

F.O.R.C.E VIDEO SCRIPT - RELIGIOUS CLAUSE

Voice Over: Many early American settlers came to the New World fleeing religious persecution in Europe. Freedom of religion was much on the minds of the founders, and is a fundamental right guaranteed by the First Amendment. But what counts as religion? And does it mean to “freely exercise” this right. Professor Sheila Kennedy has a few answers –and a few more questions.

Sheila: The phrase “separation of church and state” refers to the combined operation of the First Amendment’s two religion clauses, the Establishment Clause and the Free Exercise Clause. The phrase “separation of church and state” doesn’t appear in the Constitution.

Its first documented use was by Roger Williams, the founder of Rhode Island, well before the Revolutionary War. The most famous use of the phrase, however, came from Thomas Jefferson. When Jefferson was president, a group of Danbury Baptists wrote to him asking for an official interpretation of the First Amendment’s religion clauses. Jefferson’s response was that, when read together, the Establishment Clause and Free Exercise Clause were intended to erect a wall of separation between government and religion.

Historians tell us that the Establishment Clause went through more than twenty drafts, with the founders rejecting formulations like, “there shall be no national church” as inadequate to their intent.

The Establishment Clause prohibits the government from making any law “respecting an establishment of religion.” The courts have uniformly held that this language not only forbids the government from establishing a church or an official religion, it also prohibits government actions that endorse or sponsor religion, favor one religion over another, religion over non-religion, or non-religion over religion.

The Free Exercise Clause, for its part, prohibits government from interfering with the free exercise of religion. Americans have the right to choose their own beliefs and to express those beliefs without fear of state disapproval. (2:48)

Together, the Free Exercise Clause and the Establishment Clause require government neutrality in matters of religion. Government is not supposed to benefit or burden religious belief. One way to think about the operation of the religion clauses is that the Establishment Clause forbids the public sector, that is, government, from sponsoring or favoring religion. And the Free Exercise Clause forbids government from interfering with the expression of religious beliefs in what we like to call the public square. The public square is shorthand for the many, many non-governmental venues where citizens exchange ideas and opinions.

It’s really important to note that courts have endorsed some restrictions on religious observance as opposed to belief. For example, your religion might call for sacrificing your firstborn or for smoking dope, but your rights under the under the Free Exercise Clause don’t go that far. Laws against infanticide and drug abuse and many other things are what we call laws of general application. That means these are laws that apply to everyone—laws that were not intended to target religion in general or any particular religion, and any infringement on religious observance is coincidental.

Some of our most heated arguments in this country are rooted in religion. This has always been the case, even in colonial times. And back then, religious diversity meant mostly different kinds of Protestant. As we become more and more religiously diverse as a nation, it becomes even more important to understand the constitutional limits on the rules that government can impose.

When states misuse their authority to play favorites, to privilege some religious beliefs over others, people who don’t share the privileged beliefs are relegated to the status of second-class citizens.

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Separation of church and state prevents members of majority religions from using government to force their beliefs on others. And it keeps agencies of government from interfering with the internal operation of churches, synagogues, and mosques. As government becomes more pervasive, knowing where to draw the line between what’s permissible and what isn’t becomes much more difficult. And that makes it even more important to understand the original purpose of the religion clauses.

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As to that original purpose, there are really few explanations better than the one offered by John Leland back in the very early 1800s. Leland was an Evangelical Baptist preacher and he had strong views on the individual's relationship to God, the inviolability of the individual conscience, and the limited nature of human knowledge. He wrote, "Religion is a matter between God and individuals, religious opinions of men not being the objects of civil government nor in any way under its control. Government has no more to do with the religious opinions of men than it has with principles of mathematics."

Leland's quote brings us back to the underlying purpose of the whole Bill of Rights: The protection of individual autonomy. In a very real way, the First Amendment and the entire Bill of Rights answer the question, "Who decides?" Who decides what prayer you say, what church you attend, what political party you endorse? Who decides who you marry, and if you do, whether you have children? Thanks to the Bill of Rights in the United States, each individual gets to decide these matters for himself or herself. The religion clauses of the First Amendment require government to be neutral.

Now, some Americans, especially those whose religions have dominated in our society, experience neutrality as hostility. But preventing government from using the law and the power of the state to impose a set of beliefs is a demonstration of respect for the individual's liberty to decide these matters for ourselves. It isn't hostility to religion.

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The religion clauses guarantee Americans both freedom of and freedom from religion. Not only can we choose our own churches, synagogues, mosques, and the like, we can also choose not to believe at all—despite the popular notion that freedom of religion means only that government can't prefer one faith over another. The religion clauses don't operate like some Chinese menus where you pick from column A and column B.

The courts have made it clear that Americans also have a First Amendment right not to believe in any religion. The resources that I will provide, will give further historical and legal illumination to those very important principles.

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You know, the founders were well aware of the power of religion to divide people and to incite conflict. They weren't that far removed from Europe's religious wars. And they were really anxious to minimize the likelihood of struggles by various religious bodies to control the new government.

