shintoists), two-thirds of all respondents viewed religious discrimination as an important issue in the workplace. One in five workers had either experienced religious discrimination personally or knew of a coworker who had.

Since these are private employers and not the government, the free-exercise clause of the First Amendment can't be directly invoked. But as the drafters of the Civil Rights Act understood, our commitment to religious liberty calls us to guard the right of each citizen to follow the "dictates of conscience" whenever possible. In this case, religious groups don't intend for WFRA to cause excessive hardship or expense for business owners. But they do want more flexibility in scheduling and more sensitivity to the religious requirements of workers.

The fact that coalitions from across the religious and political spectrum support religious freedom in the workplace may signal a new, shared understanding about religious expression in the public square. For most people of faith, religion is not (nor can it be) a purely private matter. Protecting and, when feasible, accommodating religious claims of conscience in the workplace or classroom uphold the spirit of the First Amendment and serve the common good.

Partnerships: Faith-based organizations, government programs

The coalition advocating religious freedom in the workplace is bound together by a shared concern for protecting the "free exercise" of religion. Much more difficult to negotiate, of course, are issues involving the separation of church and state, especially proposals that encourage partnerships between government and religion. Two debates in particular — one over the "charitable choice" provision of the 1996 federal Welfare Reform Act and the other over relations between public schools and faith communities — have sparked sharp disagreements among religious communities as well as between religious and secular organizations. But as bipartisan support for both ideas has grown over the past few years, religious and civil libertarian groups have made a concerted effort to find some common ground.

Let's look first at the easier of the two issues: cooperation between public schools and faith communities. Given the enormous social problems and educational challenges faced by schools, it is hardly surprising that educators throughout the nation are reaching out to religious communities for help. What is striking is that these initiatives are strongly encouraged by the U.S. Department of Education and are spreading rapidly in large, urban school districts like Chicago and Philadelphia.

On this question, as with many others involving religion and schools, getting beyond the

"naked" or "sacred" models of public education is a common hurdle for school leaders. Many administrators have studiously avoided dealing with religious communities out of fear of lawsuits and controversy. Others, especially in rural areas, have traditionally seen no problem letting the local church send "Bible ladies" to teach (unconstitutional) Bible courses or with giving local clergy unfettered access to students during the school day.

But the new movement to encourage partnerships is pushing for a third model in the spirit of the "civil public school" outlined earlier. In 1999, a coalition of 14 religious and educational groups published First Amendment guidelines for cooperative arrangements between public schools and faith communities. Lead drafters included the American Jewish Congress and the Christian Legal Society. Cosigners ranged from the National PTA and the National School Boards Association to the Council on Islamic Education and the U.S. Catholic Conference.

The new agreement outlines how schools and religious groups may cooperate in providing mentoring opportunities, extended day care, recreational activities and similar programs without violating the establishment clause. For example, the partnerships must be open to all responsible community groups and not just to religious organizations, and care must be taken to ensure that cooperative programs aren't opportunities for proselytizing of students during the school affiliated program. These guidelines were included in the Clinton administration's mailing to all public schools, along with a U.S. Department of Education booklet, "How Faith Communities Support Children's Learning in Public Schools," that describes successful partnerships between schools and religious organizations.

In spite of this consensus among many religious and educational groups, a number of separationist organizations warn that these legal guidelines are only as good as their implementation. They argue that it will be difficult, if not impossible, to monitor or enforce rules against proselytizing during the cooperative programs. Moreover, distributing guidelines to all public schools may open the door to all kinds of religious groups that have long sought a way to reach public school students.

It should be noted, however, that separationists do not uniformly oppose partnerships between public schools and faith communities. Groups like the American Jewish Congress and the Baptist Joint Committee on Public Affairs take the position that such arrangements can be valuable — and, in any case, are now a widespread and growing phenomenon that must be addressed. They are convinced that while national distribution of First Amendment guidelines may carry some risk, the greater risk would be to offer no guidance.

But support for the guide from religious groups with strong separationist views of the First Amendment is only possible because the guidelines are silent on the issue of government funding (i.e., when, if ever, government money may be used to support faith- based programs for public school children). As might be expected, the funding issue is why separationists are more united in their opposition to the "charitable choice" section of the 1996 federal Welfare Reform Act. Under this provision, faith based organizations may compete for contracts or participate in voucher programs when states use private sector providers for delivering welfare services to the poor. Although the funds can't be used for religious purposes, they can be given directly to religious institutions (including houses of worship) to administer programs on behalf of the government.

