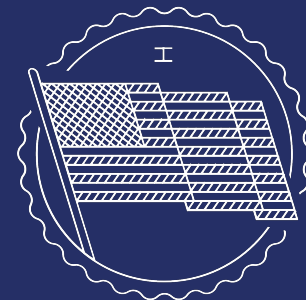


# FIRST AMENDMENT: RELIGION CLAUSES



First Amendment:  
Religion Clauses

We

THE  
People

E  
PLURIBUS  
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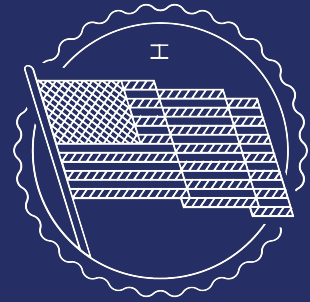


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# BIG QUESTIONS

- Why did the Founding generation write protections for religious liberty into the First Amendment?
- What is the Establishment Clause? What was the Founders' vision for this provision of the First Amendment? And how has the Supreme Court interpreted it over time?



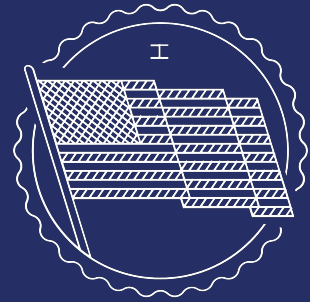
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# BIG QUESTIONS

- What is the Free Exercise Clause? What was the Founders' vision for this provision of the First Amendment? And how has the Supreme Court interpreted it over time?
- What are some of the most important areas of constitutional debate over religious liberty today?



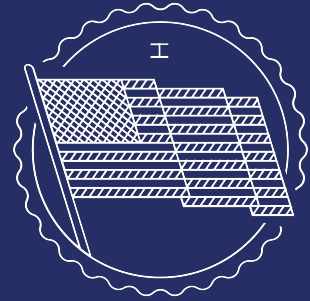
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# THE FIRST AMENDMENT

“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.”



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# THE FIRST AMENDMENT



SPEECH AND PRESS



RELIGION



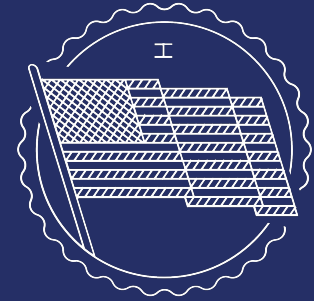
ASSEMBLY AND  
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CLAUSE



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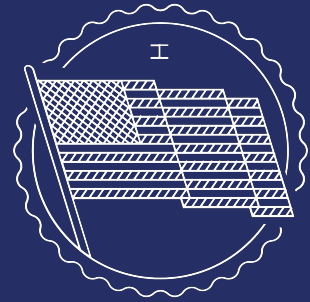
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# THE ESTABLISHMENT CLAUSE

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

The **Establishment Clause** prohibits the government from establishing or creating a religion in any way—that’s why we don’t have an official religion in the United States.



**First Amendment:  
Religion Clauses**

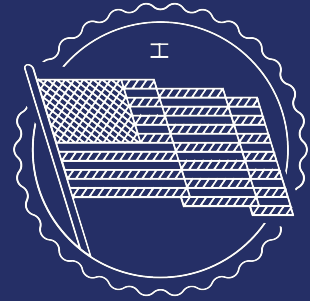
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# THE FREE EXERCISE CLAUSE

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

The **Free Exercise Clause** gives us all the right to worship God, or not, as we choose. That means the government can't punish you because of your religious beliefs, or because you don't belong to a church, or believe in God.



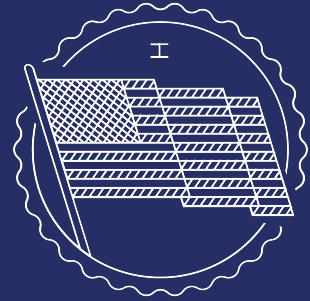
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# BIG IDEA

The First Amendment protects religious liberty in two ways. First, it guards against government establishment of religion. And second, it protects the free exercise of religion. Together, these constitutional promises are at the core of our freedom of conscience—the right to freely believe as we wish.



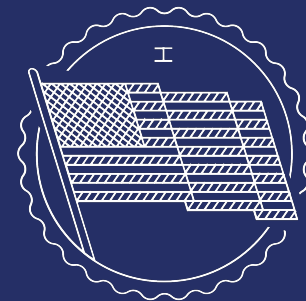
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# RELIGION IN THE COLONIES



**First Amendment:  
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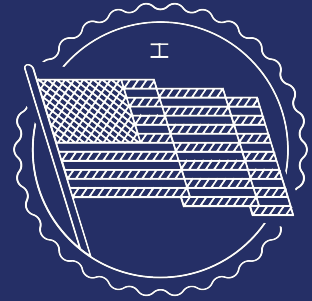
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# RELIGION IN THE COLONIES



- Puritans in New England
- Anglicans in the South
- Quakers and Lutherans in Pennsylvania
- Roman Catholics in Maryland
- Presbyterians throughout the middle colonies.
- And Jewish congregations from Rhode Island to Georgia

