

**Les lois « facialement neutres et d'application générale »
face à la liberté et à la non discrimination
de Sherbert (1963) à Groff (2023 tbc) en passant par Smith (1990)
60 ans de jurisprudence américaine instable sur la question religieuse**

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**La vision transatlantique des droits humains,
hiérarchisation des droits fondamentaux : mission impossible ?
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*1st Amdt : 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.*

1. Quatre préalables

On notera d'abord la diversité et **l'importance du contentieux religieux** devant les juridictions américaines et la Cour Suprême. Il en va de même d'une abondante doctrine, extrêmement attentive et critique. Avec 330 millions d'habitants, le contentieux américain conduit à des pratiques et des analyses impossibles dans un pays aussi petit que la Belgique. Heureusement pour cette dernière, la Grande Europe rééquilibre (675 millions d'habitants sans la Russie) permet à son tour de construire une jurisprudence continentale et une doctrine attentive. On notera encore que la jurisprudence américaine est largement accessible dans nos Universités, bien davantage que le droit des autres Etats européens, sans compter encore les obstacles linguistiques que l'accès à ces derniers soulèvent.

Deuxièmement, on prendra la mesure de la **réaction des étudiants** lorsqu'on évoque les contentieux religieux en droit américain. L'enthousiasme pour la jurisprudence américaine dépend de la figure du président. Faire du droit américain sous Trump n'est pas enthousiasmant, alors même que l'influence d'un Président sur la Cour suprême n'est pas immédiat. L'accès au droit américain est toujours un dilemme entre capacité d'influence et crainte d'impérialisme.

Troisièmement, il faut évoquer le fait que les **collègues américains, juristes ou politologues, publient extensivement sur les biographies religieuses ou philosophiques des juges** : les juges juifs, les juges catholiques, les juges protestants etc.

Combien de juges catholiques ou maçons à la Cour de cassation ou à la Cour constitutionnelle ? Question banale aux Etats-Unis. Silence absolu, et à notre sens heureux, en Belgique ou en France. Certes, en Belgique, est en discussion la modification de la composition de la Cour constitutionnelle, dans ses équilibres non pas idéologiques mais professionnels, mais personne dans la littérature n'oserait discuter publiquement les liens idéologiques de nos juges. Et on pourra s'en réjouir : on connaît et on approuve la réponse explicite tant de notre Cour constitutionnelle que de la Cour européenne des droits de l'homme pour rejeter l'identification des convictions des juges, et donner priorité à leurs obligations individuelles, déontologiques et légales d'impartialité et de déport éventuel.

Posner 2022 supreme court review Closest to our work are Blake and Wasserman-Hardy.²⁶ Controlling for ideology, Blake finds that Catholic Justices in cases from 1953 to 2007 form a distinctive voting bloc. For example, they vote more conservatively on abortion cases and more liberally on death penalty cases than other Justices—

4. Enfin, on distinguera divers niveaux d'approches de la jurisprudence américaine, explicite dans la doctrine. D'abord, distinguer l'évaluation qualitative des motivations, complexes et généralement longues et sophistiquées, dans une relation étroite avec le principe du précédent (*Stare decisis*) et les évaluations quantitatives qui porteront moins subtilement sur les dispositifs de condamnation ou de rejet. On soulignera aussi combien la jurisprudence de la Cour suprême peut donner des lignes de conduites dont ne rendront pas compte les évolutions de la jurisprudence des tribunaux inférieurs. En terme quantitatif, concernant la jurisprudence de la Cour Suprême en matière religieuse depuis 1960, Posner et Epstein (*Supreme Court Review*, 2022) estime en moyenne à 60 % les arrêts favorables à un plaignant « religieux », mais fluctuant de 54 % sous Warren à 83% sous Roberts. Par ailleurs, les mêmes auteurs montrent que ces « religieux » ne sont plus les mêmes entre 1960 et 2020. Ainsi les religions mainstream ne représentaient que 44% des victoires judiciaires pour 80% en fin de période.