The Baptist Joint Committee, Americans United, People for the American Way and other strict separationists argue that charitable choice violates the establishment clause by allowing "pervasively sectarian" institutions to receive federal funding to administer social services. By contrast, many Catholic, evangelical and some mainline Protestant groups see the provision as a welcome opportunity to expand their services to the poor through creative partnerships with government.

Now that charitable choice is the law, some religious groups initially opposed to the idea — the National Council of Churches, for example — are seeking ways to implement it without violating the establishment clause. And the American Jewish Committee has convened a number of groups representing various perspectives on the issue to explore the possibility of a common-ground set of guidelines.

Though no new breakthrough has been announced, religious-liberty expert Oliver Thomas points out that many groups on all sides of the charitable choice debate appear to agree on a number of key principles. First, they agree that there is a role for faith-based programs in the delivery of social services. Even most separationists will agree that government funding may go to religiously affiliated programs (e.g., Church World Service, Catholic Charities) as opposed to pervasively sectarian institutions such as churches. Second, they agree that secular alternatives should be available for clients receiving services through religious institutions. Third, they don't believe that direct government funding should go toward explicitly religious activities such as worship. And fourth, they agree that services should not be denied to anyone on the basis of religious belief or nonbelief.

It may be difficult, if not impossible, to reach common ground on the issue of government funds going directly to local congregations. Many separationists are firmly convinced that charitable choice and similar proposals violate liberty of conscience by forcing taxpayers to support religious institutions and that no list of "safeguards" will be sufficient to prevent government money from being used to proselytize. Many evangelicals and others oppose attempts to impose conditions on funding that would require churches to eliminate the religious character or symbols from their programs for the poor.

One possibility for bridging this gap might be to require that workers delivering the services be hired on a nondiscriminatory basis, thus creating the probability of a religiously diverse workforce for the funded program. (The Department of Housing and Urban Development, for example, currently requires faith-based providers "not to discriminate on the basis of religion in hiring.") Getting agreement on this requirement will be challenging, since it is not currently mandated by the Welfare Reform Act, and religious groups may be unwilling to waive their right to discriminate in hiring on the basis of religion under Title VII of the Civil Rights Act.

In spite of the barriers to reaching agreement, all sides — particularly the traditional separationists — have good reason to keep trying. The sentiment in Congress and in many states is to expand opportunities for faith-based organizations to deliver government funded social services. Barring a successful court challenge, government partnerships with faith-based programs are likely to proliferate in the coming decade. Without sufficient safeguards, groups on all sides have cause to worry. Religious institutions may find their autonomy threatened by government monitoring and auditing. And Americans seeking government services may find themselves subject to religious indoctrination in violation of their First Amendment right to religious liberty.

Achieving consensus on whether or not charitable choice is constitutional — or even good public policy — is highly unlikely. But just as guidelines for implementing the Equal Access Act were successfully drafted and disseminated by groups with deep differences over the wisdom of "equal access," so guidelines and safeguards on charitable choice may be agreed to by a broad range of religious and civil libertarian groups. Such an agreement would not (and should not) end the debate. But it could do much to advance the common good by providing a principled framework for implementing charitable choice.

Print

Last system update: Saturday, October 14, 2006 | 09:18:05

Overview >

Establishment clause

The first of the First Amendment's two religion clauses reads: "Congress shall make no law respecting an establishment of religion ... ." Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by the government. It forbids even laws *respecting* an establishment of religion. The establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the establishment clause because the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was adopted. It reads in part that "no state shall ... deprive any person of life, liberty or property without due process of law... ." In 1947 the Supreme Court held in *Everson v. Board of Education* that the establishment clause is one of the "liberties" protected by the due-process clause. From that point on, all government action, whether at the federal, state, or local level, must abide by the restrictions of the establishment clause.

Establishment

There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the framers' other writings and prior judicial precedent, they sometimes disagree. Some, including Chief Justice William Rehnquist, argue that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others, including a majority of the justices of the current Supreme Court, believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court in *Everson*:

> "The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion... . Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and 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.'"

To help interpret the establishment clause, the Court uses several tests, including the

Lemon, coercion, endorsement and neutrality tests.