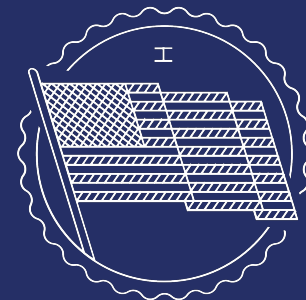
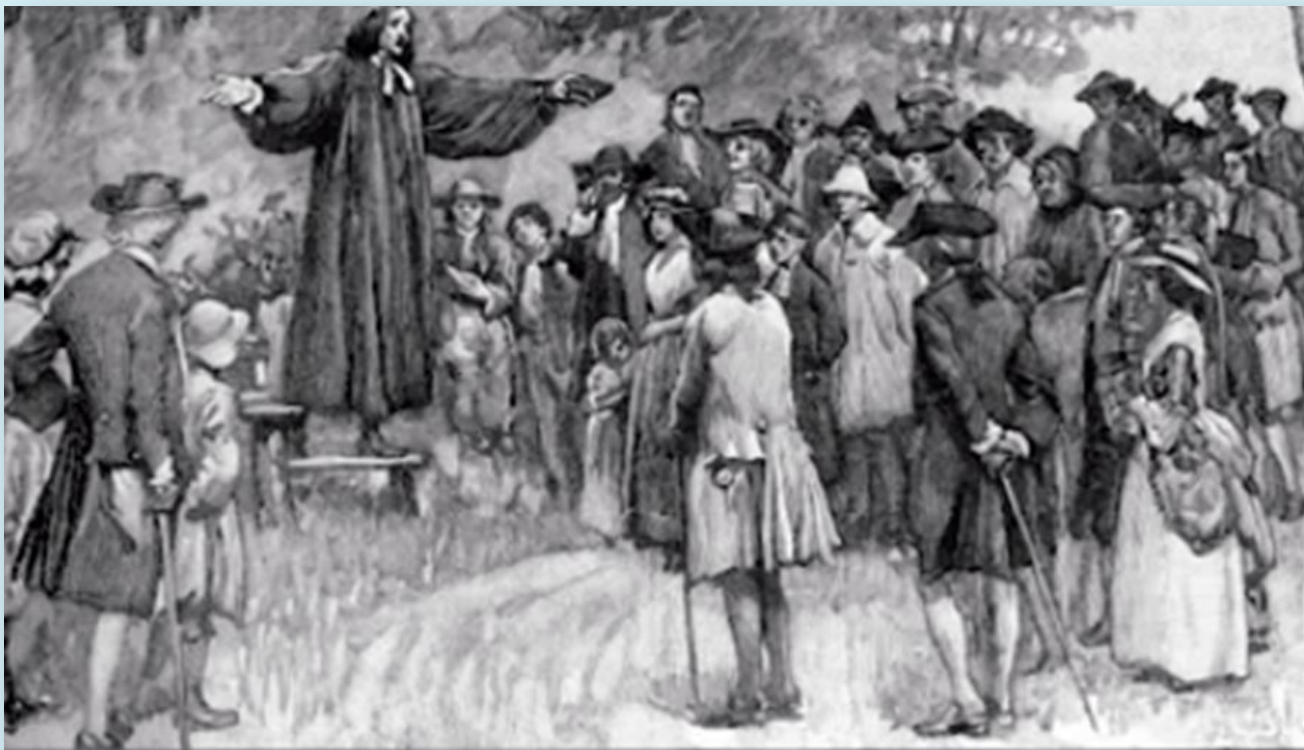


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# RELIGION IN THE COLONIES



**First Amendment:  
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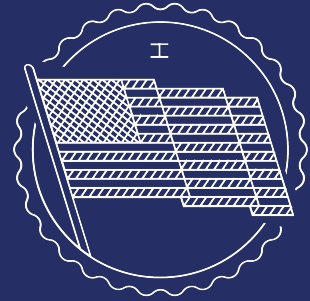
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# RELIGION IN THE STATES

Following Independence, there was a general consensus that the **national government** shouldn't be able to establish a national church, and the Establishment Clause, authored by James Madison, reflected this consensus.

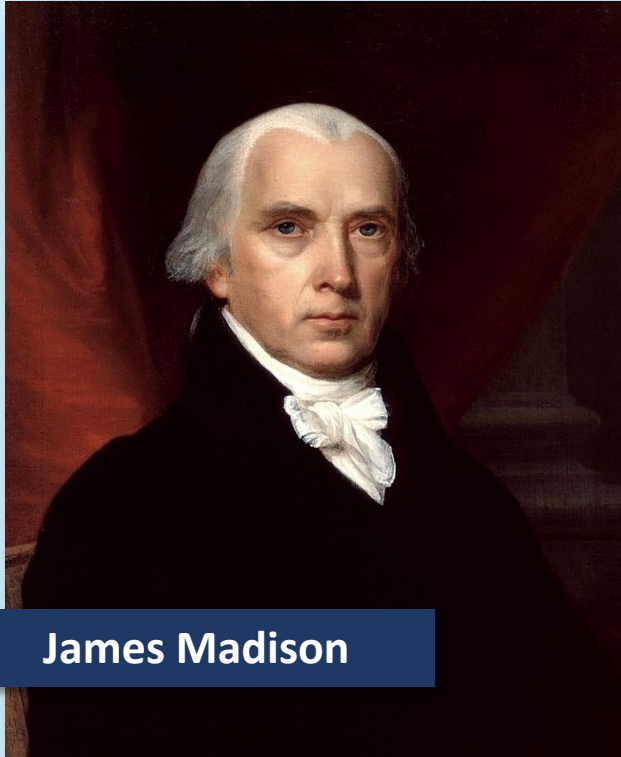
The language of the Clause itself applied only to the national government—calling out Congress. So, the national government couldn't establish a national church, **but states still could**. Even so, by 1833, all states had disestablished their state churches.



