

# The Free Exercise Clause

## RELIGION AND THE FLAG

The flag salute did not become a widespread school practice until shortly before America entered World War II. With war tensions rising, many states began adopting mandatory flag salute laws. This posed a problem for Jehovah's Witnesses (who view the flag salute as a form of idolatry that is forbidden by the Ten Commandments). [Minnersville v. Gobitis \(1940\)](#) involved the suspension of two Jehovah's Witness children who refused to salute the flag. The Supreme Court acknowledged the students' Free Exercise claims, but ruled against them. Justice Frankfurter concluded that the need to instill American values trumped their religious beliefs. "National unity is the basis of national security," he wrote. The decision unleashed unprecedented violence against Jehovah's Witnesses during the next year. Thousands were assaulted (one was even castrated); a Witness meeting hall was burnt in Maine; and laws were enacted to prosecute the children as delinquents if they refused to salute the flag. These developments prompted the Supreme Court to reconsider the issue a mere 3 years later. In [West Virginia Board of Education v. Barnette \(1943\)](#), the Court overruled [Gobitis](#), and held that students had a constitutional right to refuse to salute the flag—not simply on religious grounds, but on broader free speech grounds. Justice Jackson wrote for the Court:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us now.

**Overview**—The Free Exercise Clause is found in the First Amendment, immediately following the Establishment Clause. It is one of three separate religious protections in the U.S. Constitution,<sup>1</sup> and it reads: "Congress shall make no law ... prohibiting the free exercise [of religion]." The Supreme Court has not always agreed on the proper interpretation of this provision, although some aspects are well settled. First, as with the rest of the Bill of Rights, the Free Exercise Clause restricts only government, not private parties or businesses. And strictly speaking, it applies only to the national government. However, a 1940 Supreme Court decision "incorporated" the provision into the 14th Amendment, thereby extending it to all state and local governments.<sup>2</sup> So today, the Free Exercise Clause effectively limits the official actions of *all* public employees, including teachers, firefighters, local police, etc. Second, as with the Establishment Clause, the term "religion" is broadly construed to cover all sincerely-held spiritual beliefs, including cult religions and beliefs unique to a single person. (In actual practice, the Free Exercise Clause is mostly invoked by religious minorities, because it is unlikely that the government would take an action that is offensive to the majority.) Finally, like the Free Speech Clause, the Free Exercise Clause contains no exceptions whatsoever. Read literally, it prevents the government from interfering with *any* practice undertaken in the name of religion. E.g., a modern-day Aztec might argue a constitutional right to engage in human sacrifices. Common sense suggests that this is not acceptable. Accordingly, over the past century the Supreme Court has developed various rules to spell out when the government can or cannot interfere with a religious practice. The most important rule is the distinction between religious *beliefs* and religious *practices*. According to the Court, a person has an absolute right to believe whatever he or she wants; e.g., a modern-day Aztec could not be punished for simply believing in the need for human sacrifices. However, religious practices are a different story; these can be regulated, and even criminalized, under certain circumstances. As outlined below, the Court has had considerable difficulty spelling out these circumstances.

**Rule 1: The "valid secular purpose" test**—In the late 1800s the government prosecuted a Utah Mormon, George Reynolds, for the crime of polygamy. Reynolds argued that plural marriages were mandated by his faith, and therefore the Free Exercise Clause gave him a constitutional right to engage in this lifestyle. He lost. [Reynolds v. United States \(1878\)](#) held that a religious belief was not a defense to a criminal law that served a legitimate, secular purpose. The Supreme Court reasoned, "To permit this would be to make ... religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." For the next 85 years, the Supreme Court continued to follow this rule, which became known as the "valid secular purpose" test. So long as the law was not motivated by religious bigotry, but rather served a valid, non-religious objective, it was fully enforceable against everyone. Thus, in [Jacobsen v. Massachusetts \(1905\)](#), the Court upheld a state law that required mandatory smallpox vaccinations. There was a legitimate secular reason for the law (i.e., public health), so the Court concluded that the religious objections to immunization had to yield.

**Rule 2: The "compelling interest" test**—By 1963, the Supreme Court's valid secular purpose test was coming under increasing attack. Critics charged that it gave insufficient weight to religion, and allowed ordinary laws to trump an important constitutional liberty. The Supreme Court agreed, and used two cases to change course. [Sherbert v. Verner \(1963\)](#) involved the denial of unemployment benefits to woman who refused to work on Saturdays. She was a Seventh Day Adventist, and her faith prohibited Saturday labor. Under the valid secular purpose test she would have lost—since the state's denial of benefits was motivated by economic considerations, not religious prejudice. However, the Court adopted a new balancing approach, known as the "compelling interest" test. It required the govern-