Lemon test

The first of these tests is a three-part assessment sometimes referred to as the *Lemon* test. The test derives its name from the 1971 decision *Lemon v. Kurtzman*, in which the Court struck down a state program providing aid to religious elementary and secondary schools. Using the *Lemon* test, a court must first determine whether the law or government action in question has a bona fide secular purpose. This prong is based on the idea that government should only concern itself in civil matters, leaving religion to the conscience of the individual. Second, a court would ask whether the state action has the primary effect of advancing or inhibiting religion. Finally, the court would consider whether the action excessively entangles religion and government. While religion and government must interact at some points while co-existing in society, the concern here is that they do not so overlap and intertwine that people have difficulty differentiating between the two.

Although the test has come under fire from several Supreme Court justices, courts continue to use this test in most establishment-clause cases.

Lemon test redux

In its 1997 decision *Agostini v. Felton*, the Supreme Court modified the *Lemon* test. By combining the last two elements, the Court now used only the "purpose" prong and a modified version of the "effects" prong. The Court in *Agostini* identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion.

Coercion test

Some justices propose allowing more government support for religion than the *Lemon* test allows. These justices support the adoption of a test outlined by Justice Anthony Kennedy in his dissent in *County of Allegheny v. ACLU* and known as the "coercion test." Under this test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will. Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas. But even the coercion test is subject to varying interpretations, as illustrated in *Lee v. Weisman*, the 1992 Rhode Island graduation-prayer decision in which Justices Kennedy and Antonin Scalia, applying the same test, reached different results.

Endorsement test

The endorsement test, proposed by Justice Sandra Day O'Connor, asks whether a particular government action amounts to an endorsement of religion. According to O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. She expressed her understanding of the establishment clause in the 1984 case of *Lynch v. Donnelly*, in which she states, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Her fundamental concern was whether the particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." O'Connor's "endorsement test" has, on occasion, been subsumed into the *Lemon* test. The justices have simply incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion.

The endorsement test is often invoked in situations where the government is engaged in expressive activities. Therefore, situations involving such things as graduation prayers, religious signs on government property, religion in the curriculum, etc., will usually be examined in light of this test.

Neutrality

While the Court looks to the endorsement test in matters of expression, questions involving use of government funds are increasingly determined under the rubric of neutrality. Under neutrality, the government would treat religious groups the same as other similarly situated groups. This treatment allows religious schools to participate in a generally available voucher program, allows states to provide computers to both religious and public schools, and allows states to provide reading teachers to low-performing students, even if they attend a religious school. (See *Zelman v. Simmons-Harris*, 2002, and *Mitchell v. Helms*, 2000.) It also indicates that the faith-based initiatives proposed by President Bush might be found constitutional, if structured appropriately.

The concept of neutrality in establishment-clause decisions evolved through the years. Cited first as a guiding principle in *Everson*, neutrality meant government was neither ally nor adversary of religion. "Neutral aid" referred to the qualitative property of the aid, such as the funding going to the parent for a secular service such as busing. The rationale in *Everson* looked to the benefit to the parent, not to the religious school relieved of the responsibility of providing busing for its students.

Later cases recognized that all aid is in some way fungible, i.e. if a religious school receives free math texts from the state, then the money the school would have spent on secular texts can now be spent on religious material. This refocused the Court's attention not on the kind of aid that was provided, but who received and controlled the aid. Decisions involving vocational training scholarships and providing activity-fee monies to a college religious newspaper on the same basis as other student groups showed the Court focused on the individual's control over the funds and equal treatment between religious and non-religious groups.

In the 2002 case of *Zelman v. Simmons-Harris*, the plurality decision clearly defines neutrality as evenhandedness in terms of who may receive aid. A majority of the Court continues to find direct aid to religious institutions for use in religious activities unconstitutional, but indirect aid to a religious group appears constitutional, as long as it is part of a neutrally applied program that directs the money through a parent or other third party who ultimately controls the destination of the funds.

While many find this approach intuitively fair, others are dissatisfied. Various conservative religious groups raise concerns over diminishing the special place religion has historically played in constitutional law by treating religious freedom the same as every other kind of speech or discrimination claim. Strict separationist groups argue that providing government funds to religious groups violates the consciences of taxpayers whose faith may conflict with the religious missions of some groups who are eligible to receive funding using an "even-handed" approach.

Conclusion

Although the Court's interpretation of the establishment clause is in flux, it is likely that for the foreseeable future a majority of the justices will continue to view government neutrality toward religion as the guiding principle. Neutrality means not favoring one religion over another, not favoring religion over non-religion and vice versa.