**First Amendment:  
Religion Clauses**

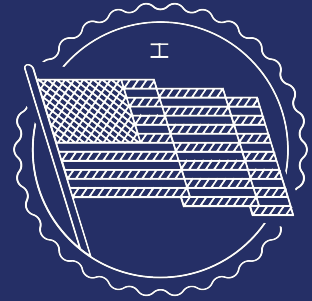
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James Madison

“It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.”



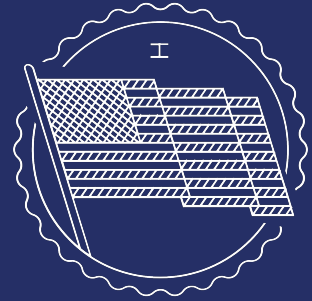
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# ARTICLE VI OF THE CONSTITUTION (1787)

“...no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”



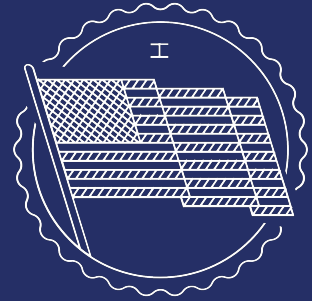
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FIRST AMENDMENT  
**ESTABLISHMENT CLAUSE**

**“CONGRESS SHALL MAKE NO LAW  
RESPECTING AN ESTABLISHMENT  
OF RELIGION...”**



**First Amendment:  
Religion Clauses**

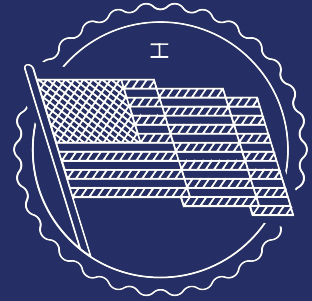
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# ESTABLISHMENT CLAUSE TODAY

Virtually all jurists would agree that it would violate the Establishment Clause for the government to:

- Require church attendance
- Mess with a religious organization's selection of clergy, or its religious doctrine
- Grant benefits to some religious entities, but not others, without some legitimate non-religious justification

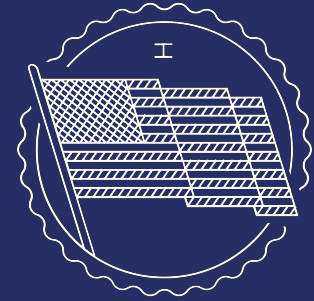


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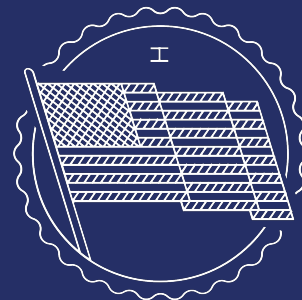




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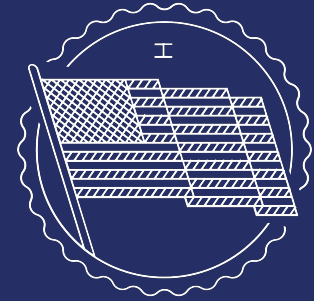


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## LEMON V. KURTZMAN (1971)



**First Amendment:  
Religion Clauses**

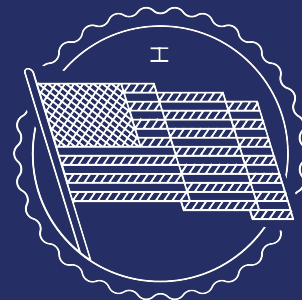
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# THE LEMON TEST

## *LEMON V. KURTZMAN* (1971)

- ✓ The statute must have a secular legislative purpose
- ✓ Its principal or primary effect must be one that neither advances nor inhibits religion
- ✓ The statute must not foster an excessive entanglement with religion



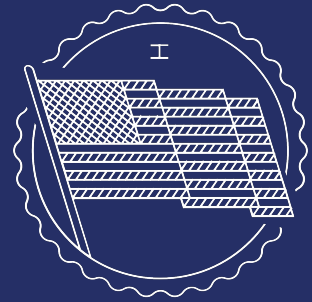
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# TYPES OF ESTABLISHMENT CLAUSE CASES

- **Government Funding**
- **Government Sponsored Prayer**
- **Religious Symbols on Government Property**

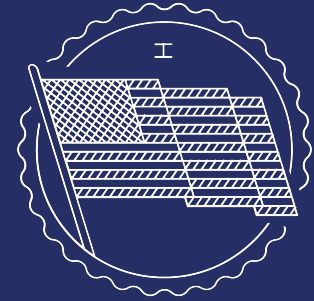


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# AID TO RELIGIOUS EDUCATION OR OTHER ACTIVITIES CONDUCTED BY RELIGIOUS INSTITUTIONS



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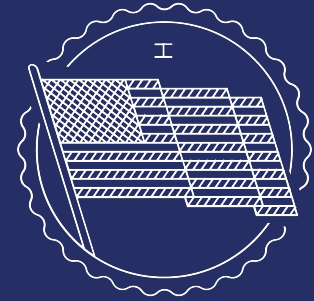
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# AID TO RELIGIOUS EDUCATION OR OTHER ACTIVITIES CONDUCTED BY RELIGIOUS INSTITUTIONS



Court first upheld state laws allowing students who attend private religious schools to receive transportation (*Everson v. Board of Education*, 1947).