II. 60 ans de jurisprudence américaine relative aux lois « facialement neutres et d'application générale » : 60 ans de jurisprudence instable

En Europe comme aux Etats-Unis, *l'indivisibilité* des droits fondamentaux est un principe relativement commun au gré d'une commune incertitude des jurisprudences sur les équilibres, les pondérations et les marges d'appréciation. Aucun droit fondamental n'est hiérarchiquement supérieur à un autre. Il reste toutefois que chaque droit fondamental est régi par des jurisprudences spécifiques, avec leurs critères propres voire leurs précédents, et à l'occasion, leur revirement de jurisprudence.

Ce serait un leurre si l'on croyait pouvoir opposer de façon trop binaire l'exercice judiciaire suprême aux USA et en Europe, tant l'exercice compliqué des équilibres et balances des droits s'y réalise au travers de motivation complexe, assorties de conditions et de pondérations

diverses. De part et d'autre de l'Atlantique, les juges suprêmes sont parfois encensés parfois contestés. Il n'y a pas de jurisprudence « au singulier » sur les contentieux à connotations religieuses entre Atlantique et Europe. Il y a des pesées complexes qui satisfont parfois les uns parfois les autres. On voudrait ici souligner que depuis soixante ans, dans le champ des contentieux en matière religieuse, la jurisprudence de la Cour suprême américaine échappe à tout catalogage dès lors qu'elle est elle-même en tension constante, en hésitation constante, non seulement envers le Congrès mais aussi en son sein. Au-delà des affirmations de principe, les affirmations solennelles demeurent encore à vérifier dans leur influence réelle sur les cours inférieures. Il en va de même en Europe, même si le statut de la Cour européenne des droits de l'homme est bien différent de celui de la Cour suprême des USA.

Parmi les trois axes de la jurisprudence (free exercise, non establishment, non discrimination), on se limite ici à la double question du statut des lois facialement neutres et d'application générale au regard du 1^{er} amendement, ainsi que des normes privées apparemment neutres, au regard l'application des lois anti-discrimination fédérales du Title VII de 1964. Après les célèbres arrêts Sherbert (1963), Yoder (1972), mais *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1973), l'arrêt *Smith* revire en 1990 la jurisprudence de la Cour Suprême et affirme que les lois facialement neutres s'appliquent sans devoir plus passer le test du strict scrutiny. Seules les lois visant explicitement un groupe religieux seraient à invalider. Immédiatement, en 1993, la Congrès réplique en adoptant une loi, le Religious Freedom Restoration Act (RFRA), rétablissant en droit fédéral, le test délaissé par la Cour Suprême. Dans un arrêt *Boerne* (1997), la Cour suprême s'abstiendra de mettre en cause la constitutionnalité du RFRA quant au fond, mais bien quant à son application au-delà du droit fédéral. Depuis lors, de nombreux Etats ont adopté des RFRA locaux, que la Cour a également laissé subsister. En 1998, le Congrès a adopté l'International Religious Freedom Act (IRFA), qui permet un contrôle diplomatique, commercial et militaire envers les législations étrangères en matière religieuse. (Comme l'a fait, avec difficulté et moins d'ampleur, la Commission européenne dans ses guidelines de 2013 EU Guidelines on the promotion and protection of freedom of religion or belief FOREIGN AFFAIRS Council meeting Luxembourg, 24 June 2013).

Depuis plus de trente ans, l'éventuel revirement de l'arrêt *Smith* est attendu ou redouté. Mais la Cour, dans des jurisprudences aux espèces pourtant spectaculaires (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006), *Hobby Lobby* (2014), *Masterpiece Cakeshop* (2018), *Fulton* (2021), *Kennedy* (2022), maintient des raisonnements, qui, tout en renouant avec une prise au sérieux des exceptions religieuses dans leur dispositif, évitent toutefois jusqu'à présent de remettre en cause de la jurisprudence *Smith*, dans leurs motivations, par diverses techniques de « distinction ».