Related

Pledge plaintiff's challenge to Congress's chaplains rejected
Federal judge throws out atheist Michael Newdow's establishment-clause claim, releasing decision on same day Newdow argued Pledge of Allegiance case before Supreme Court. 03.26.04

Louisiana school boards pray, defying ruling
Tangipahoa Parish board, which lost court ruling, forgoes public prayer to begin meeting, but other boards pray in protest. 03.03.05

Maine high court revisits voucher question
Parents in towns with no public high school want state to cover tuition for their children to attend religious schools. 03.27.05

5th Circuit upholds Bible removal from courthouse
Panel says Houston display violates establishment clause; county vows to appeal. 08.16.06

House bill aims at lawsuits filed against church-state violations
Act would deny attorney's fees for successful litigation of cases based on establishment clause; there's no Senate companion bill, however. 09.27.06

Ten Commandments, nine justices, zero winners
By Charles C. Haynes Whatever the Supreme Court does in the Ten Commandments cases, neither those who want religion endorsed in the public square nor those who want religion removed from the public square will be satisfied. 03.06.05

Will Charles-Camilla marriage spark church-state divorce?
By Charles C. Haynes Entanglement of British government with Church of England becoming increasingly awkward for everyone. 04.17.05

Church, state and Judge Roberts: Will the wall come tumbling down?
By Charles C. Haynes If nominee is confirmed and believes as his predecessor did, a vital bulwark against government-endorsed religion could be weakened. 09.18.05

In Afghanistan or America, theocracy and freedom cannot co-exist
By Charles C. Haynes Release of Christian convert from Islam reminds us that protection for religious liberty under a secular constitution is the only way to ensure freedom of conscience. 04.02.06

Print

Last system update: Saturday, October 14, 2006 | 09:16:16

Overview >

By Claire Mullally
Lawyer & contributing writer

Free-exercise clause

"Congress shall make no law ... prohibiting the free exercise (of religion)" is called the free-exercise clause of the First Amendment. The free-exercise clause pertains to the right to freely exercise one's religion. It states that the government shall make no law prohibiting the free exercise of religion.

Although the text is absolute, the courts place some limits on the exercise of religion. For example, courts would not hold that the First Amendment protects human sacrifice even if some religion required it. The Supreme Court has interpreted this clause so that the freedom to believe is absolute, but the ability to act on those beliefs is not.

Questions of free exercise usually arise when a citizen's civic obligation to comply with a law conflicts with that citizen's religious beliefs or practices. If a law specifically singled out a specific religion or particular religious practice, under current Supreme Court rulings it would violate the First Amendment. Controversy arises when a law is generally applicable and religiously neutral but nevertheless has the "accidental" or "unintentional" effect of interfering with a particular religious practice or belief.

Recent interpretation

The Supreme Court has been closely divided on this issue. In its 1990 decision *Employment Division v. Smith,* the Court greatly narrowed a 35-year-old constitutional doctrine that had required a government entity to prove that it had a "compelling interest" whenever a generally applicable law was found to infringe on a claimant's religious beliefs or practices. Under current constitutional law as explained in *Smith,* a government burden on a religious belief or practice requires little justification as long as the law in question is determined to be generally applicable and does not target a specific religion or religious practice. The Court in 1993 clarified how these principles were to apply in *Church of the Lukumi Babalu Aye v. City of Hialeah.* There, the Court closely analyzed a facially neutral and generally applicable law and determined that it was neither neutral nor generally applicable. Since the law burdened a religious practice (here the animal sacrifice ritual of the Santeria religion), the government would have to demonstrate that it had a compelling interest in passing the law. The Court would then "strictly scrutinize" the government's claims. In *Hialeah,* the government could not meet this burden and the law was stuck down.

Pre-*Smith* understanding

The first Supreme Court case that addressed the issue of free exercise was *Reynolds v. U.S.* (1878), in which the Court upheld a federal law banning polygamy over objections by Mormons who claimed that the practice was their religious duty. The Court in *Reynolds* distinguished between religious belief and religious conduct or action, stating 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 to good order." Recognizing the religious defense, the Court said, would "permit every citizen to become a law unto himself." While the government could not punish citizens because of their religious beliefs, it could regulate religiously motivated conduct, provided that it had a rational basis for doing so. This "rational basis test" became the standard for determining whether a law that impinged on a religious practice violated the free-exercise clause. As that standard was easy for the government to satisfy, for almost a century the courts generally rejected religious-freedom claims against generally applicable laws.

