**COMMON INTERPRETATION**

**The Establishment Clause**

**by Marci A. Hamilton**  
CEO and Academic Director at CHILD USA; Fox Family Pavilion Distinguished Scholar in the Fox Leadership Program at the University of Pennsylvania  
 **by Michael McConnell**  
Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; Senior Fellow at the Hoover Institution

America’s early settlers came from a variety of religious backgrounds: Puritans predominated in New England; Anglicans predominated in the South; Quakers and Lutherans flocked especially to Pennsylvania; Roman Catholics settled mostly in Maryland; Presbyterians were most numerous in the middle colonies; and there were Jewish congregations in five cities.

During colonial times, the Church of England was established by law in all of the southern colonies, while localized Puritan (or “Congregationalist”) establishments held sway in most New England states. In those colonies, clergy were appointed and disciplined by colonial authorities and colonists were required to pay religious taxes and (often) to attend church services. Dissenters were often punished for preaching without a license or refusing to pay taxes to a church they disagreed with. Delaware, New Jersey, Pennsylvania, Rhode Island, and much of New York had no established church.

After Independence, there was widespread agreement that there should be no nationally established church. The Establishment Clause of the First Amendment, principally authored by James Madison, reflects this consensus. The language of the Establishment Clause itself applies only to the federal government (“Congress shall pass no law respecting an establishment of religion”). All states disestablished religion by 1833, and in the 1940s the Supreme Court held that disestablishment applies to state governments through the Fourteenth Amendment.

Virtually all jurists agree that it would violate the Establishment Clause for the government to compel attendance or financial support of a religious institution as such, for the government to interfere with a religious organization’s selection of clergy or religious doctrine; for religious organizations or figures acting in a religious capacity to exercise governmental power; or for the government to extend benefits to some religious entities and not others without adequate secular justification. Beyond that, the meaning of the Amendment is often hotly contested, and Establishment cases in the Supreme Court often lead to 5-4 splits.

***The*Lemon*Test***

In 1971, the Supreme Court surveyed its previous Establishment Clause cases and identified three factors that identify whether or not a government practice violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion.” [*Lemon v. Kurtzman*](http://www.oyez.org/cases/1970-1979/1970/1970_89) (1971). In the years since *Lemon*, the “test” has been much criticized and the Court often decides Establishment Clause cases without reference to it. Yet the Justices have not overruled the *Lemon* test, meaning the lower courts remain obliged to use it. In some specific areas of controversy, however, the Court has adopted specific, more targeted “tests” to replace *Lemon*.

The vast majority of Establishment Clause cases have fallen in four areas: monetary aid to religious education or other social welfare activities conducted by religious institutions; government-sponsored prayer; accommodation of religious dissenters from generally-applicable laws; and government owned or sponsored religious symbols.

***Aid to religious institutions***

Scholars have long debated between two opposing interpretations of the Establishment Clause as it applies to government funding: (1) that the government must be neutral between religious and non-religious institutions that provide education or other social services; or (2) that no taxpayer funds should be given to religious institutions if they might be used to communicate religious doctrine. Initially, the Court tended toward the first interpretation, in the 1970s and 1980s the Court shifted to the second interpretation, and more recently the Court has decisively moved back to the first idea.

After two early decisions upholding state statutes allowing students who attend private religious schools to receive transportation, [*Everson v. Board of Education*](https://www.oyez.org/cases/1940-1955/330us1) (1947), and textbook subsidies available to all elementary and secondary students, [*Board of Education v. Allen*](http://www.oyez.org/cases/1960-1969/1967/1967_660) (1968), the Court attempted for about fifteen years to draw increasingly sharp lines against the use of tax-funded assistance for the religious aspects of education. At one point the Court even forbade public school teaching specialists from going on the premises of religious schools to provide remedial assistance. [*Aguilar v. Felton*](http://www.oyez.org/cases/1980-1989/1984/1984_84_237) (1985). More recently, the Court has upheld programs that provide aid to educational or social programs on a neutral basis “only as a result of the genuine and independent choices of private individuals*.*” [*Zelman v. Simmons-Harris*](http://www.oyez.org/cases/2000-2009/2001/2001_00_1751) (2002). Indeed, the Court has held that it is unconstitutional under free speech or free exercise principles to exclude otherwise eligible recipients from government assistance solely because their activity is religious in nature. [*Rosenberger v. University of Virginia*](http://www.oyez.org/cases/1990-1999/1994/1994_94_329)(1995).