La technique argumentative qui se développe progressivement consiste à rebondir sur une incise de l'arrêt *Smith*, qui excluait des jurisprudences, les législations comportant des exceptions, et cessant de ce fait d'être des lois d'application générale ». Comment toutefois prendre la mesure de ces techniques d'exception : suffit-il qu'elles soient permises par la loi, sans pourtant avoir été mises en œuvre ? Si une exception séculière est prévue, doit-elle être d'un ordre comparable avec une exception religieuse ? La variété des catégories présente dans la loi ruine-t-elle aussi son applicabilité générale ? Ou faut-il restreindre la réserve de la jurisprudence *Smith* aux seuls cas où une loi concède un plein pouvoir d'appréciation discrétionnaire à une autorité ? Le cœur du débat n'est pas de donner priorité aux exceptions

et accommodement religieux, mais de ne pas traiter moins bien les exceptions religieuses que les exceptions en d'autres matières, soit parce qu'il en existe, soit parce qu'elles sont comparables, soit enfin parce qu'il convient d'équilibrer le pouvoir discrétionnaire de l'autorité qui les accorde. Les jeux sont ouverts, mais on observe qu'ils continuent à honorer formellement la jurisprudence Smith. Aucun Justice de la Cour suprême ne s'est aventuré à revirer Smith.

Un arrêt attendu pour 2023, *Gerald Groff v DeJoy*, constituera le prochain pari des juristes américains sur cette jurisprudence instable depuis 1963....

Conclusions

La littérature, loin de voir une primauté spécifique du 1st amendement en matière religieuse, montre au contraire les délinéaments complexes des motivations de la Cour suprême. C'est le test tout inverse qui semble être aujourd'hui en discussion, à savoir ne pas exclure les spécificités convictionnelles des accommodements déjà reconnus à d'autres formes de minorités. Notre propos a consisté à brièvement rappeler que les soubressauts qui depuis 60 ans traversent la jurisprudence de la Cour suprême américaine concernant le statut des lois facialement neutres face à la liberté de religion et de conviction.

Dans ce champs le **principe de l'indivisibilité** des droits fondamentaux est un arrière-plan standard dans la théorie des droits humains et de la liberté de religion. Même les droits qui seraient reconnus comme premiers, comme le droit à la vie, demeurent traversés de controverses qui rendent vain l'idée d'une hiérarchie. Ce principe d'indivisibilité, de pondération réciproque, peut conduire à des méthodologies judiciaires singulières, au gré d'outils conceptuels jurisprudentiels, mais toujours ces outils montrent leur limite. La motivation dévoile alors le risque de parti-pris. C'est dans ce dévoilement même que se trouve le cœur de la fonction judiciaire : à la fois formaliser une argumentation en droit et en fait qui se soumet à la critique des lecteurs et des voies de recours, mais d'autre part plus encore assurer ce que Paul Ricoeur, relisant Aristote, appelait ultimement la Phronésis, la sagesse pratique, l'incarnation de la justice légale dans le traitement équitable de chaque espèce.

Le principe du précédent, plus fort aux Etats-Unis qu'en Europe, la possibilité ou non pour les juges de rendre publique une opinion dissidente, sont autant de variables à prendre en compte de part et d'autre de l'Atlantique, mais dont le résultat final ne semble pas décisif pour une comparaison qui voudrait aller au-delà des slogans.

Le propre des droits fondamentaux est leur capacité à mettre judiciairement en cause une loi pourtant votée à la majorité parlementaire. C'est l'idée même qu'il y a davantage en droit qu'une simple majorité politique. C'est la limite du politique mais aussi le risque d'une judiciarisation excessive. En Europe comme aux USA.

Annexes

Gerald Groff v DeJoy

En avril 2023, hearings SCOTUS : Former postal worker Gerald Groff, an Evangelical Christian, brought the case after the postal service signed a contract with Amazon to deliver packages all seven days of the week. Groff was a carrier associate in rural Pennsylvania assigned to fill in delivery gaps when more senior carriers were absent, and the new contract meant he could no longer take off every Sunday. He eventually quit his job and sued the postal service for violating his religious rights.

“Supreme Court Seems Ready to Strengthen Protections for Religious Workers The justices searched for common ground and may be prepared to issue a modest revision to an aspect of a 1977 precedent that imposed only a slight burden on businesses.

Adam Liptak By Adam Liptak April 18, 2023 WASHINGTON — The Supreme Court seemed poised on Tuesday to expand, though perhaps only slightly, religious workers’ protections for refusing to work on the Sabbath.

The argument in the case, brought by a Pennsylvania postal worker who said his Christian faith did not allow him to deliver mail on Sundays, was notable for the justices’ efforts to locate common ground.