It is important to note also that until the decision of *Cantwell v. Connecticut* (1940), opened the door to federal litigation against the states for religion-clause claims (by ruling that the 14th Amendment's protections against state action "incorporates" or absorbs, the free-exercise clause of the First Amendment) there was no cause of action against the state for laws that may have impinged on religious practices. In effect, the Supreme Court did not have opportunity to review this issue until the mid-20th century, when various free-exercise clause cases made their way through the state courts to the Supreme Court.

In its 1963 decision *Sherbert v. Verner,* the Supreme Court found that the Constitution afforded at least some degree of government accommodation of religious practices. Adele Sherbert, a Seventh-day Adventist, was discharged by her South Carolina employer because she would not work on Saturday, her faith's Sabbath. When she could not find other employment that would not require her to work on Saturday, she filed a claim for unemployment benefits. South Carolina law provided that a person was ineligible for benefits if he or she failed, without good cause, to accept available suitable employment when offered. The state denied Sherbert benefits, saying she had not accepted suitable employment when offered, even though she was required to work on her Sabbath. The decision was upheld by the South Carolina Supreme Court.

The U.S. Supreme Court reversed the state court decision. Justice William Brennan wrote that although the Court had theretofore "rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs and principles," the conduct or actions so regulated had "invariably posed some substantial threat to public safety, peace or order." Since Sherbert's "conscientious objection to Saturday work" was not "conduct within the reach of state legislation," any law that resulted in an incidental burden to the free exercise of her religion must be justified by a "compelling state interest in the regulation of a subject within the State's power to regulate."

Thus, in *Sherbert,* the Court adopted a "compelling interest" standard that government must meet when a generally applicable law unintentionally burdened a claimant's religious practices and beliefs. The state in *Sherbert* could not demonstrate such compelling interest: the mere possibility that allowing exemptions to the unemployment compensation laws for Saturday worshipers might result in fraudulent or spurious claims was not sufficiently compelling, the Court reasoned. Even if an increase in fraudulent claims could be proved, the state would nevertheless have to show that no alternative regulations could "combat such abuses without infringing First Amendment rights," thus also introducing a doctrine requiring the government to demonstrate that it used the "least restrictive" means when enacting legislation that burdened a religious belief or practice.

It is interesting and important to note the legal and social context in which Justice Brennan articulated this "compelling state interest" standard for free-exercise clause claims. The civil rights litigation of the 1950s and 1960s had greatly informed the Court's perspective. It had become clear to Brennan that the Court must give a "heightened scrutiny" to cases in which fundamental rights were at stake and require the state to demonstrate that the law in question served only interests that were of paramount importance. A law having a merely "rational,"

important," "valid" or "legitimate" purpose could not withstand a claim that it infringed on a fundamental right.

In 1972, the Court reaffirmed that a generally applicable law, "neutral on its face" may nonetheless violate the First Amendment if such law "unduly burdens the practice of religion." In *Wisconsin v. Yoder*, the Court held that the state's interest in requiring a child's compulsory attendance at school through age 16, though important, could not withstand a free-exercise claim by members of the Amish religious sect. An Amish family claimed that requiring their children to attend public schools after age 14 would expose them to "wordly influences" against their traditionalist beliefs and undermine the insular Amish community. The Court in *Yoder* noted that the purpose of mandatory education was to develop a productive, self-reliant citizenry, but that the state's purpose must be examined in light of the particular circumstances of the case. Since the Amish had a 200-year tradition of training their adolescents to be productive members of their "separated agrarian" community, the government's interests could still be achieved by requiring education only through age 14. This would obviate the burden to the Amish community's right to freely exercise its religion, while the state's overriding interest would still be served. In a clear statement of its doctrine, the Court in *Yoder* held that "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

After *Sherbert* and *Yoder*, the Court applied the religious-exemption doctrine by examining two questions: Has the government significantly burdened a sincerely motivated religious practice? If so, is the burden justified by a compelling state interest? Increasingly, however, the Court narrowed the concept of a "significant burden" to religion and in a series of decisions throughout the 1980s, the Court rejected many free- exercise claims on this basis. The Court also became more willing to label state interests as "compelling" in cases where religious practice was significantly burdened by a general law.

The *Smith* revolution

It was clear that the Supreme Court was struggling with the issue of requiring accommodations based on the compelling-interest standard. In its 1990 decision *Employment Division v. Smith*, still a highly controversial opinion, the Court ruled that it would no longer give heightened scrutiny to the government's refusal to grant exemptions to generally applicable laws that unintentionally burden religious beliefs or practices.

