

FIRST AMENDMENT RELIGIOUS PROTECTION CASES (ADAPTED FROM TDSJ2 APPENDIX 11D)

Note to instructors: You'll find the background and sources cited in these scenarios on this website under Religious Oppression "Further Resources." (These scenarios and sources are adapted from the more extensive discussions in Religious Oppression selections and CD Appendix 11C "Background information on First Amendment Constitutional safeguards for religion" in TDSJ2.)

SET UP FOR THIS ACTIVITY

Depending on class size, have students form groups of 3-5 students each, to ensure full participation in group work. Assign each of the groups one or more of the 10 scenarios written up below.

Provide a lecturette in which you explain the "free of religion" clauses of the 1st Amendment and help students understand the various factors that lead a person or group to bring a legal complaint based on the 1st Amendment. Explain some of the factors that may go into a court's interpretation of the 1st Amendment in making a decision about the cases.

Here are the relevant "freedom of religion" clauses from the 1st Amendment to the United States Constitution: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*" This was extended to state constitutions by the 14th Amendment.

INSTRUCTIONS TO SMALL GROUPS

Based on your understanding of these two "religion" clauses – (1) no legally "established" religion and (2) no legal prohibitions on the free exercise of religion -- how would you resolve the following cases which were actually brought before state and federal courts?

In making your decision, you'll need to answer these four questions. (Your group can arrive at majority and minority opinions, just as a court would, but you must clearly express your reasoning.)

- (1) What do you see as the specific prohibition – a religious establishment or abridgement of free exercise -- in this specific case?
- (2) What is your decision, drawing upon one or both of the 1st Amendment "religion" clauses?
- (3) What are your reasons for this decision?
- (4) What do you think will be long-term consequences of your decision (including perhaps some unintended consequences), if your decision were to establish legal precedent for future cases?

Case #1: Reynolds v. United States (1878): Mormon Polygamy Case

A Mormon was convicted of violating a federal anti-polygamy statute, but defended his polygamy as necessary to the practice of his religion. He argued he should be exempted from the federal statute because his conduct was constitutionally protected under the free exercise clause.

Case #2: Engel v. Vitale (1962): School Prayer Case

Jewish families in Long Island protested (in 1958) the use of a supposedly nondenominational daily prayer in school, as required by a New York state statute (1951) that had been designed to promote religious commitment and moral and spiritual values. Plaintiffs received numerous antisemitic hate letters while the case made its way to the Supreme Court: "America is a Christian nation, 'If you don't like our God, then go behind the Iron Curtain where you belong, Kike, Hebe, Filth'" are some of the things said in the hate mail (quoted Feldman 1997, 233) .

Case #3: Sherbert v. Verner (1963): Seventh-Day Adventist Sabbath Work Case

A Seventh-Day Adventist had been fired from her job for refusing to work on Saturday, which was her Sabbath. She was then denied unemployment compensation for her refusal to be available for work on weekends “without good cause.” The state argued the necessity of this unemployment regulation in its efforts to find people available to work on weekends as well as the state’s interest in preventing fraudulent unemployment compensation claims.

Case #4: Wisconsin v. Yoder (1972): Amish Schooling Case

Members of the Old Order Amish had violated state compulsory education laws by removing their children from school after the 8th grade. The state required regular school hours for children from the ages of seven through sixteen. The Amish family’s challenge was based on their religious requirement to educate their fourteen to sixteen year old children at home. The state argued its “interest” in public education.

Case #5: Lyng v. Northwest Indian Cemetery Protective Association (1988) Case

Three Native American Indian tribes challenged the U.S. Forest Service for building a road through sacred sites in the Chimney Rock section of the Six Rivers National Forest. The road would link two California towns and provide a route for harvesting and selling timber. The tribes argued – and the Forest Service agreed -- that this “high country” cut through by the road was sacred to their tribes and central to their religious ceremonies. The road would significantly interfere with the free exercise of the religion. The state argued that the road was necessary to link the towns, facilitate the timber harvest, and improve the local economy.