“The argument has been productive in finding points of agreement,” Justice Samuel A. Alito Jr. said.

There was, for instance, something like consensus that a phrase in *Trans World Airlines v. Hardison*, a key 1977 precedent, went too far in allowing employers to discriminate against religious workers. The decision said that employers need not accommodate workers if the effort imposed more than a “de minimis” burden on their businesses.

Justice Neil M. Gorsuch said there was general agreement that the phrase was a misstep.

“I think there’s common ground, too,” he said, “that de minimis can’t be the test, in isolation at least, because Congress doesn’t pass civil rights legislation to have de minimis effect, right? We don’t think of the civil rights laws as trifling, which is the definition of de minimis.”

He added, echoing an adage, “The law does not concern itself with trifles.”

The *Hardison* decision interpreted Title VII of the Civil Rights Act of 1964, a federal law that requires employers to “reasonably accommodate” workers’ religious practice so long as they can do so “without undue hardship” to the company’s business.

Thanks for reading The Times.

Subscribe to The Times Much of the argument concerned what alternative interpretation of “undue hardship” the court should offer to guide lower courts and employers.

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Affirmative Action Cases: A question involving slavery asked by Justice Brett Kavanaugh during oral arguments last October has raised an inconvenient issue for the court’s conservative judges.

Ethical Matters: After recent disclosures about Justice Clarence Thomas's unreported luxury travel and tuition payments, as well as Justice Neil Gorsuch's sale of a property in Colorado, two senators introduced a bipartisan bill aimed at forcing the court to establish an ethics code. The case was brought by Gerald Groff, an evangelical Christian and former missionary who worked as a substitute mail carrier. After the U.S. Postal Service struck a deal with Amazon in 2013 to deliver packages on Sundays, Mr. Groff said he had to choose between his faith and his livelihood, opting to quit after being disciplined for missing work.

Solicitor General Elizabeth B. Prelogar, representing the Postal Service, said Mr. Groff's refusal to work on Sundays imposed a significant burden on a small post office, was in tension with an agreement with a labor union and was bad for other workers' morale.

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The Rays Are Better Than Everyone.
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"His absences created direct concrete burdens on other carriers who had to stay on their shifts longer to get the mail delivered," Ms. Prelogar said of Mr. Groff. "That caused problems with the timely delivery of mail, and it actually produced employee retention problems, with one carrier quitting and another carrier transferring and another carrier filing a union grievance. That is an undue hardship under any reasonable standard."

Despite occasional confusion in the lower courts, she said, the Hardison decision has been effective in protecting the rights of religious workers.

Justice Alito disagreed, pointing to supporting briefs filed in the case, *Groff v. DeJoy*, No. 22-174.

"We have amicus briefs here by many representatives of many minority religions — Muslims, Hindus, Orthodox Jews, Seventh-day Adventists — and they all say that that is just not true, and that Hardison has violated their right to religious liberty."

Aaron Streett, a lawyer for Mr. Groff, urged the court to overrule the Hardison decision and replace it with a standard borrowed from civil rights laws like the Americans With Disabilities Act, which requires employers to provide an accommodation unless it would impose significant difficulty or expense.

Under current law, Mr. Streett said, disabled and pregnant workers receive more protection than religious ones. "A diabetic employee could receive snack breaks under the A.D.A. but not prayer breaks under Title VII, he said, adding that "an employee could receive weekly leave for pregnancy checkups but not to attend Mass."

Justice Elena Kagan said that aligning the statutes was a task for Congress, not the court.

"Congress has had that opportunity to change it," she said of the Supreme Court's interpretation of Title VII. "Congress has not done so."

By the conclusion of the argument it seemed clear that Mr. Groff would emerge with a more protective legal standard. But the justices may return the case to the lower courts to apply the new standard to his case, and it was not clear that would prevail at the end of the day.

"The hard thing is how to apply it," Justice Brett M. Kavanaugh said, sketching out his interpretation of "undue hardship."

"I understand that term in the original statute," he said, "to reflect a balance between two important values: one, religious liberty and the other the rights of American businesses to thrive, and to thrive, you have to be able to make money."