***Government-sponsored prayer***

The Court’s best-known Establishment Clause decisions held it unconstitutional for public schools to lead schoolchildren in prayer or Bible reading, even on an ostensibly voluntary basis. [*Engel v. Vitale*](http://www.oyez.org/cases/1960-1969/1961/1961_468/)(1962); [*Abington School District v. Schempp*](http://www.oyez.org/cases/1960-1969/1962/1962_142) (1963). Although these decisions were highly controversial among the public (less so among scholars), the Court has not backed down. Instead it has extended the prohibition to prayers at graduation ceremonies, [*Lee v. Weisman*](http://www.oyez.org/cases/1990-1999/1991/1991_90_1014)(1992), and football games, [*Santa Fe Independent School District v. Doe*](http://www.oyez.org/cases/1990-1999/1999/1999_99_62)(2000).

In less coercive settings involving adults, the Court has generally allowed government-sponsored prayer. In [*Marsh v. Chambers*](http://www.oyez.org/cases/1980-1989/1982/1982_82_23)(1983), the Court upheld legislative prayer, specifically because it was steeped in history. More recently, the Court approved an opening prayer or statement at town council meetings, where the Town represented that it would accept any prayers of any faith. [*Town of Greece v. Galloway*](http://www.oyez.org/cases/2010-2019/2013/2013_12_696) (2014).

***Accommodation of religion***

Hundreds of federal, state, and local laws exempt or accommodate religious believers or institutions from otherwise neutral, generally-applicable laws for whom compliance would conflict with religiously motivated conduct. Examples include military draft exemptions, kosher or halal meals for prisoners, medical neglect exemptions for parents who do not believe in medical treatment for their ill children, exemptions from some anti-discrimination laws for religious entities, military headgear requirements, and exemptions for the sacramental use of certain drugs. The Supreme Court has addressed very few of these exemptions. While the Court held that a state sales tax exemption limited to religious publications was unconstitutional in [*Texas Monthly, Inc. v. Bullock*](http://www.oyez.org/cases/1980-1989/1988/1988_87_1245)(1989), it unanimously upheld the exemption of religious organizations from prohibitions on employment discrimination for ministers.  [*Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*](http://www.oyez.org/cases/2010-2019/2011/2011_10_553)(2012).

Two federal laws, the [Religious Freedom Restoration Act](https://www.law.cornell.edu/uscode/text/42/2000bb%E2%80%931)(RFRA) and the [Religious Land Use and Institutionalized Persons Act](https://www.law.cornell.edu/uscode/text/42/chapter-21C) (RLUIPA), provide broad-based statutory accommodations for religious practice when it conflicts with federal and certain state and local laws. A unanimous Court upheld this approach for prisoners against a claim that granting religious accommodations violates the Establishment Clause, reasoning that RLUIPA “alleviates exceptional government-created burdens on private religious exercise” in prisons. [*Cutter v. Wilkinson*](http://www.oyez.org/cases/2000-2009/2004/2004_03_9877) (2005).

The Court in *Cutter* left open the question whether such a regime applied to land use is constitutional and it also left open the possibility that even some applications in prisons may be unconstitutional if they are not even-handed among religions or impose too extreme a burden on non-believers. The Court’s recent 5-4 decision in [*Burwell v. Hobby Lobby Stores, Inc.*](http://www.oyez.org/cases/2010-2019/2013/2013_13_354) (2014), holding that RFRA exempts for-profit employers from paying for insurance coverage of contraceptive drugs that they believe are abortion-inducing, has reinvigorated the debate over such laws.

***Government-sponsored religious symbols***

The cases involving governmental displays of religious symbols—such as Ten Commandment displays in public school classrooms, courthouses, or public parks; nativity scenes in courthouses and shopping districts; or crosses on public land—have generated much debate. The most prominent approach in more recent cases is called the “endorsement test”; it asks whether a reasonable observer acquainted with the full context would regard the display as the government endorsing religion and, therefore, sending a message of disenfranchisement to other believers and non-believers.

