Topic: Freedom of Speech and Freedom of Religion:

"Expressive Freedoms"

I. Introduction

In contemporary America, the phrase "it's my First Amendment right!" is often thrown around without serious regard for the scope of the rights afforded by the First Amendment of the Constitution, the restrictions of such, and what it truly means for something to be in violation of the First Amendment.

The Bill of Rights was designed to guarantee personal freedoms and create clear limitations of the government's power. The First Amendment, in simplest terms, addresses the freedoms of religion, speech, and the press and the rights to peacefully assemble and petition the government. Specific to religious freedom and freedom of speech, it says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..."[1]

The Free Speech Clause simply states that the government shall not pass any laws that would abridge "the freedom of speech" without further elaboration.[2] "Religious freedom," that is commonly referred to, is split into two clauses: the Establishment Clause and the Free Exercise Clause. The former clause establishes the United States as having no official religion and prohibits the government from favoring one religion over another. In the words of Thomas Jefferson, this clause is said to create a "wall of separation between church and state".[3] The latter clause simply refers to the fact that the government shall not pass any laws that prohibit the free exercise of religion.

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[1] U.S. Const. amend. I.
[2] U.S. Const. amend. I.
[3] Batten, Donna, ed. "Establishment Clause." *Gale Encyclopedia of Everyday Law, 3rd Edition* 1 (2013): 785.

The First Amendment has a self-limiting nature; there are freedoms that are granted to all individuals, but only insofar as those freedoms do not violate someone else's freedoms. Both free speech and religious freedom include individual rights of expression and exercise, with some exceptions, typically grounded in the fact that such exceptions infringe on the rights of others or more generally violate some other law. It is only in the case of religious freedom that the exception extends to any laws that would favor one religion over the other. Nevertheless, there is an interestingly close relationship between the freedoms of religion and speech, as they both encompass a more general right of expression and have similar reasons to uphold. Moreover, these freedoms must prevail to protect individual liberty and they shall be maintained by prohibiting government interference without substantive reason.

II. History and Rationale

The experiences of the Framers greatly shaped their perspective of liberty and the types of freedoms that ought to be guaranteed. Many of the early colonists included groups who fled religious persecution in Europe, and as time went on and colonies expanded, religious context changed and the debate of the relationship between government and religion stirred. Puritan leader Roger Williams, who later went on to found Rhode Island on the principle of religious freedom, wrote in 1636: "God requireth not an uniformity of Religion to be inacted and enforced in any civill state; which inforced uniformity (sooner or later) is the greatest occasion of civill Warre..."[4] This was an early opposition to a state-official religion, and similar concerns were held by the Framers when writing the Constitution. The Framers shared similar religious backgrounds, being mostly Protestant, but there were many distinct religious variations:

[4] Polin, Constance, and Raymond Polin. *Foundations of American Political Thought*. (New York: Peter Lang, 2013), 60.

Just as with the case of freedom of speech, the religious freedom granted by the First Amendment is not absolute. For example, if an individual murders someone and claims that this murder was a religious act, the Free Exercise clause would not justify their act of murder or protect them from legal ramifications. In other words, these freedoms afforded by the First Amendment are not absolute, rather they consist of some maximum amount of freedom proportionate to the ability to infringe on the rights of others.

The actual content of these freedoms may seem to differ greatly. However, they have some stark similarities. In the same way that the definition of speech refers to a wide range of expressions, religious freedom encompasses a wide range of expressions. To that end, both the Free Exercise Clause and the Free Speech Clause can be categorized as a more general freedom of expression, because individuals, whether they are being guided by secular or religious reasons, may express their beliefs and reactions without fear of maltreatment by the government.

However, the Establishment Clause touches on a sort of freedom that does not apply to the issue of free speech: the idea that the government shall not favor one religion over the other. Because religious beliefs are often tied to some formal establishment, for example the Catholic Church, which often extends to a physical location, consists of a community of people, and provides services to people, the Establishment Clause serves to address the potential for government entanglement with religion.

In any case, when evaluating statutes for constitutionality, courts are not concerned with what might be deemed "ideal" or "stupid" speech or whether a religion is the "right one" or a "wrong one"; they only assess whether a statute violates an individual's right to expression[8] or

[8] Protected forms of expression have been established through many Court cases. In *Cohen v. California,* 403 U.S. 15 (1971) the Court protected two elements of speech: expression of emotion, and expression of ideas; the statute that prohibited the display of offensive messages violated the freedom of expression protected by the First Amendment.

places an undue burden on one's ability to exercise religion freely[9], or if the statute excessively entangles religion with government[10].

When it comes to these issues, a similar line of thinking arises: Does the given statute impede or prohibit one's right to freely exercise religion? Does the given statue impede or prohibit one's right to the freedom of speech? And in cases where the statute seems to impede or prohibit freedom, the court evaluates to what extent the statue *does* impede or prohibit, and if the reasons for such are substantive.

Importantly, with both freedom of speech and freedom of religion, excluding the exceptions laid out earlier, the freedom extends to even speech or acts that are deemed offensive (be that for religious or secular reasons). The government allowing an individual statement or expression that *may be religiously insensitive* (for example, "God does not exist!") does not infringe on the religious individual's ability to exercise freely, nor does it mean the government has shown favor towards an establishment of religion. This religious sensitivity is equivalent to the same sensitivity one may feel when they are offended by speech or art.

IV. Conclusions

In totality, the First Amendment does not shield us from religious insensitivities or expressions we find disgusting or offensive; to do so would be to infringe on the freedoms of

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[9] *Sherbert v. Verner,* 374 U.S. 398 (1963) established that the Free Exercise Clause is violated in cases where there is both "compelling interest" and "narrow tailoring" of the statute in question, and it has caused for an individual to be substantially burdened. Later, *Employment Division v. Smith,* 494 U.S. 872 (1990) expanded on the simplicity of the *Sherbert* test, finding that statues that are religiously-neutral or generally-applicable in nature, despite not being enacted with the intent to interfere, have the potential to impede with religious freedom, and thus may still be in violation of the Free Exercise clause (only if the statue *substantially* burdens a religious person's' ability to freely exercise).

[10] *Lemon v. Kurtzman,* 403 U.S. 602 (1971) led to the *Lemon* test, which is often used help guide the Court in cases dealing with a possible Establishment Clause violation. The Court laid out a "three-pronged test" to check the constitutionality of a statute in regards to the Establishment Clause:

(1) "it has a primarily secular purpose"
(2) "its principal effect neither aids nor inhibits religion"
(3) "government and religion are not excessively tangled"

others. Instead, the First Amendment exists to protect individual rights. Without freedom of speech or freedom of religion, individuals are unable to rightfully express their emotions, beliefs, opinions, or practice their religion, among things, without fear of punishment by the government. Furthermore, lack of protection for such expressions would allow the government (or majority groups) to easily diminish the rights of minority groups and leave individuals with no grounds to express their true beliefs about their government; this mode of being is entirely antithetical to the foundation of our country. As such, freedom of religion and freedom of speech are essential to securing and maintaining individual liberty.

Bibliography

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