Case #6: Goldman v. Weinberger (1988): Religious Apparel

An Orthodox Jewish rabbi, who was an officer in the Air Force, was prohibited from wearing by Air Force regulations from wearing any headgear indoors. However, as an Orthodox Jew, Goldman was required by his religion to cover his head, wearing a yarmulke.

Case #7: Oregon v. Smith (1990): The Peyote Use Case.

Alfred Smith was a recovering alcoholic, who worked with Galen Black at the Douglas County, Oregon, Council on Alcohol and Drug Abuse Prevention and Treatment facility. They were dismissed from their jobs for using an illegal drug – peyote – and denied unemployment benefits by the state of Oregon. They argued that they used peyote during a religious ceremony of the Native American Church, a pan-Indian group recognized as a religious body by state and federal governments. Smith was Klamath Indian, Black was not, but both claimed infringement of their free exercise right to worship.

Case #8: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993): the Santeria case

The ceremonial rituals for members of the Santeria Church of the Lukumi Babalu Aye in Hialeah, Florida, included the sacrifice of chickens, pigeons or other small animals to the *orisha*, their gods. In 1987 they purchased a building and used car lot to open a place of worship. The Hialeah town council passed ordinances prohibiting animal sacrifice in the city. The city attorney said “This community will not tolerate religious practices which are abhorrent to its citizens” (quoted in Eck, 2000, p. 325). The Sanitarians argued that they were being specifically targeted, since the town ordinances excluded Jewish kosher slaughter practice from its prohibitions.

Case #9: Livingstone School District and Sikh students (1994):

In California’s Livingstone School District, three Khalsa-initiated students in 1994 were prohibited from wearing the *kirpan*, a ceremonial dagger considered one of the five sacred symbols of Sikhism and worn by all initiated Sikhs. School policy forbade the carrying of any weapons, including knives, on school premises. The Sikhs found this a violation of free exercise.

Case #10: United States v. Board of Education of School District of Philadelphia (1990):

A twelve-year employee of the Philadelphia school district decided in 1982 to adopt the headscarf and long dress she believed was required by her religion. In 1984 she was told she could not teach while wearing religious attire, nor could she be a substitute teacher, on the basis of a 1895 statute directed against Catholic nuns in public schools (see Moore, 2000, pp. 111-112). She filed a complaint, not under the free exercise clause of the 1st Amendment, but under a 1972 amendment to the Title VII (enacted in 1964) which read: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he [or she] is unable to reasonably accommodate to an employee’s or perspective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business” (quoted in Moore, 2000, p. 114).

HERE ARE THE ACTUAL LEGAL DECISIONS TO THE CASES LISTED ABOVE

Case #1: Reynolds v. United States (1878): Mormon Polygamy Case (free exercise clause)

A unanimous Supreme Court found that while the free exercise clause protects religious belief, it does not protect religious conduct. The Court argued that polygamy was a danger to social norms and an exemption in this case would make “professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself” (quoted in Long, 2000, p. 48).

Case #2: Engel v. Vitale (1962): School Prayer Case (establishment clause)

The Court found the daily prayer in violation of the Establishment clause. It drew upon colonial history for its case – the resistance of Puritans to the official imposition of a common Prayer Book in England as a basis for this reading of 1st Amendment prohibition of any form of official religion.

This decision created a huge outcry with efforts to add a Christian amendment to the Constitution, part of the 1964 Republican Party platform, and warnings that this decision might unleash a wave of antisemitism.

Case #3: Sherbert v. Verner (1963): Seventh-Day Adventist (free exercise clause)

The Supreme Court majority found on behalf of the appellant and established the *Sherbert* three-part “test” for free exercise of religion: (1) Does the state law place a burden on the free exercise of religion? [In this case, the answer was Yes.] If yes to the first, then (2): Does the application of this law to everyone, uniformly, serve a compelling governmental interest and has it been achieved in the least restrictive way possible? [In this case, the answer was Yes.] If yes, then (3): Does a religious exemption to this law undermine a compelling governmental interest? [In this case, the answer was No.]