In *Smith*, two counselors were fired from their jobs with a private drug rehabilitation organization because they ingested peyote at a ceremony of the Native American Church. The two men, members of the Native American Church, were determined to be ineligible for unemployment benefits because they had been fired for work-related "misconduct." The Oregon Supreme Court held that the prohibition against sacramental peyote use was invalid under the free-exercise clause and thus the men could not be denied unemployment benefits for such use. The U.S. Supreme Court held that the free-exercise clause permits the state to prohibit sacramental peyote use and the state can thus deny unemployment benefits to persons discharged for such use.

Justice Antonin Scalia, writing for the majority, declined to apply the balancing test of *Sherbert v. Verner*, greatly limiting the scope of that precedent. Instead Scalia reached back to the early opinion in *Reynolds v. U.S.* (the polygamy case), claiming that to require the government to show a "compelling interest" in enforcing a generally applicable law when such a law impedes on religiously motivated conduct permits the individual "to become a law unto himself," "invites anarchy" and would produce a "constitutional anomaly." It would, Scalia claimed, make a citizen's obligation to obey the law contingent on his religious beliefs. Scalia found that the Court had never in fact invalidated any government

action on the basis of the *Sherbert* compelling-interest test except the denial of unemployment compensation (that *Smith* was itself an unemployment compensation case is not addressed in the decision). Scalia further stated that the only decisions in which the Court had held that the First Amendment barred the application of a generally applicable law to religiously motivated conduct involved not just free-exercise clause claims, but those claims *in conjunction with* other constitutional protections, such as freedom of speech and the press or the right of parents to direct the education of their children (*Yoder*). The *Smith* case, the Court said, did not involve such a "hybrid situation."

Justice Sandra Day O'Connor, although concurring in the outcome, vigorously disagreed with the Court's abandonment of the "compelling interest" standard, as did Justice Harry Blackmun in the dissent. O'Connor reasoned that the free-exercise clause provides relief from a burden imposed by government whether the burden is imposed directly through laws that prohibit specific religious practices, which would be clearly unconstitutional, or indirectly through laws that "in effect make abandonment of one's own religion ... the price of an equal place in society."

Post-*Smith* implications

In the three years following *Smith,* more than 50 reported free-exercise cases were decided against religious groups and individuals. As a result, more than 60 religious and civil liberties groups, including the American Civil Liberties Union, Concerned Women for America, People for the American Way and the National Association of Evangelicals, joined to draft and support the passage of the Religious Freedom Restoration Act — or RFRA. The act, which was signed by President Clinton on Nov. 17, 1993, restored the compelling-interest test and ensured its application in all cases where religious exercise is substantially burdened.

Also in 1993, the Supreme Court re-visited the religious exemption issue in *City of Hialeah.* After a Santeria church announced plans to establish a house of worship in Hialeah, the city enacted an ordinance prohibiting the ritual slaughter or sacrifice of animals, which is one of the religion's principal forms of devotion. The Supreme Court found that the history of the ordinance showed that it specifically targeted the Santeria practice of animal sacrifice while providing numerous exemptions for other instances of animal slaughter, including Kosher slaughter. Since the ordinance both burdened religious practice and was neither neutral nor generally applicable, the Court would apply "strict scrutiny" and the "compelling interest" standard to the city's actions. The ordinances could not withstand such scrutiny, the Court stated, holding them invalid under the free-exercise clause.

After *City of Hialeah,* the inquiry into whether a law is in fact "neutral" and "generally applicable" has provided claimants with ammunition in free-exercise clause claims (see *Fraternal Order of Police v. City of Newark,* and *Keeler v. Mayor of Cumberland*). Many "general" laws provide categorical exceptions of one kind or another. Arguably, once a legislature has carved out an exemption for a secular group or person, the law is no longer "generally applicable," and thus subject to the *City of Hialeah* standard of strict scrutiny. Similarly, a claimant may prevail if he can prove that a law of general applicability that burdens religion is unevenly enforced (see *Rader v. Johnston*). However, some lower courts have interpreted *City of Hialeah* to mean that religious claimants must demonstrate an anti-religious motive when challenging a law that on its face is generally applicable, a difficult standard to prove.

While widely supported, RFRA was short-lived. On June 25, 1997, the Supreme Court, by a vote of 6-3, struck down the act as applied to state and local governments. The Court in *City of Boerne v. Flores* held that Congress overstepped its bounds by forcing states to provide more protection for religious liberty than the First Amendment, as interpreted by

the Supreme Court in *Employment Division v. Smith,* required. While RFRA no longer applies to the states, it is still applicable to the federal government, as seen recently in several district court decisions.