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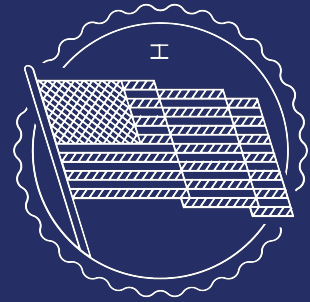
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# AID TO RELIGIOUS EDUCATION OR OTHER ACTIVITIES CONDUCTED BY RELIGIOUS INSTITUTIONS

More recently, the Court has

- Upheld programs that give government money to educational or social programs on a neutral basis—**“only as a result of the genuine and independent choices of private individuals”** (*Zelman v. Simmons-Harris*, 2002)
- Struck down state laws that keep religious institutions that otherwise qualify for government aid/assistance solely from getting it (*Trinity Lutheran Church of Columbia v. Comer*, 2017).



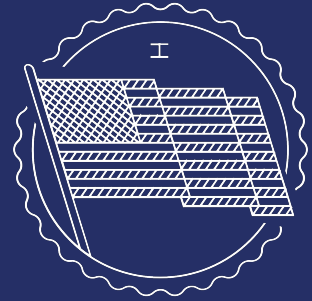
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# GOVERNMENT-SPONSORED PRAYER



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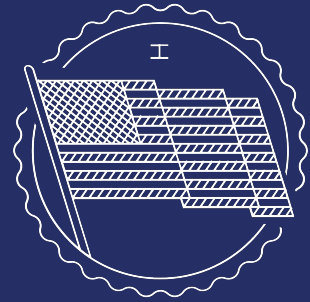


# GOVERNMENT-SPONSORED PRAYER



It is unconstitutional for public schools to lead schoolchildren in prayer or Bible reading, even on a voluntary basis

- *Engel v. Vitale*, 1962
- *Abington School District v. Schempp*, 1963



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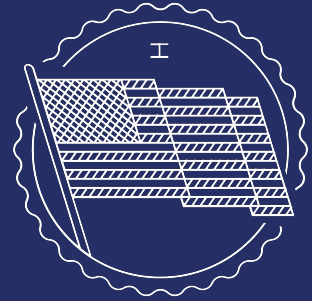


# GOVERNMENT-SPONSORED PRAYER



The Court has even gone so far as to extend the prayer ban to:

- Graduation Ceremonies (*Lee v. Weisman*, 1992)
- Football Games (*Santa Fe Independent School District v. Doe*, 2000)



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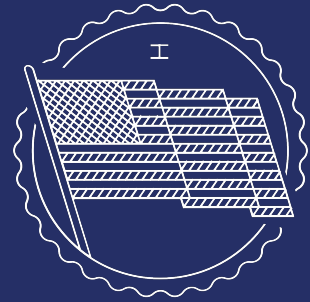
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# GOVERNMENT-SPONSORED PRAYER

However, in settings involving adults, the Court has generally allowed government-sponsored prayer,

- Upholding legislative prayer (*Marsh v. Chambers*, 1983)
- Approving an opening prayer or statement at town council meetings, where the town represented that it would accept prayers from all faiths (*Town of Greece v. Galloway*, 2014).

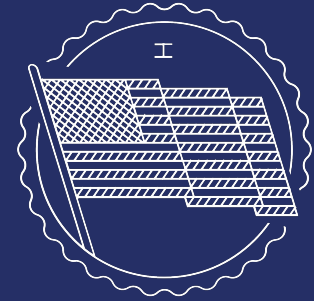


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# GOVERNMENT-OWNED OR -SPONSORED RELIGIOUS SYMBOLS



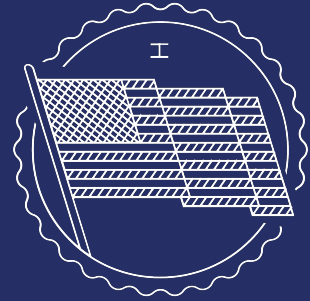
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# ENDORSEMENT TEST

Asks the common-sense question of whether a reasonable observer acquainted with the full context would regard the display as the government endorsing religion and, therefore, sending a message of discouragement to other believers and non-believers.



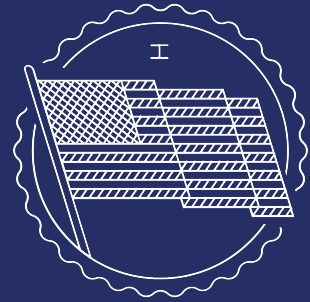
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# GOVERNMENT-OWNED OR -SPONSORED RELIGIOUS SYMBOLS

- *Lynch v. Donnelly* (1984), the Court upheld the display of a nativity scene surrounded by other holiday decorations in the heart of a shopping district.
- But in *County of Allegheny v. ACLU* (1989), a different set of Justices held that the display of a nativity scene by itself at the top of the grand stairway in a courthouse violated the Establishment Clause.