ment to accommodate religion (i.e., make an exemption for the believer), unless there was a very compelling reason why the law had to be enforced against everyone. Because the state's unemployment compensation system would not collapse if it made a few exceptions for people like the plaintiff, the Seventh Day Adventist won. In *Wisconsin v. Yoder* (1972) the Supreme Court ruled in favor of the Amish, applying the same balancing test. Jonas Yoder and other members of the Amish Mennonite Church had violated a state law requiring children to attend school until the age of 18. (The Amish home schooled their children after the 8th grade in furtherance of their devout lifestyle.) The Supreme Court concluded that there was no compelling reason why an exemption could not be made. Although the Court's the new test improved the odds that the religious person would prevail, it did not guarantee that outcome. For example, the Amish lost a subsequent challenge to having to pay social security tax. This time, the Supreme Court concluded the government *did* have a compelling reason to enforce its tax laws against everyone. See *United States v. Lee* (1982). Similarly, an orthodox Jewish psychologist lost his battle with the Air Force over the right to wear a yarmulke under his official military cap, see *Goldman v. Weinberger* (1982). Bob Jones University lost its tax-exempt status for engaging in religiously-motivated race discrimination, see *Bob Jones University v. United States* (1983). And Native Americans lost their battle to block construction of a road across national forest lands held sacred by the tribe, see *Lyng v. Northwest Indian Prot. Cemetery Assn.* (1988).

**The Court flip-flops!**—In 1990, with virtually no prior warning, the Supreme Court returned to the original, valid secular purpose test (at least where criminal laws are involved). *Employment Division v. Smith* (1990) involved the denial of unemployment benefits to two Native Americans who were fired from their jobs for using peyote in religious rituals. Although some states give exemptions to members of the Native American Church, Oregon did not. Its drug laws criminalized the use of all hallucinogenic drugs. The fired Native Americans (who ironically had been employed as drug counselors) argued that peyote was part of a longstanding religious tradition, and the state had no compelling reason to deny them an exemption. They might have prevailed with this argument, but five justices of the Supreme Court abandoned the compelling interest balancing test. They concluded that the free exercise of religion does not give a person the right to violate a valid, neutral law that is not targeted at religion. In other words, they seemingly returned to the original approach adopted in the polygamy case. The peyote decision was widely criticized, with some arguing that the Supreme Court had “gutted” the Free Exercise Clause. In fact, Congress responded in 1993 by passing the Religious Freedom Restoration Act (RFRA). (It was approved by the Senate in a near-unanimous vote of 97 to 3, and signed into law by President Clinton.) The law attempted to overrule the Supreme Court and mandate the use of the compelling interest balancing test. It led to an upsurge in lawsuits, especially by inmates. However, four years later, in *City of Boerne v. Flores* (1997) the Court declared the RFRA unconstitutional! Justice Kennedy wrote that Congress had exceeded its power; that in accordance with *Marbury v. Madison* (1803), it was “emphatically the province and duty of the judicial department to say what the law is.” It is not clear, however, how the Supreme Court will handle future Free Exercise Clause disputes. One of the five supporters of the peyote decision is no longer on the Court (Rehnquist), and two new justices have come onboard. It is quite possible, therefore, that the Supreme Court could return to the compelling interest test, or develop a new approach to dealing with these controversies.

1. Article 6, sec. 3 (in the main body of the Constitution) declares “...no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The Constitution's second religious freedom guarantee is the Establishment Clause which is discussed in a separate fact sheet.

2. The case was *Cantwell v. Connecticut* (1940) (reversing the conviction of a Jehovah's Witness for preaching door-to-door in violation of a state anti-solicitation law.) For details on the “incorporation” process see my Nationalization of the Bill of Rights fact sheet.

## ANIMAL SACRIFICE

In 1987 the Church of Lukumi Babalu Aye leased land in the small Florida community of Hialeah. The Church is part of the Santeria religion, which originated in Africa, moved to Cuba, and incorporated Roman Catholic beliefs along with African spiritual elements. Its customs include the sacrifice of animals (chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles). The animals are killed by the cutting of the carotid arteries in the neck. Except in certain death and healing rituals, the sacrificed animals are then cooked and eaten. When the Florida townspeople learned of the church's practices, they called emergency city council meeting and passed several ordinances prohibiting the ritual sacrifice of animals within city limits. The Church sued, arguing that the ordinances violated their Free Exercise rights under the Constitution. In *Church of Lukumi Babalu Aye v. City of Hialeah* (1993), the Supreme Court unanimously agreed. (It should be noted unanimous rulings in the area of religion are extremely rare!) Justice Kennedy reasoned that the city's ordinances were not religiously neutral, but were rather aimed at suppressing a specific religious practice. And the laws could not be defended on sanitation or animal rights grounds, since they did not prohibit non-religious killings of those same animals within city limits. Justice Kennedy concluded:

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.... Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

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