



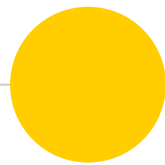
Liberty and Free Exercise Clause in the U.S. Constitution

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1. liberty and liberty of conscience



Two concepts of liberty

- Negative liberty: “What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons?”
- Positive liberty: “What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?”

Isaiah Berlin, “Two Concepts of Liberty” 1969, pp. 121–22

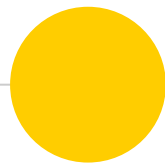
Imagine you are driving a car through town, and you come to a fork in the road. You turn left, but no one was forcing you to go one way or the other. Next you come to a crossroads. You turn right, but no one was preventing you from going left or straight on. There is no traffic to speak of and there are no diversions or police roadblocks. So you seem, as a driver, to be completely free.

But this picture of your situation might change quite dramatically if we consider that the reason you went left and then right is that you're addicted to cigarettes and you're desperate to get to the tobacconists before it closes. Rather than *driving*, you feel you are *being driven*, as your urge to smoke leads you uncontrollably to turn the wheel first to the left and then to the right. Moreover, you're perfectly aware that your turning right at the crossroads means you'll probably miss a train that was to take you to an appointment you care about very much. You long to be free of this irrational desire that is not **only** threatening your longevity but is also stopping you right now from doing what you think you ought to be doing.

Liberty of conscience

- What about liberty of conscience, negative or positive?
- Why liberty of conscience?

2. free exercise clause in U.S Constitution



Freedom of religion clauses in constitutions and constitutional documents:

Chinese Constitution (article 36), Dutch constitution (article 7), the European Convention on Human Rights (article 9), the Universal Declaration of Human Rights (article 18), the International Covenant on Civil and Political Rights (article 27) and the First Amendment of the U. S. Constitution (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”).

Why freedom of religion?

- religion is good in itself?
- preventing from bloodshed?
- constitutional practice?

Sherbert v. Verner (1963)

- ◎ The sherbert test:
- ◎ The first prong investigates whether government has **substantially burdened** the individual's free exercise of religion by imposing a penalty or withholding a benefit.
- ◎ The government may still constitutionally impose the burden on the individual's free exercise if the government can show
 - it possesses some **compelling state interest** that justifies the infringement; and
 - no alternative form of regulation can avoid the infringement and still achieve the state's end (the **narrow tailoring** prong).

***Wisconsin v. Yoder* (1972)**

- U. S. Supreme Court holds: States cannot force individuals to attend school when it infringes on their First Amendment rights. In this case, the state of Wisconsin interfered with the practice of a legitimate religious belief.

Employment Division v. Smith (1990)

- The Court held that the First Amendment's protection of the "free exercise" of religion does not allow a person to use a religious motivation as a reason not to obey such generally applicable laws.
- backlash: Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.

Burwell v. Hobby Lobby stores (2014)

- The U.S. Supreme Court used the sherbert test again.
- And, the SCOTUS for the first time, extended religious exemptions from federal laws to for-profit corporations.

Why freedom of religion?

- What's the difference between freedom of religion and freedom of conscience?

United States v. Seeger (1964)

- “The test of belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is in a relation to a Supreme Being and the other is not.”

Welsh v. United States (1970)

- The majority opinion finally ruled by extending the approach in Seeger case, it declared that Welsh counted as 'religious', as his conscience was spurred by deeply moral, ethical, or religious beliefs, which gave him no rest or peace if he allowed himself to become a part of an instrument of war.