Different states had different religious establishments, and they wanted to avoid having the federal government favor some over others. You will remember that the Bill of Rights wouldn't be applied to state and local units of government until after the Civil War. Neutrality of the central government was thought to be very important. So how does this work?

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The operation of the religion clauses is based on a fairly simple division: The difference between the public sector and the public square. The public sector, as I've said, is government. The public square is basically everywhere else, or at least every non-government venue where we argue, debate, and otherwise interact.

The Establishment Clause prohibits government from sponsoring or endorsing religious belief or observance, from favoring one religion over others, from favoring religion over non-religion, or from favoring non-religion over religion. Basically, it says government must butt out.

The Free Exercise Clause restricts government from interfering with individual religious beliefs at all, and it also forbids government from interfering with most religious observances. The exception, as I noted earlier, is for laws of general application that may inadvertently infringe on a religious ritual or behavior.

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You know in Indiana, a couple of years ago, pot activists tested that by establishing a Church of Cannabis and challenging the state's drug laws for infringing their free exercise rights. They lost.

When the Constitution was drafted, there were no public schools. And ever since public schools were established, a very large number of religious liberty cases have involved public school classroom behaviors and activities. Now, again, remember, the Bill of Rights only restrains government.

So private and parochial schools can't violate the First Amendment or any part of the Bill of Rights. They're private. People who are unhappy with government neutrality in matters of religion often allege that voluntary prayer has been driven from public school classrooms, but that is inaccurate. What's really at issue is whether a student's prayer is voluntary. If it is, it's protected by the Free Exercise Clause. If the prayer was initiated or led by public school personnel who are government employees, then it violates the Establishment Clause.

The rules governing public schools are comprehensively covered in one of the readings that will be on your reference list.

The basic Establishment Clause analysis can be found in a case called *Lemon versus Kurtzman*. That case outlined a three-pronged strategy for deciding Establishment Clause challenges. Does this law or action being challenged have a secular, that is a non-religious, purpose? Secondly, irrespective of the purpose or the intent of the law, does that law or government action have the primary effect of advancing religion? And third, does the law or action promote an excessive entanglement with religion? The law or action being challenged has to pass all three tests or the challenge succeeds.

Now there are obviously cases where the Lemon test isn't really applicable. The test has been widely criticized by legal scholars but so far, it hasn't been replaced. It has, however, been supplemented. When Sandra Day O'Connor was on the court, she developed an alternate test that is often used. And that test can be summed up with: Would an objective observer believe that government was sponsoring or endorsing a religious observance? If the answer to that is yes, it violates the Establishment Clause.

So to sum up: The Establishment Clause forbids the public sector, that's government, from favoring or disfavoring religion. And the Free Exercise Clause forbids government from interfering with the expression of religious beliefs in the public square, everywhere but government. The courts have endorsed some restrictions on religious observance as opposed to belief, but only when those observances run afoul of laws of general application—that is, laws that apply to everyone. And again, these can be complicated issues and the references that will be supplied will help you find your way through this particular Constitutional territory.

So much for an overview. Let's look at some fairly recent cases, several of which are still subject to heated debate.

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In *Burwell versus Hobby Lobby*, in a five to four ruling, two corporations owned by Christian families challenged a provision of the Affordable Care Act that required them to provide their employees with health insurance coverage that included birth control. The corporations' owners argued that they tried to run their businesses on Christian principles and that offering birth control coverage violated those principles. The Supreme Court majority, five Supreme Court justices, agreed, saying that because these corporations were closely held—that is, because all of the stock in those corporations was held by the families that had established the businesses— those corporations could claim religious liberty rights under the First Amendment. This was something of a departure, and dissenting Justices Ginsburg and Sotomayor said that the court had, for the first time, extended religious freedom protections to the commercial profit-making world.

Similar disputes have been litigated between religiously affiliated hospitals and employees of those hospitals who come from other religious traditions. The cases raising these issues have been cited by advocates for single-payer health care, who point out that this is one of many drawbacks that you encounter when you tie health insurance to employment.

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In a case called *Trinity Church versus Comer*, the Supreme Court relied on the Free Exercise Clause in deciding that the State of Missouri had improperly excluded the Trinity Lutheran Church Child Learning Center from a grant program. That program was available to schools that wanted to upgrade their playgrounds with a pour-in-place rubber surface that the state provided under its Scrap Tire Program. Missouri's state constitution, like that of many other states, including Indiana, had a provision that prohibited tax dollars from going to religious institutions. The text says, no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or denomination of religion. Two lower courts had ruled that the state could exclude religious schools from participating in that program based upon that language, but the Supreme Court reversed. The majority held that excluding the preschool from participating in the program was "express discrimination based on religious identity." And it stressed that the court was not addressing religious uses of funding or other forms of discrimination.

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A case that's received a great deal of attention is one called *Masterpiece Cake Shop Limited versus the Colorado Civil Rights Commission*. As a statement from the American Bar Association noted, the underlying issue in that case is profoundly significant. Does a business have a constitutional right to discriminate based on its owners' beliefs? All anti-discrimination statutes create a tension between equality on the one hand and liberty on the other. Any law that prohibits discrimination, whether that discrimination is based on race or sex or religion or sexual orientation, or any other ground, infringes on our complete freedom to choose who to serve or who to hire.