In 2000, President Clinton signed the Religious Land Use and Institutionalized Persons Act, or RLUIPA, which mandates the use of the compelling-interest and least- restrictive means standards for free-exercise cases that involve infringements on religion from land-use laws and to persons institutionalized in prisons, hospitals and retirement or nursing homes. Cases challenging the constitutionality of RLUIPA are also making their way through the federal appellate courts.

Currently, 11 states have passed their own RFRAs, all of which reinstate the compelling-interest test to varying degrees.1 In other states — such as Minnesota, Massachusetts and Wisconsin — the courts have held that the compelling-interest test is applicable to religion claims by virtue of their own state constitutions. In many states, however, the level of protection that applies to free-exercise claims is uncertain.

The jurisprudence regarding religious exemptions to generally applicable laws is clearly still in flux, providing an uneven and uncertain patchwork of protections to religious adherents.

Notes

1 The following states had RFRAs as of Aug. 25, 2002: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina and Texas.

Print

Last system update: Saturday, October 14, 2006 | 09:18:14

Religious Court Rulings

The following rulings are some of the most significant court decisions regarding State-Church Separation.

[Religious Liberty | Evolution/Creationism Issues]

In *Everson v. Board of Education* (330 U.S., 1947) the Supreme Court stated in its majority opinion: "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 to 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 from 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 and 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.'"

In the 1948 case of *Illinois ex rel. McCollum v. Board of Education*, the U.S. Supreme Court ruled that religious instruction could not be conducted in public school buildings. Justice Hugo Black declared: "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable."

In 1961, in *Torcaso v. Watkins*, the Court held that the state of Maryland cannot require applicants for public office to swear that they believed in the existence of God. The Court unanimously ruled that a religious test violates the Establishment Clause. See Article VI., Clause 3, of the US Constitution.

In 1962, in *Engel v. Vitale*, the U.S. Supreme Court forbade public schools to require the recitation of prayers. Because of the prohibition of the First Amendment against the enactment of any law "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State at the beginning of each school day, even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited. (Real Audio)

In 1963 *Abington School District v. Schempp*, the Court prohibited any state law or school board to require that passages from the Bible be read or that the Lord's Prayer be recited in the public schools at the beginning of each school day — even if individual students may be excused from attending or participating in such exercises upon written request of their parents. (Real Audio - Part 2)

The 1971 *Lemon v. Kurtzman* case established the three part test for determining if an action of government violates First Amendment's separation of church and state: 1) the government action must have a secular purpose; 2) its primary purpose must not be to inhibit or to advance religion; 3) there must be no excessive entanglement between government and religion. (Real Audio)

In the 1980 case of *Stone v. Graham*, the Supreme Court ruled that the Ten Commandments cannot be posted within the public schools. The ruling stated that the Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, has no secular legislative purpose, and therefore is unconstitutional as violating the Establishment Clause of the First Amendment.

In *Wallace v. Jaffree*, 1985, the high court voted 6-3 to strike down an Alabama law requiring public schools to set aside a moment of silence for meditation or prayer. Justice John Paul Stevens wrote: "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of con science protected by the First Amendment embraces the right to select any religious faith or none at all."

In the 1992 *Lee v. Weisman* case, the Court ruled that public schools may not sponsor invocations at graduation ceremonies. Justice Anthony M. Kennedy wrote: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the prot ection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." (Real Audio)

The following are excerpts from important court decisions regarding evolution and creationism issues.

In 1968, in *Epperson v. Arkansas*, the United States Supreme Court invalidated an Arkansas statute that prohibited the teaching of evolution. The Court held the statute

unconstitutional on grounds that the First Amendment to the U.S. Constitution does not permit a state to require that teaching and learning must be tailored to the principles or prohibitions of any particular religious sect or doctrine.

(*Epperson v. Arkansas*, 393, U.S. 97, 1968)

In 1981, in *Segraves v. State of California,* the Court found that the California State Board of Education's *Science Framework*, as written and as qualified by its anti-dogmatism policy, gave sufficient accommodation to the views of Segraves, contrary to his contention that class discussion of evolution prohibited his and his children's free exercise of religion. The anti-dogmatism policy provided that class distinctions of origins should emphasize that scientific explanations focus on "how," not "ultimate cause," and that any speculative statements concerning origins, both in texts and in classes, should be presented conditionally, not dogmatically. The court's ruling also directed the Board of Education to widely disseminate the policy, which in 1989 was expanded to cover all areas of science, not just those concerning issues of origins.