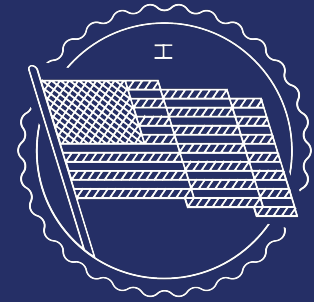
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# GOVERNMENT-OWNED OR -SPONSORED RELIGIOUS SYMBOLS

- In *McCreary County v. ACLU* (2005), the Court held that a prominent display of the Ten Commandments at the county courthouse, which was preceded by an official's description of the Ten Commandments as the "embodiment of ethics in Christ," was unconstitutional
- While on the same day—in *Van Orden v. Perry* (2005)—upholding a Ten Commandments monument, which was donated by a secular organization dedicated to reducing juvenile delinquency and surrounded by other monuments on the spacious state grounds.



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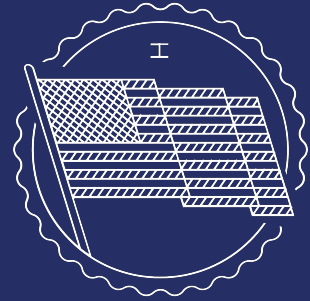
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FIRST AMENDMENT  
**FREE EXERCISE CLAUSE**

**“CONGRESS SHALL MAKE NO LAW**  
respecting an establishment of religion, or  
**PROHIBITING THE FREE EXERCISE**  
**THEREOF...**

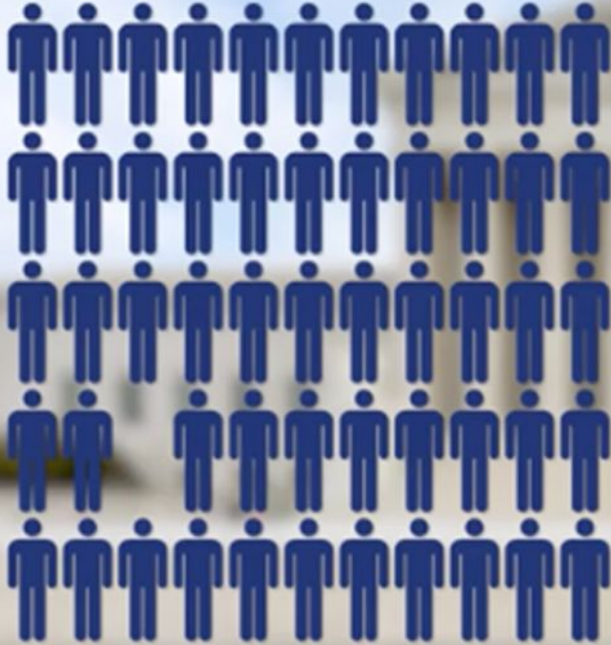


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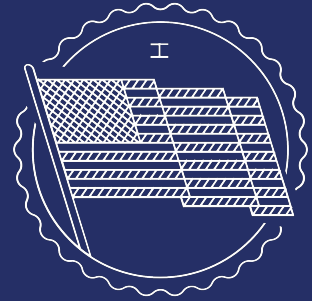
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# A LAW



"It's against my religion!"



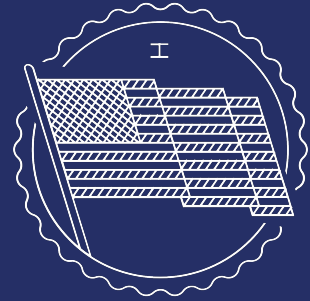
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# FREE EXERCISE CLAUSE

The court has said that the free exercise clause “embraces two concepts—freedom to believe and the freedom to act. The first is absolute but, in the nature of things, the second cannot be.” (*Cantwell v. Connecticut*, 1940).



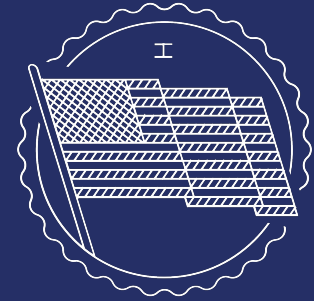
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# FREE EXERCISE IN LEGAL CHALLENGES

- **When the government bans behavior that a person's religion requires**  
(Polygamy, animal sacrifice, the use of hallucinogenic drugs, or even human sacrifice, for that matter)
- **When the government requires conduct that a person's religion bans**  
(Fighting in a war, paying taxes to serve a program that violates your religious beliefs, or taking off your yarmulke)
- **When individuals claim that laws burden religious observance**  
(Working on the Sabbath)

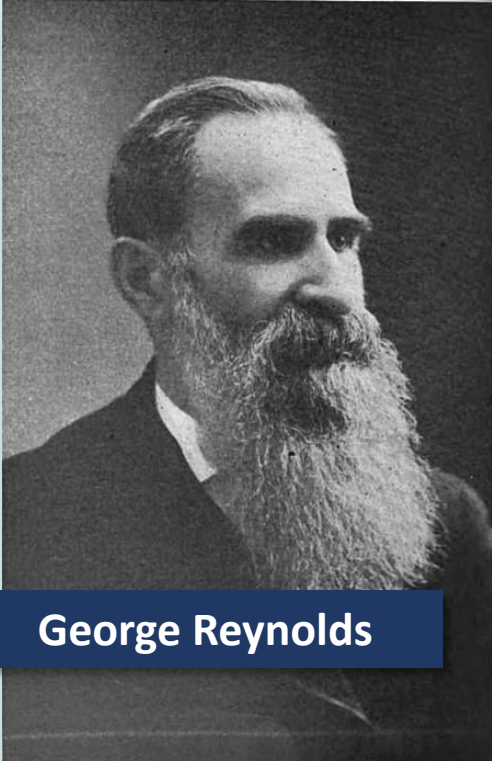


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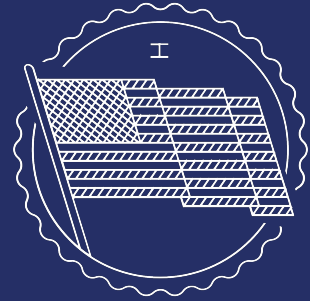