The Court’s decisions in this arena are often closely divided. They also illustrate that the Court has declined to take “a rigid, absolutist view” of the separation of church and state. In [*Lynch v. Donnelly*](http://www.oyez.org/cases/1980-1989/1983/1983_82_1256)(1984), the Court allowed display of a nativity scene surrounded by other holiday decorations in the heart of a shopping district, stating that it “engenders a friendly community spirit of good will in keeping with the season.” But in [*County of Allegheny v. American Civil Liberties Union*](http://www.oyez.org/cases/1980-1989/1988/1988_87_2050) (1989), a different majority of Justices held that the display of a nativity scene by itself at the top of the grand stairway in a courthouse violated the Establishment Clause because it was “indisputably religious—indeed sectarian.” In [*McCreary County v. American Civil Liberties Union*](http://www.oyez.org/cases/2000-2009/2004/2004_03_1693) (2005), the Court held that a prominent display of the Ten Commandments at the county courthouse, which was preceded by an official’s description of the Ten Commandments as the “embodiment of ethics in Christ,” was a religious display that was unconstitutional. The same day, it upheld a Ten Commandments monument, which was donated by a secular organization dedicated to reducing juvenile delinquency and surrounded by other monuments on the spacious statehouse grounds. [*Van Orden v. Perry*](http://www.oyez.org/cases/2000-2009/2004/2004_03_1500) (2005). Only one Justice was in the majority in both cases.

More broadly, the Establishment Clause provides a legal framework for resolving disagreements about the public role of religion in our increasingly pluralistic republic.

**The Establishment Clause: A Check on Religious Tyranny**

**by Marci A. Hamilton**  
CEO and Academic Director at CHILD USA; Fox Family Pavilion Distinguished Scholar in the Fox Leadership Program at the University of Pennsylvania

An accurate recounting of history is necessary to appreciate the need for disestablishment and a separation between church and state. The religiosity of the generation that framed the Constitution and the Bill of Rights (of which the First Amendment is the first as a result of historical accident, not the preference for religious liberty over any other right) has been overstated. In reality, many of the Framers and the most influential men of that generation rarely attended church, were often Deist rather than Christian, and had a healthy understanding of the potential for religious tyranny. This latter concern is to be expected as European history was awash with executions of religious heretics: Protestant, Catholic, Jewish, and Muslim. Three of the most influential men in the Framing era provide valuable insights into the mindset at the time: Benjamin Franklin, James Madison, and John Adams. Franklin saw a pattern:

If we look back into history for the character of the present sects in Christianity, we shall find few that have not in their turns been persecutors, and complainers of persecution. The primitive Christians thought persecution extremely wrong in the Pagans, but practiced it on one another. The first Protestants of the Church of England blamed persecution in the Romish Church, but practiced it upon the Puritans. These found it wrong in the Bishops, but fell into the same practice themselves both here [England] and in New England.

**Benjamin Franklin,**[***Letter to the London Packet***](http://press-pubs.uchicago.edu/founders/documents/amendI_religions14.html)**(June 3, 1772).**

The father of the Constitution and primary drafter of the First Amendment, James Madison, in his most important document on the topic, [*Memorial and Remonstrance* *against Religious Assessments*](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (1785), stated:

During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. . . . What influence, in fact, have ecclesiastical establishments had on society?  In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been the guardians of the liberties of the people.

Two years later, John Adams described the states as having been derived from reason, not religious belief:

It will never be pretended that any persons employed in that service had any interviews with the gods, or were in any degree under the influence of Heaven, any more than those at work upon ships or houses, or laboring in merchandise or agriculture; it will forever be acknowledged that these governments were contrived merely by the use of reason and the senses. . . .Thirteen governments [of the original states] thus founded on the natural authority of the people alone, without a pretence of miracle or mystery, which are destined to spread over the northern part of that whole quarter of the globe, are a great point gained in favor of the rights of mankind.

