# The Limits to Religious Freedom In America

by Kenneth Walters

Last fall the Supreme Court of the United States was asked to decide whether a company must give an employee Saturdays off because of the employee's religious convictions. Paul Cummins, a production scheduler with the Parker Seal Company in Berea, Kentucky, is a member of the Worldwide Church of God. His church forbids work from Friday sundown to Saturday sundown and on seven holy days which correspond to Jewish observances. When complaints arose from fellow workers who were forced to substitute for him on Saturdays, he was discharged.

Mr. Cummins sued in federal court, but the court dismissed his complaint. A federal appeals court reversed the lower court, ruling that the Civil Rights Act of 1964, which prohibits discrimination in employment on grounds of religion (as well as race, color, sex, age and national origin), requires that Parker Seal Company make reasonable efforts to accommodate its business to Mr. Cummins' religious practices. The company had not shown that it had suffered "undue hardship" by accommodating Mr. Cummins' beliefs, the appeals court said.

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Parker Seal Company appealed to the Supreme Court of the United States, making what some felt was a surprising argument: If the federal government forces it to give some employees Saturdays off, it is, in effect, giving official recognition to a particular religion in conflict with the First Amendment, which bars the "establishment of religion" by government. Must an employer excuse an employee from Saturday work to attend church, while an atheistic employee who wants to go fishing on Saturday enjoys no similar right, the company asked. This is a preference for religious over secular reasons for not working, hence a violation of the "establishment of religion" clause of the constitution, it urged.

Mr. Cummins countered that the First Amendment also guarantees "the free exercise of religion" and that the purpose of the Civil Rights Act was to prevent discrimination in employment on grounds of religious belief and practice. He urged that he not be punished for his religious convictions. The Civil Rights Act is not an "establishment of religion" in violation of the constitution merely because it increases his religious freedom, he argued.

The Supreme Court had a difficult case on its hands. The two principles in the First Amendment guaranteeing freedom of religion, known to lawyers as the "establishment clause" and the "free exercise clause," have admirably protected

individuals from a wide variety of attempted encroachments on the rights of conscience and religious practice for decades. But the conflict between the two clauses posed a problem for the Supreme Court in *Cummins v. Parker Seal Co.* The precise issue was: Does a rule designed to protect individuals' religious freedom by requiring employers to accommodate employees' religious practices constitute an establishment of religion in violation of the First Amendment? On November 2, 1976, the Supreme Court held in a 4-4 vote that Parker Seal Co. had indeed violated federal civil rights laws. The tie vote meant that the lower appeals court decision was upheld, but left unresolved the question of whether the Supreme Court believes employers must honor scheduling requests of employees who refuse to work on certain days for religious reasons. The two-sentence opinion of the Supreme Court in the Cummins case did not give any clues as to which way the individual justices voted or why. It reported only that the lower-court judgment was "affirmed by an equally divided court" and that Justice John Paul Stevens disqualified himself in the case.

Other cases are being appealed to the Supreme Court, brought by other employees who have been fired for refusing to work on either Saturdays or Sundays for religious reasons. The justices have not said whether they will hear them. Sooner or later, the Supreme Court will decide one of these cases and only then will we know how this complex problem is resolved. But the matter of refusal to work on certain days for religious reasons demonstrates again that cases involving religious freedom do not always pose trivial or simple choices. However much one reveres religious freedom, it is naive and misleading to characterize it in absolute terms. Other factors must always be balanced against even an important constitutional principle like religious freedom.

How far should society go in granting individuals free exercise of religion? Are there limits? Most agree that some limits must exist. For example, in a 1975 case the Tennessee Supreme Court held that the First Amendment did not give a religious group the right to ask members to drink strychnine and handle poisonous snakes to prove their "faith," despite the members' insistent claims of religious freedom. Some members of the sect had died from these activities. The court felt that freedom of religion does not include the right to take certain risks affecting one's survival. "Tennessee has the right to guard against the unnecessary creation of widows and orphans," the court remarked.