## REYNOLDS V. UNITED STATES (1878)



George Reynolds

The Court unanimously rejected free exercise challenges to anti-polygamy laws aimed at suppressing the practice by members of LDS church, holding that the Free Exercise Clause protects beliefs but not conduct.

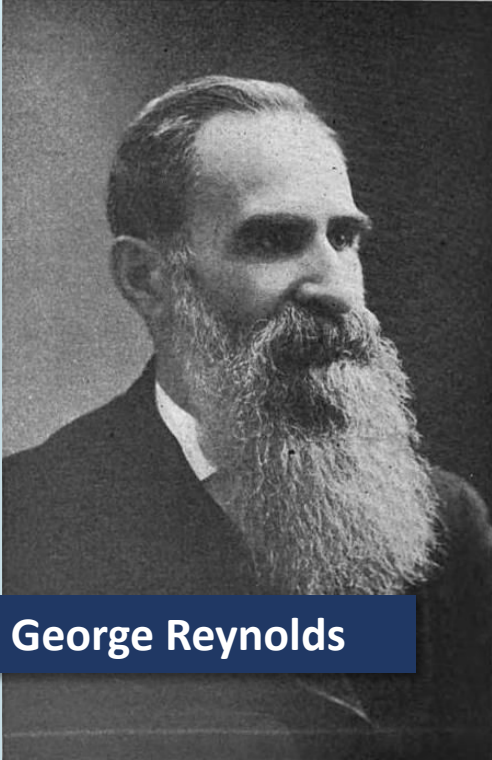


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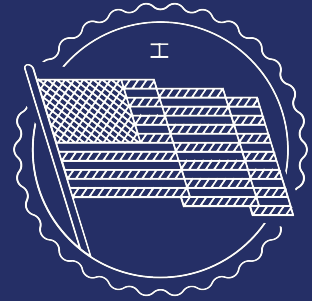


## REYNOLDS V. UNITED STATES (1878)



George Reynolds

“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”

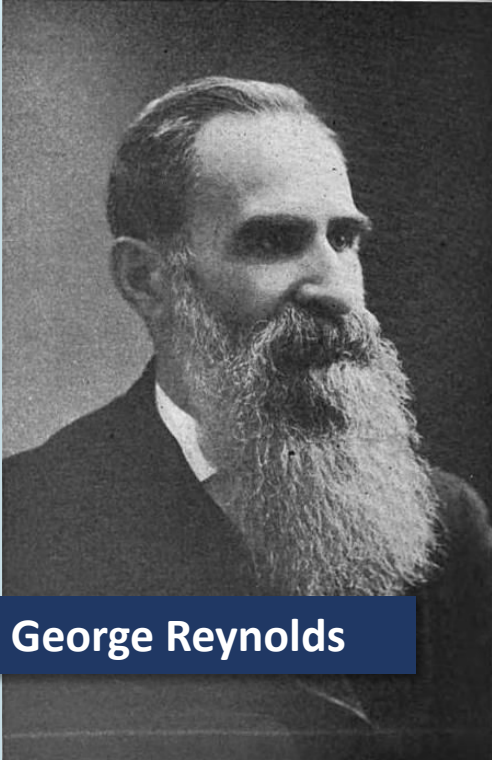


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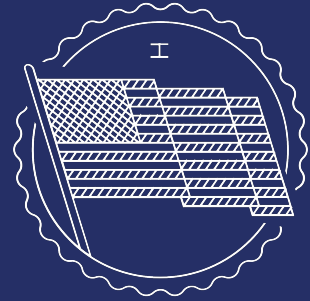


## REYNOLDS V. UNITED STATES (1878)



George Reynolds

To rule otherwise “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”



First Amendment:  
Religion Clauses

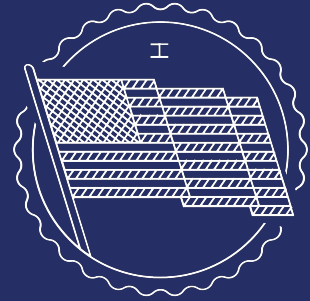
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## FREE EXERCISE CLAUSE IN THE TWENTIETH CENTURY.

In *Cantwell v. Connecticut*, 1940, the Court finally extended the Clause to limit state laws and other state actions that burden religious exercise (**incorporation**).

In the 60s and early 70s, the Court shifted, strengthening protection for religious conduct by reading the Free Exercise Clause to protect a right of religious believers to exemption from generally applicable laws which burden religious exercise.