***The Works of John Adams, Second President of the United States*, Vol. 4, 292-93 (Charles C. Little & James Brown, eds., 1851).**

Massachusetts and Pennsylvania are examples of early discord. In Massachusetts, the Congregationalist establishment enforced taxation on all believers and expelled or even put to death dissenters. Baptist clergy became the first in the United States to advocate for a separation of church and state and an absolute right to believe what one chooses. Baptist pastor John Leland was an eloquent and forceful proponent of the freedom of conscience and the separation of church and state. For him, America was not a “Christian nation,” but rather should recognize the equality of all believers, whether “Jews, Turks, Pagans [or] Christians.”  “Government should protect every man in thinking and speaking freely, and see that one does not abuse another.” He proposed an amendment to the Massachusetts Constitution in 1794 because of the “evils . . . occasioned in the world by religious establishments, and to keep up the proper distinction between religion and politics."

Pennsylvania, dubbed the “Holy Experiment” by founder William Penn, was politically controlled by Quakers, who advocated *tolerance* of all believers and the mutual co-existence of differing faiths, but who made their Christianity a prerequisite for public office, only permitted Christians to vote, and forbade work on the Sabbath. Even so, the Quakers set in motion a principle that became a mainstay in religious liberty jurisprudence: the government may not coerce citizens to believe what they are unwilling to believe. If one looks carefully into the history of the United States’ religious experiment, one also uncovers a widely-shared view that too much liberty, or “licentiousness,” is as bad as no liberty. According to historian John Philip Reid, those in the eighteenth century “had as great a duty to oppose licentiousness as to defend liberty.”

***Establishment Clause Doctrine***

The Establishment Clause has yielded a wide array of doctrines (legal theories articulated by courts), each of which is largely distinct from the others, some of which are described in Professor McConnell’s and my joint contribution on the Establishment Clause. The reason for this proliferation of distinct doctrines is that the Establishment Clause is rooted in a concept of separating the power of church and state. These are the two most authoritative forces of human existence, and drawing a boundary line between them is not easy. The further complication is that the exercise of power is fluid, which leads both state and church to alter their positions to gain power either one over the other or as a union in opposition to the general public or particular minorities.

The “separation of church and state” does not mean that there is an impermeable wall between the two, but rather that the Framers fundamentally understood that the *union* of power between church and state would lead inevitably to tyranny. The established churches of Europe were well-known to the Founding era and the Framers and undoubtedly contributed to James Madison’s inclusion of the Establishment Clause in the First Amendment, and its ratification. The following are some of the most important principles.

***The Government May Not Delegate Governing Authority to Religious Entities***

The Court has been sensitive to incipient establishments of religion. A Massachusetts law delegated authority to churches and schools to determine who could receive a liquor license within 500 feet of their buildings. The Supreme Court struck down the law, because it delegated to churches zoning power, which belongs to state and local government, not private entities. [*Larkin v. Grendel’s Den, Inc.*](http://www.oyez.org/cases/1980-1989/1982/1982_81_878) (1982). According to the Court: The law “substitutes the unilateral and absolute power of a church for the reasoned decision making of a public legislative body . . .  on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of [p]olitical fragmentation and divisiveness along religious lines.”

In another scenario, the Supreme Court rejected an attempt to define political boundaries solely according to religion. In [*Board of Education of Kiryas Joel Village School District v. Grumet*](http://www.oyez.org/cases/1990-1999/1993/1993_93_517) (1994), the state of New York designated the neighborhood boundaries of Satmar Hasidim Orthodox Jews in Kiryas Joel Village as a public school district to itself. Thus, the boundary was determined solely by religious identity, in part because the community did not want their children to be exposed to children outside the faith. The Court invalidated the school district because political boundaries identified solely by reference to religion violate the Establishment Clause.

***There Is No Such Thing as “Church Autonomy” Although There Is a Doctrine that Forbids the Courts from Determining What Religious Organizations Believe***

In recent years, religious litigants have asserted a right to “church autonomy”—that churches should not be subject to governmental regulation—in a wide variety of cases, and in particular in cases involving the sexual abuse of children by clergy. The phrase, however, is misleading. The Supreme Court has never interpreted the First Amendment to confer on religious organizations a right to autonomy from the law. In fact, in the case in which they have most recently demanded such a right, arguing religious ministers should be exempt from laws prohibiting employment discrimination, the Court majority did not embrace the theory, not even using the term once. [*Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*](http://www.oyez.org/cases/2010-2019/2011/2011_10_553) (2012).