Throughout American history the courts have faced a wide variety of claims that individuals' rights to the free exercise of religion have been infringed. The first case arose in 1878. The followers of the Mormon prophet Joseph Smith had organized a community in Utah under the leadership of Brigham Young. In 1853, Young had announced the doctrine of plural marriage. Enough people were sufficiently upset by what was happening in Utah that Congress made bigamy a federal crime. One George Reynolds was convicted of violating the law, and in appealing his case to the Supreme Court, argued that the First Amendment guaranteed him the right to free exercise of religion. The court concluded that "Congress was deprived of all legislative power over mere *opinion,* but was left free to reach *actions* which were in violation of social duties or subversive of good order." The free exercise clause protected only belief, not behavior, so long as Congress acted in pursuit of a valid secular objective.

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This (together with a later Mormon polygamy case) established what became known as the "secular regulation rule," an interpretation of the free exercise clause which predominated for several decades. This rule said that religious beliefs were protected absolutely, but conduct or behavior could be regulated if the regulation

had a "legitimate secular purpose." The only case of record during this period where an individual's claim was upheld against a secular regulation was in the 1920s when a California public school made dancing a required part of the physical education curriculum. The Hardwicke family's fundamentalist beliefs prohibited dancing, and the California court of appeals said the requirement infringed on their freedom of religion.

The next significant case raising the free exercise issue to reach the Supreme Court came in 1934. A small group of students at the University of California at Berkeley refused, on religious grounds, to enroll in the required ROTC program. When they were expelled, they sued for reinstatement, arguing that the requirement was in violation of the free exercise clause. The Supreme Court unanimously upheld the mandatory ROTC requirement, restating the rule that the free exercise clause protects religious *beliefs,* not *behavior* such as the students' refusal to conform to a regulation which had a valid secular purpose.

Of all the religious groups to raise free exercise claims before the Supreme Court, the most impressive record of legal achievement belongs to the Jehovah's Witnesses. The most significant of the many Jehovah's Witnesses cases to reach the Supreme Court is *Cantwell v. Connecticut,* decided in 1940. Newton Cantwell and his two sons sold Jehovah's Witness literature in New Haven, a heavily Catholic city. They would approach people on the street and ask permission to play a phonograph record which described the Catholic church as the "Scarlet Woman" and the "Whore of Babylon." Predictably, this upset some people. A Connecticut statute made it unlawful to publicly solicit for a religious or charitable cause without being certified by the state and, eventually, the Cantwells were convicted.

In reviewing the case, the Supreme Court again spoke of a distinction between belief and action, as in the Mormon polygamy case. Justice Owen Roberts wrote: "The (First) Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." He cited the Mormon polygamy case as authority for the latter principle.

Still, the court overturned the Cantwells' conviction for soliciting funds without a permit, since the licensing statute required an administrator to "determine whether such cause is a religious one or is a bona fide object of charity." The court explained: "To condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the constitution."

The significance of the Cantwell case was that religious conduct or action was no longer wholly unprotected. The circumstances under which conduct should be protected were not spelled out by Justice Roberts, but the free exercise clause no longer protected only belief. The Cantwell case thus marked the beginning of the demise of the belief-action distinction of the "secular regulation rule."

Just two weeks after the Cantwell case was decided, the Supreme Court also decided *Minersville School District v. Gobitis.* The Gobitis children, Jehovah's Witnesses, had refused to salute the flag at school and were expelled. Even before the case reached the Supreme Court, it had attracted national attention and debate. The court's decision hardly quelled the controversy. Justice Felix Frankfurter's opinion for the majority of the Supreme Court reasoned that requiring the Gobitis children to salute the flag was not to coerce them in their religious beliefs. Saluting the flag was a secular exercise, with no religious connotations.

Justice Frankfurter said: "The religious liberty which the constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects . . . Constitutional scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

The reaction of the academic legal profession was swift and highly critical of the Gobitis deci-

sion. Three years later, the Supreme Court overruled the Gobitis case in *West Virginia Board of Education v. Barnette,* another Jehovah's Witnesses flag-salute case.

In an important sense, "modern" free exercise rights began in 1961 when the Supreme Court decided several cases known as the Sunday Closing Law cases. The free exercise of religion issue raised was whether Sabbatarians (in these cases, orthodox Jews) could be punished under criminal law if their religious convictions required them to close their shops on Saturday and they opened them on the forbidden Sunday instead. The court held that the Sunday laws were not a violation of the free exercise clause. The Sunday law, Chief Justice Earl Warren noted, only posed an *indirect* burden on the Sabbatarians. No one was forcing them to work on their Sabbath. They were only losing money because they chose not to open their stores on Saturday. "It cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sect and not to others," the court concluded.