The majority opinion argued that “in balancing such a compelling interest against the burden imposed on the free exercise right, a court should not accept a law or action that has merely a rational relationship to a colorable state interest. Rather, free exercise rights may only be limited in the protection of some paramount governmental interest” (Rievman, 1989, p. 175).

Case #4: Wisconsin v. Yoder (1972): Amish Schooling Case (free exercise clause)

The Supreme Court reversed Wisconsin’s refusal to exempt Amish students from its mandatory school attendance requirements. The reversal drew on the precedent established by the *Sherbert* criteria, namely that the mandatory school attendance regulation burdened the free exercise of religion by the Amish; that compulsory education did not amount to a compelling interest; and that the exemption of Amish children did not undermine state interest.

Case #5: Lyng v. Northwest Indian Cemetery Protective Association (1988) Case

The Ninth Circuit upheld an injunction granted on behalf of the free exercise claims. Both the District and the Ninth Circuit Appeals courts agreed that the roadway would prevent free exercise of Native religion and was thus unconstitutional, even though it had not intentionally designed to disrupt (a concern raised in other sacred site precedent-setting cases).

The Supreme Court, however, reversed the lower courts against the Native claims, partly by focusing narrowly on the meaning of “prohibit” in the 1st Amendment Free Exercise clause (“prohibiting the free exercise thereof”) as key to the majority finding that “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government” (quoted in Linge, 2000, p. 331). The decision also focused on whether or not the plaintiffs were “coerced”, reasoning that although the logging road “would interfere significantly” with worship, “the affected individuals would [not] be coerced by the Government’s action into violating their religious beliefs” (quoted in Long, 2000, p. 145). Even more telling, Justice O’Connor wrote, “Whatever rights the Indians may have to the use of the area, however, these rights do not divest the Government of *its right to use what is, after all, its land*” (quoted Linge, 2000, p. 332, italics added).

Three Justices wrote a minority opinion in the *Lynx* logging-road case to point out the “cruelly surreal result” of a Supreme Court finding in which the Indian’s religious freedom “amounts to nothing more than the right to believe that their religion will be destroyed” and having

absolutely no constitutional protection against perhaps the gravest threat to their religious practices ... Religious freedom is threatened no less by governmental action that makes the practice of one’s chosen faith impossible than by government programs that pressure on to engage in conduct which is inconsistent with religious beliefs” (Justice Brennan’s dissent in *Lynx*, quoted in Linge, 2000, pp. 332-4).

Brennan further observed that “Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause” (quoted in Long, 2000, p. 145). (See Rievman, 1989, pp. 184-197 for comparison of *Yoder* with *Lynx*, and the free exercise issues involved in these and related cases.)

The majority opinion claimed “The government cannot operate efficiently, if it had to satisfy everyone’s religious beliefs-desires,” and the minority dissent argued “the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause” The minority dissent noted that this approach sacrifices a religion as old as the nation and the spiritual well-being of 5,000 adherents “so that the Forest Service can build a six-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it” (quoted in Long 2000, 146).

Case #6: Goldman v. Weinberger (1988): Religious Apparel

The Court found that the Air Force had special needs for military obedience and unity, which rendered “strict scrutiny” of free exercise inappropriate, meaning that the military regulations need not be examined as violation of the Free Exercise clause. The Court reasoned that Air Force standardized uniforms encourage “the subordination of personal preferences and identities in favor of the overall group mission” (quoted in Feldman, 1997, p. 247). The court reasoned that the special needs of the military overcame the strict scrutiny test of free exercise claims, and having rejected strict scrutiny, then concluded that military regulations were reasonable and did not violate the free exercise clause. Two elements in the *Goldman* decision are especially telling:

First, the Court’s stress upon “standardized uniforms” disregards the fact that the *standard* will almost always mirror the values and practices of the dominant majority – namely Christians. Put bluntly, the U.S. military is unlikely to require everyone to wear a yarmulke as part of the standard uniform. Second, and most clearly opposed to the *Yoder* Court’s receptiveness [to the claims of Amish, Jehovah’s Witnesses, and Seventh Day Adventists], the *Goldman* Court characterized the wearing of a yarmulke as a matter of mere *personal preference*. Evidently, the majority of the justices (all of the justices at this time were Christian) were unable to comprehend the [religious] significance of the yarmulke (Feldman, 1997, p. 247).

Subsequently, Congress passed legislation that set aside the Air force Regulations.

Case #7: Oregon v. Smith (1990): Native American Indian Peyote Use Case.

The Oregon state attorney argued this was not an issue of religious liberty but of the state's right to enforce its drug laws. The nearly unanimous U.S. Supreme Court found that the Oregon law on drug use (peyote) applied to all people and fulfilled a legitimate state purpose. This decision created a new threshold for Free Exercise cases – that the law in question was not neutral but directed against religious observance (see Case #7) -- and overturned the compelling government interest thresholds from *Sherbert* and *Yoder*. The decision found that the Free Exercise Clause “only protects activity that is directly targeted by a government action” (Long 2000, 286). A separate but concurring majority decision argued to maintain the “compelling government interest” test from *Sherbert*. The dissent argued the absence of a state compelling interest in denying a religious exemption and thus argues for the religious exemption.

Aftermath: The Native American Church in coalition with other religious groups pressed Congress to pass the Religious Freedom Restoration Act (RFRA) and the State of Oregon passed a religious exception to its drug laws. The American Indian Religious Freedom Act (AIRFA) exempted peyote in religious ceremonies from federal drug laws. Subsequently, a divided Supreme Court ruled that the AIRFA was unconstitutional on state's rights grounds and on the principle of separation of powers (that is, Congress, in the view of the Court, had infringed on the authority of the Court). Some RFRA laws were subsequently introduced in nineteen state legislatures and passed in some cases.

Case #8: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993): the Santeria case

The U.S. Supreme Court ruled in *Church of the Lukumi Babalu Aye v. City of Hialeah* that the city ordinances prohibiting animal killings had been directed specifically against the religious practices of the Santerians. The Court's opinion held that laws specifically enacted to burden the practice of one's faith trigger the highest scrutiny and must serve a compelling state interest by the least restrictive means. The Court found that the local ordinances burdened the ability to practice Santeria that the ordinances did not serve a compelling state interest, and they were overly broad.

This case was reasoned by the Court majority to be congruent with the earlier *Smith* decision that neutral and generally applicable laws do not trigger high scrutiny for Free Exercise Clause review. The minority continued to present their strenuous objections to *Smith*.

Case #9: Livingstone School District and Sikh students:

U.S. District Court barred the three Sikh students from wearing the *kirpan* and their parents kept them home from school. The Ninth U.S. Circuit Court of Appeals required the school district to make “all reasonable efforts” to accommodate the Sikh beliefs and practices, so long as the *kirpan* was small, sewn into the sheath, and not a threat to safety.

Case #10: United States v. Board of Education of School District of Philadelphia (1990):

The EEOC (Equal Employment Opportunity Commission) found the complaint valid and negotiated with the school board. The teacher was reinstated as a substitute teacher and then full time to teach and to wear her religious attire. She was not awarded back pay and the school district did not concede the religious garb statute was applied discriminatorily. The case moved to federal district court which found that the treatment was “selective and disparate” and also that Title VII prohibited enforcement of the statute against religious attire. The case then moved on appeal to the U.S. Court of Appeals which found for the state and against the complainant, on the basis of “undue hardship” to the schools and (2) a “compelling interest” on the part of the state to maintain a secular public school system (see discussion in Moore, 2000, pp. 110-117).