The courts are forbidden, however, from getting involved in determining what a religious organization believes, how it organizes itself internally, or who it chooses to be “ministers” of the faith. Therefore, if the dispute brought to a court can only be resolved by a judge or jury settling an intra-church, ecclesiastical dispute, the dispute is beyond judicial consideration. This is a corollary to the absolute right to believe what one chooses; it is not a right to be above the laws that apply to everyone else. There is extraordinary slippage in legal briefs in numerous cases where the entity is arguing for “autonomy,” but what they really mean is freedom from the law, *per se*. For the Court and basic common sense, these are arguments for placing religion above the law, and in violation of the Establishment Clause. They are also fundamentally at odds with the common sense of the Framing generation that understood so well the evils of religious tyranny.

**The Establishment Clause: Co-Guarantor of Religious Freedom**

**by Michael McConnell**  
Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; Senior Fellow at the Hoover Institution

The Establishment Clause of the First Amendment – “Congress shall pass no law respecting an establishment of religion” – is one of the most misunderstood in the Constitution. Unlike most of the Constitution, it refers to a legal arrangement, the “establishment of religion,” which has not existed in the United States in almost two centuries. We understand what “freedom of speech” is, we know what “private property" is, and we know what “searches and seizures” are, but most of us have no familiarity with what an “establishment of religion” would be.

The “Church by Law Established” in Britain was a church under control of the government. The monarch was (and is) the supreme head of the established church and chooses its leadership; Parliament enacted its Articles of Faith; the state composed or directed the content of its prayers and liturgy; clergy had to take an oath of allegiance to the king or queen; and not surprisingly, the established church was used to inculcate the idea that British subjects had a religious as well as a civic obligation to obey royal authority. The established church was a bit like a government-controlled press: it was a means by which the government could mold public opinion.

British subjects (including Americans in eight of the colonies) were legally required to attend and financially support the established church, ministers were licensed or selected by the government, and the content of church services was partially dictated by the state.

The establishment of religion was bad for liberty and it was bad for religion, too. It was opposed by a coalition of the most fervently evangelical religious sects in America (especially the Baptists), who thought the hand of government was poisonous to genuine religion, joined by the enlightenment and often deist elite (like Thomas Jefferson and Benjamin Franklin), who thought church and state should be separate, and by the leadership of minority religions, who worried that government involvement would disadvantage them. Accordingly, there was virtually no opposition to abolishing establishment of religion at the national level. Establishments survived for a while in a few states, but the last state (Massachusetts) ended its establishment in 1833.

The abolition of establishment of religion entails a number of obvious and uncontroversial elements. Individuals may not be required to contribute to, attend, or participate in religious activities. These must be voluntary. The government may not control the doctrine, liturgy, or personnel of religious organizations. These must be free of state control. Other issues are harder.

For a few decades between the late 1960s and the early 1990s, the Supreme Court attempted to forbid states to provide tax subsidies to schools that teach religious doctrine along with ordinary secular subjects. Most of these schools were Roman Catholic. This effort was largely based on a misinterpretation of history, egged on by residual anti-Catholicism. The Justices said that neutral aid to schools is just like a 1785 effort to force Virginians to contribute to the church of their choice. The analogy, however, made little sense: there is all the difference in the world between funding churches because they inculcate religion and funding schools because they provide education. In fact, the history of the early republic shows that states (and later the federal government, during Reconstruction) funded education by subsidizing all schools on a nondiscriminatory basis, and no one ever suggested this violated the non-establishment principle. By 2002, in [*Zelman v. Simmons-Harris*](http://www.oyez.org/cases/2000-2009/2001/2001_00_1751), the Supreme Court returned to this original idea, allowing the government to fund schools on a neutral basis so long as the choice of religious schools was left to voluntary choice. Not only was ruling this true to history, it also best serves the ideal of religious freedom, making it possible for families to choose the type of education they want for their children.