Chief Justice Warren's distinction between direct and indirect burdens was an attempt to clarify further Justice Roberts' opinion in the Cantwell case that actions as well as beliefs could be protected by the free exercise clause. But only those secular regulations which bear *directly* on the free exercise of religion were invalid. *Indirect* burdens were permissible, presuming as always the legislation had a valid secular purpose.

Three justices dissented in the Sunday law cases. Justice William Brennan said that government had no right to force an individual to choose "between his business and his religion."

The majority holding in the Sunday Closing Law cases was seriously undermined (some legal scholars say overruled) two years later in *Sherbert v. Verner.* Mrs. Sherbert, a Seventh-day Adventist, worked at a textile mill in South Carolina. She was discharged for refusing to work on Saturdays. The state unemployment conpensation authorities denied her unemployment benefits since a person who "refuses suitable work when offered . . . by the employment office or by the employer" was not qualified to receive benefits under South Carolina law.

The Supreme Court held 7-to-2 that depriving Mrs. Sherbert of unemployment benefits was a breach of her free exercise of religion. Justice Brennan, who had dissented in the Sunday Closing Law cases two years earlier, wrote the court's majority opinion. He set a tone in the Sherbert opinion which differed significantly from that which had been set by Chief Justice Warren in the Sunday Closing Law cases. The state's denial of unemployment benefits to Mrs. Sherbert could stand only if the "incidental burden on the free exercise of (her) religion may be justified by a compelling state interest in the regulation of a subject." The only state interest that was presented in the Sherbert case was a possibility of "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work." Justice Brennan brushed this contention aside on the ground that "there was no proof whatever to warrant such fears" of deceit on Mrs. Sherbert's part. The court concluded that no "compelling state interest" in the regulation had been shown.

In the opinion of legal scholars, the Supreme Court's decision in the Sherbert case greatly extended the reach of the free exercise clause by protecting one's conscience against the unintended burden of a law which had an unquestionably valid secular purpose. There was no longer any question that free exercise of religion clearly extended beyond convictions, and that rights of conscience could be restricted as much by an unintended as by an intended effect of legislation. Furthermore, the Supreme Court ruled in the Sherbert case that the government must assume the burden of proof in showing the overriding importance of its legislative interests if the individual's free exercise claim is to be denied.

Justice John Harlan dissented in the Sherbert case, lamenting that the ruling required the government to have a special sensitivity for religious motives, as opposed to "personal reasons" for not working. The majority decision in the Sherbert case, he said, makes the government "constitutionally *compelled to carve out an exemption*—and to provide benefits—for those whose unavailability is due to their religious convictions."

The basic rationale of the Sherbert case was upheld by the Supreme Court in the most recent major free exercise case, *Wisconsin v. Yoder.* Jonás Yoder, a member of the Amish Mennonite Church, was convicted under the Wisconsin law requiring children to attend public or private school until reaching age 16. The Amish reject formal schooling for their children beyond the eighth grade because of the biblical requirement to be "separate from the world."

Chief Justice Warren Burger's opinion for the court was untroubled by the fact that religious motives were being given special treatment. The Chief Justice noted that "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis" and would, therefore, not be protected by the First Amendment. Thoreau's choice, he concluded, "was philosophical and personal rather than religious, and such belief does not rise to the demands of the (free exercise) clause."

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In the wake of the Sherbert case and the Yoder case, it is now clear that religiously based conduct may sometimes make an individual constitutionally exempt from regulatory statutes of the government. The belief-action distinction has been thoroughly rejected. In retrospect, it is somewhat surprising that the distinction was ever made at all since the First Amendment speaks of protecting the *exercise* of religion. If the framers of the constitution had in mind only to protect personal religious beliefs, they could have chosen words suitable for that purpose. They chose instead to protect the free exercise of religion.

Yet, the question of limits on one's free exercise of religion remains. The criterion set forth in the Sherbert and Yoder cases, that the government show a compelling interest in regulation in order to override the individual's claim to free exercise of religion, is the general test. Applying this test is easy in some cases. For example, in a 1970 case, an orthodox Jew was held in contempt of court for not removing his skullcap in court. The contempt citation was dismissed by the appeals court on the grounds that there was no compelling governmental interest in applying the regulation to those who wear hats or caps for religious reasons.