**First Amendment:  
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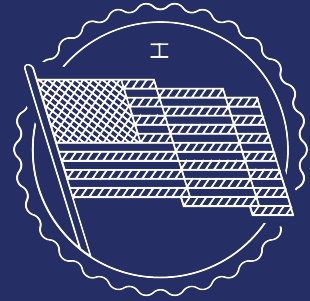


## *SHERBERT V. VERNER (1963)*



**Adeil Sherbert**

A state denied unemployment benefits to a woman, a member of the Seventh-Day Adventist Church, who quit her job rather than work on her Saturday Sabbath.



**First Amendment:  
Religion Clauses**

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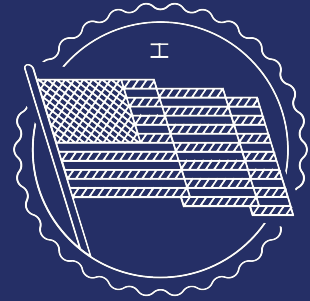


## *SHERBERT V. VERNER (1963)*



**Adeil Sherbert**

The Supreme Court concluded that making her choose between her faith and her income, and the denial of benefits, imposed a substantial burden and constituted a violation of the Free Exercise Clause.

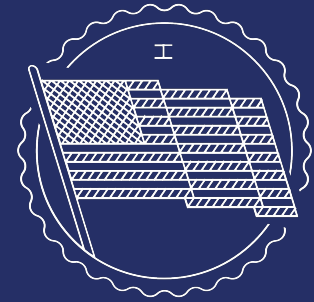


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# WISCONSIN V. YODER (1972)



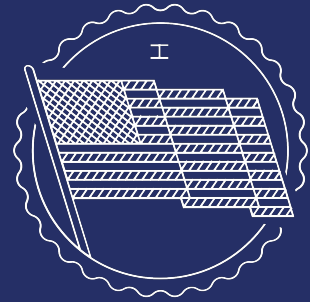
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## *WISCONSIN V. YODER (1972)*

The Court reasoned: “The Amish objection to formal education beyond the eighth grade is firmly grounded in [their] religious concepts. They object to high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.”



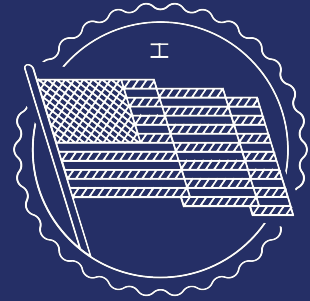
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## *WISCONSIN V. YODER (1972)*

**“The record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”**



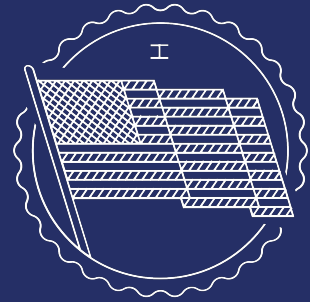
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## WISCONSIN V. YODER (1972)

The Court concluded: **“The impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with . . . their religious belief.”**



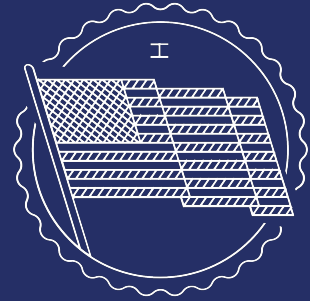
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## WISCONSIN V. YODER (1972)

And the **“self-sufficient”** nature of Amish society made education for 14- and 15-year-old children unnecessary and the two additional years of compulsory education **“will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.”**

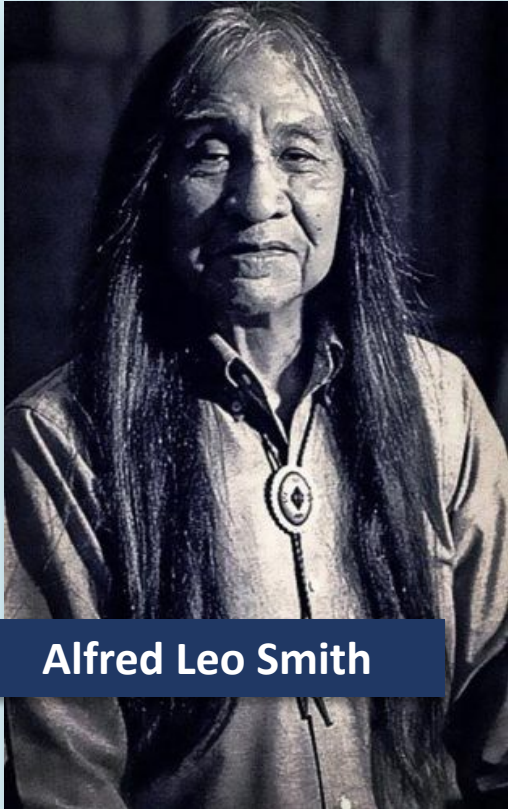


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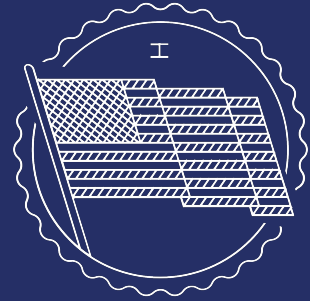
## EMPLOYMENT DIVISION V. SMITH (1990)



Alfred Leo Smith

The case involved Native Americans dismissed from their jobs for failing a drug test.

They had smoked peyote during a religious ceremony. Because of this drug use—religiously motivated or not—Oregon then denied them unemployment benefits.



