

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Amdt1.4.1 Overview of Free Exercise Clause

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment’s Free Exercise Clause forbids Congress from “prohibiting the free exercise” of religion.¹ The general framework for the Supreme Court’s Free Exercise jurisprudence was largely established in the 1940 case *Cantwell v. Connecticut* , which also gave the Supreme Court the opportunity to apply the Free Exercise Clause to the states.² In *Cantwell* , the Court explained that the Religion Clauses “embrace[] two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”³ Starting with the first freedom, as explored in more detail in a subsequent essay,⁴ the Free Exercise Clause “categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.”⁵

The Court also clarified in *Cantwell*  that religious actions, as opposed to beliefs, are “subject to regulation for the protection of society.”⁶ However, the Court cautioned that the government must exercise its regulatory power cautiously so it does not “unduly . . .

infringe” religious freedom.⁷ Therefore, a law that burdens but does not directly regulate religious belief is not categorically prohibited but will likely still be subject to constitutional scrutiny. Over the years, the Court has fleshed out standards to determine when regulations of religious conduct unduly infringe constitutionally protected free exercise. These standards have differed over time and circumstances, as discussed in the following essays.

The prevailing standard governing most laws was established in 1990’s *Employment Division v. Smith* , in which the Supreme Court ruled that “the right of free exercise 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).’”⁸ This statement echoed early, pre-*Cantwell*  cases involving free exercise challenges to criminal laws prohibiting polygamy in U.S. territories.⁹ In these cases, the Supreme Court rejected the challenges brought by those who practiced religiously motivated polygamy, holding that the government could permissibly prohibit polygamy and the defendants’ religious beliefs could not excuse them from punishment.¹⁰ Similarly, early cases rejected the idea that conscientious objectors had a constitutional right “to avoid bearing arms,” in light of Congress’s broad war powers authority.¹¹ Although *Smith*  hearkened back to these earlier cases,¹² the opinion’s lenient standard of constitutional scrutiny departed from some cases in the mid-twentieth century that had suggested the government needed a compelling interest to apply a facially neutral law in a way that burdened a person’s religious activity.¹³

Even after *Smith* , though, a law that imposes special burdens on religious activities may not be considered neutral or generally applicable and will likely trigger heightened scrutiny.¹⁴ Accordingly, one critical factor in evaluating Free Exercise Clause challenges has been whether a law discriminates against religion in its text, purpose, or effect.¹⁵ As one opinion cautioned, “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”¹⁶

Although it has not always been an explicit part of the Supreme Court’s analysis, some Free Exercise Clause cases have turned on whether the government policy had a coercive effect on religious exercise.¹⁷ The Court has at times viewed coercion relatively broadly, stating that “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,” may violate the First Amendment.¹⁸ Emphasizing “the potentially coercive nature of classroom instruction,” for example, the Supreme Court held that a school’s use of storybooks that conflict with parents’ beliefs burdened the parents’ religious exercise by interfering with their children’s religious development.¹⁹ At the same time, the Court has clarified that “incidental effects of government programs” with “no tendency to coerce individuals into acting contrary to their religious beliefs” do not trigger heightened constitutional scrutiny.²⁰ For example, the Court rejected a free exercise challenge to a program that allowed public schools to release students during the school day to take religious classes at private religious institutions.²¹ The program did

not involve any free exercise issue, in the Court’s view, because it did not involve coercion: no one was “forced to go to the religious classroom and no religious exercise or instruction [was] brought to the classrooms of the public schools.”²² Accordingly, the Court has sometimes held that where a government action does not require regulated entities to act in a way that their religious beliefs prohibit, there is no Free Exercise Clause violation.²³ Essentially, a law that does not regulate belief or burden religious exercise will not violate the Free Exercise Clause.²⁴

Footnotes

1. ¹ U.S. CONST. amend. I.
2. ² *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)  (holding that the Free Exercise Clause had been incorporated against the states through the Fourteenth Amendment); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934)  (holding that the “liberty” protected by the due process clause” of the Fourteenth Amendment includes the right to hold and teach certain religious beliefs). See also Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.
3. ³ *Cantwell*, 310 U.S. at 303–04 . See also *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (“Prayer unquestionably constitutes the ‘exercise’ of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place.”);
4. ⁴ Amdt1.4.2 Laws Regulating Religious Belief.
5. ⁵ *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)  (plurality opinion).
6. ⁶ *Cantwell*, 310 U.S. at 304 . See also *Braunfeld v. Brown*, 366 U.S. 599, 603–04 (1961)  (plurality opinion) (“[L]egislative power . . . may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s

religion.”); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) [↗](#) (noting that the government may regulate religiously motivated actions under otherwise valid laws that protect “public safety, peace or order”).