Justice Amy Coney Barrett suggested that other employees' morale must factor into the calculus. Morale may be hard to quantify, she said, but businesses are hurt if "employees aren't

as productive because they're grumbling, they're not willing to kind of go the extra mile, put their best foot forward."

Mr. Streett, the lawyer for the postal worker, said those concerns should not suffice to overcome religious accommodation. "It's not enough to have morale issues," he said. "It's not enough to just have grumbling."

Justice Gorsuch proposed that the court issue a modest decision, one that merely rejected "this de minimis language."

"Maybe we could do a good day's work and put a period at the end of it," he said, "by saying that that is not the law."

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Principaux arrêts SCOTUS en matière religieuse

[Reynolds v. U.S. \(1878\)](#)

A party's religious belief cannot be accepted as a justification for committing an overt act made criminal by the law of the land.

[Minersville School District v. Gobitis \(1940\)](#)

A regulation requiring that pupils in public schools salute the flag and recite the pledge of allegiance was constitutional as applied to children entertaining a conscientious religious belief that such obeisance to the flag is forbidden by the Bible. (This decision was overruled by [West Virginia State Board of Education v. Barnette](#).)

[West Virginia State Board of Education v. Barnette \(1943\)](#)

The action of a state in making it compulsory for children in public schools to salute the flag and pledge allegiance violates the First Amendment. The issue does

not turn on the possession of particular religious views or the sincerity with which they are held. (This decision overturned *Gobitis*.)

Girouard v. U.S. (1946)

A foreign national who is willing to take the oath of allegiance and to serve in the army as a non-combatant but who, due to religious scruples, is unwilling to bear arms in defense of the U.S. may be admitted to citizenship.

Everson v. Board of Education (1947)

The First Amendment does not prohibit a state from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.

McCullum v. Board of Education (1948)

The utilization of a state's tax supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings violated the First Amendment.

Zorach v. Clauston (1952)

A program did not violate the First Amendment when it permitted public schools to release students during school hours, on written requests of their parents, so that they may leave the school buildings and grounds and go to religious centers for religious instruction or devotional exercises.

Braunfeld v. Brown (1961)

A state law prohibiting the Sunday retail sale of certain enumerated commodities did not violate the Free Exercise Clause.

McGowan v. Maryland (1961)

In light of the evolution of Sunday closing laws and their recent emphasis on secular considerations, most of these laws are of a secular rather than religious character.

Torcaso v. Watkins (1961)

A religious test for public office unconstitutionally invaded freedom of belief and religion.

Engel v. Vitale (1962)

State officials may not compose an official state prayer and require that it be recited in public schools, even if the prayer is denominationally neutral, and even if students may remain silent or be excused.

Sherbert v. Verner (1963)

A substantial infringement of an individual's right to religious freedom must be justified by a compelling state interest.

Abington School District v. Schempp (1963)

No state law or school board may require that passages from the Bible be read or that the Lord's Prayer be recited in public schools, even if students may be excused from attending or participating upon written request of their parents.

Epperson v. Arkansas (1968)

A state could not prohibit teachers in state-supported schools and universities from teaching or using a textbook that teaches the theory of evolution.

Walz v. Tax Commission of City of New York (1970)

Granting property tax exemptions to religious organizations for properties used solely for religious worship did not violate the Establishment Clause of the First Amendment.

Lemon v. Kurtzman (1971)

To comply with the Establishment Clause, a law must have a secular legislative purpose, its principal or primary effect must neither advance nor inhibit religion, and it must not foster an excessive government entanglement with religion.

Wisconsin v. Yoder (1972)

The state interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause and the traditional interest of parents with respect to the religious upbringing of their children.

Stone v. Graham (1980)

A state law requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the state had no secular legislative purpose and thus was unconstitutional.

Thomas v. Review Board of the Indiana Employment Security Division (1981)

The guarantee of free exercise is not limited to beliefs that are shared by all the members of a religious sect.

Widmar v. Vincent (1981)

A state's interest in achieving greater separation of church and state than is already ensured under the Establishment Clause is not sufficiently compelling to justify content-based discrimination against religious speech.

Mueller v. Allen (1983)

A statute does not violate the Establishment Clause when it allows state taxpayers to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending an elementary or secondary school, even if parents take the tax deduction for expenses incurred in sending their children to parochial schools.