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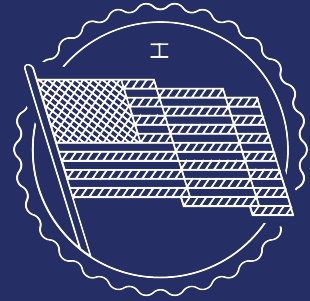


## EMPLOYMENT DIVISION V. SMITH (1990)



**Justice Antonin Scalia**

When they challenged this action on free exercise grounds, the Supreme Court rejected their claim. Justice Scalia—writing for the majority—traded the traditional test for a clearer rule that was even less protective of religious objectors.



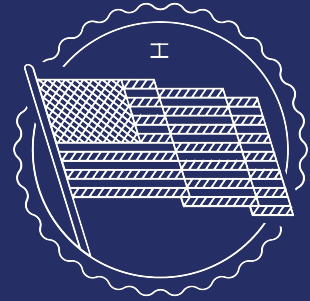
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## *EMPLOYMENT DIVISION V. SMITH (1990)*

Justice Scalia wrote that the Free Exercise Clause **“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).”**



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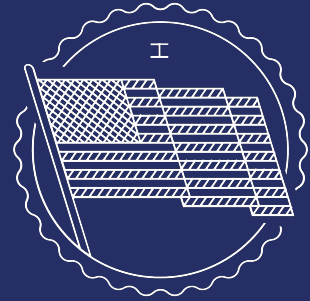
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## *EMPLOYMENT DIVISION V. SMITH (1990)*

Scalia echoed Reynolds's concern that religious exemptions permit a person, **“by virtue of his beliefs, to become a law unto himself,”** contradicting **“both constitutional tradition and common sense.”**

Any religious exceptions to general laws, therefore, must come from the **“political process.”**



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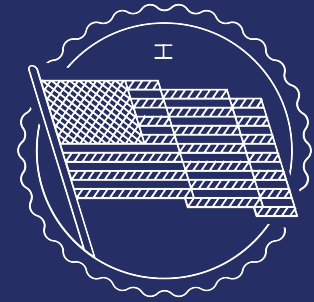
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## CONGRESSIONAL LEGISLATION

- **Religious Freedom Restoration Act (1993)**
- **Religious Land Use and Institutionalized Persons Act**

Allow courts to exempt a person from any law that imposes a substantial burden on sincere religious beliefs or actions, unless the government can show that the law is the “least restrictive means” of furthering a “compelling governmental interest.”.



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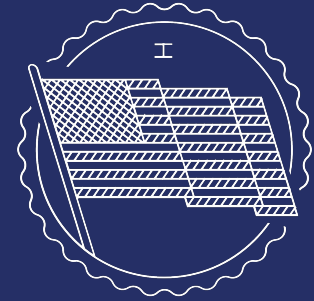
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## BURWELL V. HOBBY LOBBY STORES INC (2014)



The Court by a 5-4 vote excused a commercial family-owned corporation from complying with the Affordable Care Act's "contraception mandate."



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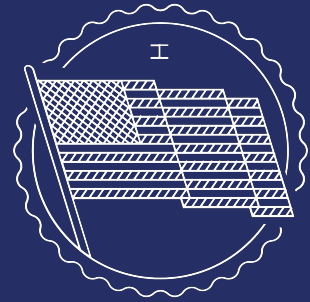
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## CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH (1993)

The Court unanimously struck down a local law against the “unnecessary” killing of animals in a “ritual or ceremony” because the law was **directed** against the Santeria religion, which uses animal sacrifice as one of its principal forms of worship.

The Court said that *Smith* was still good law, but that *Smith*’s (easy-to-pass) test didn’t apply in a case like this one—when a law was drawn to apply only to a small and unpopular religious sect. So, with *Lukumi*, the Court wrote a strong anti-discrimination principle into Free Exercise law.



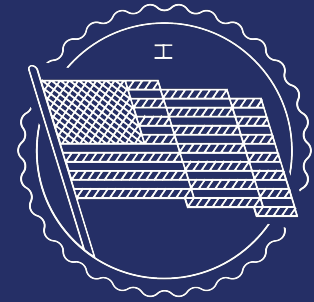
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## *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE (2020)*

The Court struck down Montana’s “no aid” provision, which prevented religious schools and religious parents from receiving public benefits because of the religious nature of the school. The Court ruled that this was a violation of the Free Exercise Clause.



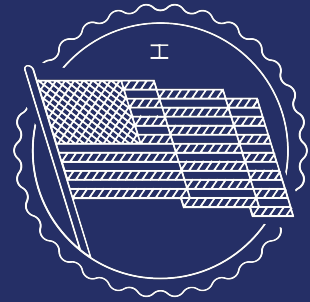
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## *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE* (2020)

The Free Exercise Clause “**protects religious observers against unequal treatment**” and against “**laws that impose special disabilities on the basis of religious status.**” Status-based discrimination—punishing the free exercise of religion by disqualifying the religious from government aid—gets the strictest of scrutiny from the Court. The Court concluded that while states need not give money to private education, once they do, they cannot discriminate solely on the basis of religious belief.



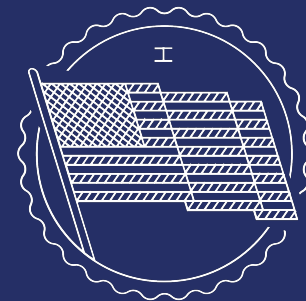
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# WHAT DOES RELIGIOUS FREEDOM MEAN?



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