It is sometimes suggested that laws making special accommodations for people whose religious beliefs are at odds with government policy violate the Establishment Clause, on the theory that these accommodations “privilege” or “advance” religion. This is a recently-minted idea, and not a sensible one. In all cases of accommodation, the religion involved is *dissenting*from prevailing policy, which means, by definition, that the religion is not dominating society. The idea that making exceptions for the benefit of people whose beliefs conflict with the majority somehow “establishes” religion is a plain distortion of the words. And the Supreme Court has unanimously held that religious accommodations are permissible so long as they lift a governmental obstacle to the exercise of religion, take account of costs to others, and do not favor one faith over another. Nonetheless, when religions take unpopular stances on hot-button issues (for example, regarding abortion-inducing contraceptives or same-sex marriage), critics are quick to assert that it violates the Constitution to accommodate their differences, no matter how little support that position has in history or Supreme Court precedent.

The fundamental error is to think that the Establishment Clause is designed to reduce the role of religion in American life. A better understanding is captured in this statement by Justice William O. Douglas of the Supreme Court: this country “sponsor[s] an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.” [*Zorach v. Clauson*](https://supreme.justia.com/cases/federal/us/343/306/case.html) (1952).

# The Free Exercise Clause

**by Frederick Gedicks**  
Guy Anderson Chair and Professor of Law at the J. Reuben Clark Law School at Brigham Young University  
**by Michael McConnell**  
Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; Senior Fellow at the Hoover Institution

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*](https://www.oyez.org/cases/1850-1900/98us145) (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*](https://www.oyez.org/cases/1940-1955/310us296)(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*](http://www.oyez.org/cases/1970-1979/1971/1971_70_110/) (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*](http://www.oyez.org/cases/1980-1989/1989/1989_88_1213/) (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](https://www.law.cornell.edu/uscode/text/42/chapter-21B) (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](https://www.law.cornell.edu/uscode/text/42/chapter-21C) (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.*](http://www.oyez.org/cases/2010-2019/2013/2013_13_354)(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*](http://www.oyez.org/cases/1990-1999/1992/1992_91_948) (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.*](http://www.oyez.org/cases/2010-2019/2011/2011_10_553) (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.

**Religious Liberty Is Equal Liberty**

**by Frederick Gedicks**  
Guy Anderson Chair and Professor of Law at the J. Reuben Clark Law School at Brigham Young University

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*](http://founders.archives.gov/documents/Madison/01-08-02-0163) (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*](http://www.oyez.org/cases/1980-1989/1989/1989_88_1213/) (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*](http://www.oyez.org/cases/2010-2019/2011/2011_10_553) (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*](http://www.oyez.org/cases/1980-1989/1981/1981_80_767) (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*](http://www.oyez.org/cases/1980-1989/1984/1984_83_1935) (1985).

The Court seems poised to adopt this “third-party burden” principle in decisions interpreting the 1993 [Religious Freedom Restoration Act](https://www.law.cornell.edu/uscode/text/42/chapter-21B)(RFRA) as well. Five Justices in [*Burwell v. Hobby Lobby Stores, Inc.*](http://www.oyez.org/cases/2010-2019/2013/2013_13_354) (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*](http://www.oyez.org/cases/1990-1999/1992/1992_91_948)(1993); *[Sherbert v. Verner](http://www.oyez.org/cases/1960-1969/1962/1962_526/)* (1963). Under RFRA and the related [Religious Land Use and Institutionalized Persons Act](https://www.law.cornell.edu/uscode/text/42/chapter-21C) of 2000 (RLUIPA), the federal government and often the state governments are prohibited from burdening religious exercise without adequate justification. [*Holt v. Hobbs*](http://www.oyez.org/cases/2010-2019/2014/2014_13_6827) (2015); [*Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*](http://www.oyez.org/cases/2000-2009/2005/2005_04_1084) (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*](http://www.oyez.org/cases/1980-1989/1984/1984_83_1158) (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.

**Free Exercise: A Vital Protection for Diversity and Freedom**

**by Michael McConnell**  
Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; Senior Fellow at the Hoover Institution

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*](https://www.oyez.org/cases/1850-1900/98us145) (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](http://www.oyez.org/cases/1960-1969/1962/1962_526)* (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*](http://www.oyez.org/cases/1980-1989/1989/1989_88_1213) (1990).

Today we have a patchwork of rules. When the federal government is involved, legislation called the [Religious Freedom Restoration Act](https://www.law.cornell.edu/uscode/text/42/chapter-21B) 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*](http://www.oyez.org/cases/2010-2019/2014/2014_13_6827) (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*](http://www.oyez.org/cases/1980-1989/1989/1989_88_1213) (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.