(*Segraves v. California,* No. 278978 Sacramento Superior Court, 1981)

In 1982, in *McLean v. Arkansas Board of Education*, a federal court held that a "balanced treatment" statute violated the Establishment Clause of the U.S. Constitution. The Arkansas statute required public schools to give balanced treatment to "creation-science" and "evolution-science." In a decision that gave a detailed definition of the term "science," the court declared that "creation science" is not in fact a science. The court also found that the statute did not have a secular purpose, noting that the statute used language peculiar to creationist literature in emphasizing origins of life as an aspect of the theory of evolution. While the subject of life's origins is within the province of biology, the scientific community does not consider the subject as part of evolutionary theory, which assumes the existence of life and is directed to an explanation of how life evolved after it originated. The theory of evolution does not presuppose either the absence or the presence of a creator.

(*McLean v. Arkansas Board of Education*, 529 F. Supp. 1255, 50 (1982) U.S. Law Week 2412)

In 1987, in *Edwards v. Aguillard*, the U.S. Supreme Court held, 7-2, the Louisiana's "Creationism Act," unconstitutional. This statute prohibited the teaching of evolution in public schools, except when it was accompanied by instruction in "creation science." The Court found that, by advancing the religious belief that a supernatural being created humankind, which is embraced by the term *creation science*, the act impermissibly endorses religion. In addition, the Court found that the provision of a comprehensive science education is undermined when it is forbidden to teach evolution except when creation science is also taught.

(*Edwards v. Aguillard*, 482, U.S. 578, 55 (1987) U.S. Law Week 4860, S. CT. 2573, 96 L. Ed. 2d510)

In 1990, in *Webster v. New Lennox School District*, the Seventh Circuit Court of Appeals found that a school district may prohibit a teacher from teaching creation science in fulfilling its responsibility to ensure that the First Amendment's establishment clause is not violated, and religious beliefs are not injected into the public school curriculum. The court upheld a district court finding that the school district had not violated Webster's free speech rights when it prohibited him from teaching "creation science," since it is a form of religious advocacy.

(*Webster v. New Lennox School District #122*, 917 F.2d 1004 [7th. Cir., 1990])

In 1994, in *Peloza v. Capistrano Unified School District*, the Ninth Circuit Court of Appeals upheld a district court finding that a teacher's First Amendment right to free exercise of religion is not violated by a school district's requirement that evolution be taught in biology classes. Rejecting plaintiff Peloza's definition of a "religion" of "evolutionism," the Court found that the district had simply and appropriately required a science teacher to teach a scientific theory in biology class.

(*Peloza v. Capistrano Unified School District*, 37 F.3d 517 [9th Cir., 1994])

In 1997, in *Freiler v. Tangipahoa Parish Board of Education*, the United States District Court for the Eastern District of Louisiana rejected a policy requiring teachers to read aloud a disclaimer whenever they taught about evolution, ostensibly to promote "critical thinking". Noting that the policy singled out the theory of evolution for attention, that it specifically stated that the only concept from which students were not to be dissuaded was "the Biblical concept of Creation," and that students were already urged in all their classes to engage in critical thinking, the Court wrote that, "In mandating this disclaimer, the School Board is endorsing religion by disclaiming the teaching of evolution in such a manner as to convey the message that evolution is a religious viewpoint that runs counter to... other religious views." Besides addressing disclaimer policies, the decision is noteworthy for recognizing that curriculum proposals for "intelligent design" are equivalent to proposals for teaching "creation science." On August 13, 1999, the 5th circuit court of appeals affirmed the ruling. On June 19, 2000, the Supreme Court declined to hear the School Board's appeal, thus letting the lower court's decision stand.

(*Freiler v. Tangipahoa Board of Education*, No. 94-3577, E.D. La. Aug. 8, 1997.)

Related Sites

- American Civil Liberties Union
- National Center for Science Education
- Americans United for Separation of Church and State
- Teaching about Evolution and the Nature of Science

- Separation of Church and State Home Page
- Court Decisions - Religious Freedom Page
- Joint Statement from the Department of Education
- National Science Teachers Association Position Statement
- US Supreme Court Multimedia Database
- The Secular Web - Separation of Church and State
- FFRF - Is America a Christian Nation?
- Yahoo! search - Church and State

Home Page | Further Reading | Site Map | Send Feedback