That was a key objection by the way, to the Civil Rights Act of 1964. Opponents asserted that their religions required separating the races or subordinating women and objected to the Civil Rights Act on that basis.

All civil rights laws interfere with the freedom to choose one's customers or employees. Proponents of equal civil rights point out that businesses depend upon government—to protect their properties from theft and fire, provide the streets and sidewalks

that bring customers to their doors, get their garbage picked up, many other things that actually make doing business possible—and that, in return, government should have the right to demand that they obey civil rights laws.

In this case, the Supreme Court punted. It didn't answer the question, but decided the case on narrower grounds by concluding that members of the Colorado Civil Rights Commission had expressed an impermissible hostility to religion, and the court sent it back to lower courts for resolution.

As these and so many other cases make clear, religious liberty cases can be very contentious. They implicate our deeply held values of liberty and equality. And they raise a question that applies to all public policies, which is, what is government's job and what are the limits of government's power? I will supply you with some references that delve more fully into those very, very difficult questions.

If you listen to the rhetoric around church/state issues today, you would never know that the wall of separation contemplated by Jefferson and Madison was seen as a very important protection for both religion and government. It was, and for some very sound reasons. As one scholar has noted, the exercise of religion requires that each person follow his or her own conscience. Since opinions and beliefs can be shaped only by individual consideration of evidence that that particular individual finds persuasive, no one can really impose opinions on someone else. As I mentioned, Roger Williams who founded Rhode Island, is most often cited for the religious view of the importance of separation. He was the originator as far as we know, of the phrase, a wall of separation—and a full 150 years before Thomas Jefferson used it.

Historians sometimes overlook the importance eighteenth- and nineteenth-century Christians placed on the doctrine of Liberty of Conscience, what they called soul freedom. Such views were most strongly held by the Mennonites, Quakers, and Baptists, but they were also part of the beliefs of colonial-era Episcopalians, Methodists, and Presbyterians.

And once again, here is my favorite John Leland quote: “The very tendency of religious establishments by human law is to make some hypocrites and the rest fools. They are calculated to destroy those very virtues that religion is designed to build up. Government has no more to do with the religious opinions of men than it has with the principles of mathematics.”

Today, in addition to rampant historical revisionism, there are two common justifications for allowing government to take cognizance of religion—arguments that when you think about it, are mutually exclusive, although they’re often offered by the very same people. You’re all familiar with what is called the instrumental argument.

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It’s best summarized by a bumper sticker that was popular a few years ago, something along the lines of when prayer was removed from the classroom, guns and teenage pregnancy came in. I didn’t say it was a logical argument. This naïve belief that exposure to a denatured and generic religion in the classroom will make students behave, is exactly the same justification given for current efforts to post the Ten Commandments. Well, if people see thou shalt not kill on the wall of a public building, they won’t kill. For complex theological reasons I don’t understand, this evidently doesn’t work if the building is privately owned, but anyway... Unfortunately, available evidence doesn’t support this belief in the magical powers of religious iconography.

The United States is by far the most religious of all the western industrialized nations. And we’re also the most violent. There are few, if any, atheists in our prisons. Folks in the Bible Belt pray more, and they kill more.

The reason these proponents of government-sponsored prayer want government to make us pray is because they’re convinced that in the absence of state coercion, we won’t. That’s why they object to non-mandatory, private baccalaureate services in lieu of prayer at high school graduations.

Such baccalaureate services, which used to be the norm, permit meaningful prayer for those who wish to participate. So what’s the objection? Tellingly, it’s that such services are voluntary and those who really need to pray won’t come. The folks making this argument know what prayer is good for you and me, and they’re willing to use the power of the state to make us participate in a ceremony that includes that prayer. The instrumental argument for supporting public religion and public prayer is basically: Religion is good for people so the state should impose it.

On the other hand, what’s sometimes called the Ceremonial Defense of Public Religion is that it has no effect at all. It’s meaningless. This is the argument that prayers at graduations and similar venues are just traditional and ceremonial. People of faith, quite justifiably, find such characterizations pretty offensive.

As a minister friend of mine likes to say, he doesn’t pray “to whom it may concern.” No religion I know of sanctions the notion that prayer is merely ceremonial, void of any particular significance, and useful only as an archaic, although charming, tradition.

The founders of this nation believed that government neutrality in matters of religious belief was absolutely essential if government was going to be seen as legitimate. They also believed that state neutrality was necessary if genuine religious sentiment was to flourish.

You only need to look at nations without a First Amendment to see how right they were. Countries like England have seen state-sponsored religions degenerate into pleasant rituals without vitality.

On the other end of the spectrum, nations like Saudi Arabia and Iran have employed the force of the state in the service of religious conformity.

I hope this brief discussion has been helpful and that the references I will supply will further illuminate the dimensions of our religious liberty clauses.

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