Sometimes the individual's free exercise claim is weak or even nonsensical. A taxpayer who claimed substantial charitable contributions as deductions on his income tax also claimed (unsuccessfully) that his religious convictions required that he not reveal the recipients to the Internal Revenue Service. A number of cases have ruled that citizens opposed to fluoridated water on religious grounds may not prevent municipal water systems from installing or operating fluoridation devices.

Some cases have proved to be more difficult. One of the most controversial decisions is the California Supreme Court's holding in 1963 that Navajo Indians belonging to the Native American Church may use the drug peyote in their religious services. The court stressed that the drug had been used in this way for generations by the Navajos. All other subsequent claims that drug usage is protected by the free exercise clause have been rejected by the courts, including Timothy Leary's defense to criminal charges that his usage of marijuana was "religiously" inspired.

Another problem area is the state's right to order blood transfusions to be given to Jehovah's Witnesses who need transfusions and reject them on religious grounds. Some courts have said that the state has no interest which outweighs the religious dictates of the individual. Others have suggested that especially where the individual has a family with small children who are dependent on the parent for support, the state has an interest in the parent's survival. When Federal Judge J. Skelly Wright ordered an emergency blood transfusion given to a

Jehovah's Witness, he said: "I am determined to act on the side of life." Others strongly urge that judges should not so interfere with the rights of conscience, even if life is at stake. Presumably, those who take this position would also disagree with the Tennessee Supreme Court's ruling that the government has the right "to guard against the unnecessary creation of widows and orphans."

One can only conclude that within the past 15 years the Supreme Court has greatly expanded the scope of the free exercise clause. Only under rare circumstances now can the government apply policies to individuals which may harm, burden, or operate in such a way as to discriminate against religious beliefs or practice.

Have these expansions of the free exercise clause been wise? Some constitutional scholars say that it is unwise to require exceptions and exemptions on religious grounds from otherwise proper health and public welfare regulations. The free exercise clause could become, they argue, a general protection of unorthodox behavior under the guise of religion. They see the new liberal interpretations of the free exercise clause in the Sherbert and Yoder cases inviting a "conscience" explosion in which more and more people will attempt to escape from civil regulations on grounds of free exercise of religion. The courts must make some fine distinctions. Since the free exercise of *religion* is guaranteed by the First Amendment, what is "religion"? Should "religion" essentially mean conscience, or is belief in God or membership in a formal group and adherence to its teaching required? If an individual's religious conviction does not come from formal church teaching (in some cases, the individual's belief is even contrary to "official" church teaching), is the person still entitled to an exemption?

The Yoder case suggests that the current Supreme Court is not inclined to interpret the First Amendment so as to make protection of conscience of "lifestyle" tantamount to free exercise of religion. Chief Justice Burger noted in that case that "the very concept of ordered liberty precludes allowing every person to make his own standards of conduct in which society as a whole has important interests." He noted further that Amish scruples against compulsory education past the eighth grade had been "long-established."

Another argument advanced against the liberalized interpretation of the free exercise clause is that courts are now required to pass on the sincerity of religious claims, which some feel courts are unsuited to determine. The courts, however, have not found sincerity to be a particularly difficult factual issue. In one case, an employee was fired when he refused on religious grounds to work on Sundays. When the court learned that he often had worked Sundays, the judge easily concluded that the employee "did not demonstrate the requisite sincerity of religious convictions." In another recent case, a group of workers who did not want to join a union claimed to be Seventh-day Adventists. When asked about certain Adventist doctrines and teachings, the workers were unable to recall much, if any, Adventist theology. It turned out that they were not Adventists.

A final objection to the liberalized interpretations of the free exercise clause is that the exemptions for religious reasons should be considered an unconstitutional "establishment of religion." Justice Harlan's dissenting opinion in the Sherbert case argued against "singling out religious conduct for special treatment." Those situations in which the free exercise clause requires special treatment for individuals on account of their religion should be "few and far between," said Justice Harlan. Whatever the merits of this view, the majority of the Supreme Court rejected this position in the Sherbert and Yoder cases.

As I noted at the outset, the argument was raised again in *Cummins v. Parker Seal Co.*, where the employer asserted that to favor Mr. Cummins' religious reasons for not working Saturdays over other employees' secular reasons for not wanting to work Saturdays is an establishment of religion, violating the constitution. Since the Supreme Court did not hear the case, we have no idea how this sticky constitutional dilemma will eventually be resolved.