7. [↗](#) *Cantwell*, 310 U.S. at 304 [↗](#).
8. [↗](#) See *Emp. Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) [↗](#) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) [↗](#) (Stevens, J., concurring)).
9. [↗](#) *Late Corp. of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) [hereinafter *LDS*]; *Davis v. Beason*, 133 U.S. 333 (1890) [↗](#); *Reynolds v. United States*, 98 U.S. 145 (1845). *LDS* and *Davis* [↗](#) involved laws attaching legal consequences to the criminal practice of polygamy: a business’s dissolution and a person’s disenfranchisement. *Cf.* *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (concluding that religious motivation did not negate criminal intent in polygamy prosecution); *Miles v. United States*, 103 U.S. 304, 310–11 (1880) [↗](#) (holding that because religion was not a defense to a polygamy prosecution, the constitutional rights of a juror in a bigamy trial “could not” be violated by inquiring “whether he himself was living in polygamy, and whether he believed it to be in accordance with the divine will and command”).
10. [↗](#) *LDS*, 136 U.S. at 50; *Davis*, 133 U.S. at 341–42 [↗](#); *Reynolds*, 98 U.S. at 166. In *Reynolds*, the Court looked to the long historical precedent of laws prohibiting polygamy. *Id.* at 164–66. In the other two cases, the Court appeared to take a more normative approach, saying that to call advocating polygamy “a tenet of religion is to offend the common sense of mankind,” *Davis*, 133 U.S. at 341–42 [↗](#), and describing the religious belief in the practice of polygamy a “pretence” and “sophistical plea” for engaging in criminal activity, *LDS*, 136 U.S. at 49.
11. [↗](#) *United States v. Macintosh*, 283 U.S. 605, 624 (1931) [↗](#).
12. [↗](#) See *Smith*, 494 U.S. at 879, 882 [↗](#) (citing *Reynolds* and conscientious objector caselaw as support).
13. [↗](#) *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) [↗](#); see Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.
14. [↗](#) *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) [↗](#).

15. ^ See Amdt1.4.4 Laws that Discriminate Against Religious Practice.
16. ^ *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)  (plurality opinion).
17. ^ *Bd. of Educ. v. Allen*, 392 U.S. 236, 248–49 (1968)  (rejecting a free exercise challenge to a textbook lending program because the challengers had not alleged the program “coerce[d] them as individuals in the practice of their religion”). See *also* *Tilton v. Richardson*, 403 U.S. 672, 689 (1971)  (plurality opinion) (rejecting a free exercise challenge to a federal program offering grants for constructing academic facilities because the challengers could not “identify any coercion directed at the practice or exercise of their religious beliefs”).
18. ^ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–51 (1988) . The concept of indirect coercion has also come up in the Establishment Clause context. See Amdt1.3.7.2 Coercion and Establishment Clause Doctrine.
19. ^ *Mahmoud v. Taylor*, No. 24-297, slip op. at 21–22, 26 (U.S. June 27, 2025).
20. ^ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–51 (1988) ; see *also* Amdt1.4.3.3 Laws Neutral to Religious Practice and Internal Government Affairs.
21. ^ *Zorach v. Clauson*, 343 U.S. 306, 308 (1952) .
22. ^ *Id.* at 311.
23. ^ See, e.g., *Jimmy Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 391–92 (1990)  (holding that a generally applicable sales and use tax, applied to religious materials, imposed “no constitutionally significant burden on appellant’s religious practices or beliefs”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion) (saying that the Free Exercise Clause did not require a sales tax exemption for religious publications where there was no evidence that the payment of the tax “would offend . . . religious beliefs or inhibit religious activity”); *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 303–04 (1985)  (rejecting free exercise challenge to federal law that would require a religious employer to compensate employees, saying that although they held religious objections to cash wages, the required compensation could come in the form of benefits). *Cf.* *Native Am. Church of Navajoland, Inc. v. Ariz. Corp. Comm’n*, 329 F. Supp. 907, 910 (D. Ariz. 1971) (rejecting free exercise challenge to a state denial of corporate status based on the corporation’s stated

purpose to advocate for religious peyote use, saying that the state's refusal to grant corporate status "by itself does not infringe in any significant way on the free exercise of their religious practices"), *aff'd*, 405 U.S. 901 (1972) [↗](#) (mem.).

24. [^](#) *Tony & Susan Alamo Found.*, 471 U.S. at 303 [↗](#).