Marsh v. Chambers (1983)

A state legislature did not violate the Establishment Clause by beginning each of its sessions with a prayer by a chaplain paid by the state with the legislature's approval.

Lynch v. Donnelly (1984)

A city's inclusion of a creche in its annual Christmas display in a private park, which also included secular symbols, did not violate the Establishment Clause.

Wallace v. Jaffree (1985)

A state law authorizing a one-minute period of silence in public schools for meditation or voluntary prayer violated the Establishment Clause.

Estate of Thornton v. Caldor, Inc. (1985)

A state law providing Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath violated the Establishment Clause.

Goldman v. Weinberger (1986)

Review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.

Bowen v. Roy (1986)

While the Free Exercise Clause affords an individual protection from certain forms of governmental compulsion, it does not afford an individual a right to dictate the conduct of the government's internal procedures.

Edwards v. Aguillard (1987)

A state cannot forbid teaching the theory of evolution in public schools unless accompanied by instruction in creation science, even if the law does not require teaching either theory unless the other is taught.

Lyng v. Northwest Indian Cemetery Protective Ass'n (1988)

Incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require the government to bring forward a compelling justification for its otherwise lawful actions.

Allegheny County v. ACLU (1989)

A creche display violated the Establishment Clause when the creche angel's words endorsed a patently Christian message, and nothing in the creche's setting detracted from that message.

Employment Division v. Smith (1990)

The Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that their religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for non-religious reasons.

Lee v. Weisman (1992)

Including clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)

If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. It is invalid unless it is justified by a compelling interest and narrowly tailored to advance that interest.

Zobrest v. Catalina Foothills School District (1993)

Government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Rosenberger v. Rector and Visitors of the University of Virginia (1995)

The guarantee of neutrality is respected when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including some that are religious, are broad and diverse.

City of Boerne v. Flores (1997)

Although Congress can enact legislation enforcing the constitutional right to the free exercise of religion, its power to enforce under Section 5 of the Fourteenth Amendment is only preventive or remedial.

***Santa Fe Independent School District v. Doe* (2000)**

A policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause.

***Zelman v. Simmons-Harris* (2002)**

A government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their genuine and independent private choice.

***Locke v. Davey* (2004)**

A state's exclusion of the pursuit of a devotional theology degree from its otherwise inclusive scholarship aid program did not violate the Free Exercise Clause.

***McCreary County v. ACLU of Kentucky* (2005)**

When the text of the Ten Commandments is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message that goes beyond an excuse to promote the religious point of view.

***Van Orden v. Perry* (2005)**

While the Ten Commandments are religious, they also have a historical meaning. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (2006)

The Religious Freedom Restoration Act prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that the application of the burden to the person represents the least restrictive means of advancing a compelling interest.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

The Establishment and Free Exercise Clauses bar lawsuits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws.

Town of Greece v. Galloway (2014)

Legislative prayer, while religious in nature, is compatible with the Establishment Clause.

Burwell v. Hobby Lobby Stores, Inc. (2014)

The Religious Freedom Restoration Act applies to regulations that govern the activities of closely held for-profit corporations. Protecting the free exercise rights of closely held corporations protects the religious liberty of the people who own and control them.

Trinity Lutheran Church of Columbia, Inc. v. Comer (2017)

Denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. Thus, laws imposing special disabilities on the basis of religious status trigger the strictest scrutiny.

Espinoza v. Montana Department of Revenue (2018)

A state need not subsidize private education, but once a state decides to do so, it cannot disqualify some private schools solely because they are religious.

American Legion v. American Humanist Ass'n (2019)

When time's passage imbues a religiously expressive monument, symbol, or practice with familiarity and historical significance, removing it may no longer appear neutral, especially to the local community. The passage of time thus gives rise to a strong presumption of constitutionality.

Fulton v. Philadelphia (2021)

A law is not generally applicable under the Free Exercise Clause if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. When such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason.

Carson v. Makin (2022)

A state's non-sectarian requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause.

Kennedy v. Bremerton School District (2022)

The Free Exercise and Free Speech Clauses protect an individual engaging in a personal religious observance from government reprisal. The Constitution neither mandates nor permits the government to suppress such religious expression.