



Supreme Court of the United States

Jerry Brown v. Jason Owens

By Joseph Resnek

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 02-1315.

JERRY BROWN, ATTORNEY GENERAL OF CALIFORNIA, et al.
Defendant-Appellant

v.

JASON OWENS
Plaintiff-Appellee

PRIOR HISTORY: Appeal from the US District Court for the Southern District of California

DISPOSITION: Reversed

Note: This case is based on the 2004 Supreme Court case of Locke v. Davey, and the "Appeals Court" opinions included in the case are in reality the Supreme Court's opinions from that case.

BACKGROUND

In 2004, the California state legislature created a financial aid initiative known as the Promise Scholarship program. Promise Scholarships were awarded to high school seniors accepted to 4-year Californian universities. Each scholarship was in the amount of \$10,000 and was funded solely by state taxes.

Promise Scholar candidates had to meet various academic standards and economic requirements. Additionally, the California legislature provided that in order to receive a scholarship, a student must not major in theology, the study of religious belief.

Jason Owens, an eighteen year-old senior at Capo Beach High School in California, was accepted to Trinity Life Bible College in California. The valedictorian of his class, Owens met all of the academic and economic criteria to receive the Promise Scholarship and was notified that he would receive the state scholarship. However, shortly after Owens, an aspiring theology major,

received this initial notification, he received a second letter from the state informing him that he would be ineligible for the Promise Scholarship unless he opted to study a non-religious subject.

Owens sued the state, arguing that the denial of his scholarship violated the First Amendment's Free Exercise and Establishment Clauses.

First, the case was tried in US District Court, where Judge Mendoza declared the anti-theology portion of the scholarship unconstitutional, citing the Supreme Court case *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, to defend his decision. The state subsequently appealed the case to the Ninth Circuit Court of Appeals.

Held:

California's anti-theology portion of the Promise Scholarship program does not violate the Free Exercise clause of the First Amendment.

299 F. 3d 748, reversed.

The First Amendment and Religious Freedom

The First Amendment is perhaps the most famous section of the US Constitution, and is the place where many of the freedoms and rights most dear to the American people are enshrined. The Amendment protects everything from free speech and the press to the right to protest the government.

However, the first right enumerated in the First Amendment—and indeed, the Bill of Rights as a whole—is the freedom of religion. The Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This phrase can be divided, both linguistically and legally, into two clauses: the Establishment Clause and the Free Exercise Clause.

The Establishment Clause arose partly out of the founders' opposition to the Church of England, which was, prior to the American Revolution, established as the official church in many colonies. Consequently, the clause was originally interpreted quite strictly. Thomas Jefferson even said that the clause was intended to erect a "wall of separation between church and State." Common sense, however dictates that this is untenable in practice. After all, is the fire department (a state-run institution) to be barred from putting out a fire in a church? Would that not constitute support for religion in violation of the "wall of separation"?

While the Establishment Clause serves - at least in theory

- to prevent government from forcing citizens to practice a particular religion, the Free Exercise clause ensures that government will not prevent citizens from practicing the religion of their choice. As with the Establishment Clause, the Free Exercise Clause is fraught with potential real-world problems. Most notably, conflicts have occurred when someone's religious beliefs conflict with secular laws. For example, what ought to happen if a member of an obscure religion believes strongly in the idea of communal property, and thus attempts to commit robbery as part of his religious service? What if a religion believes in human sacrifice? A strict interpretation of the Free Exercise clause might suggest that a true believer in such religions ought to be exempt from criminal laws, an interpretation that is obviously impractical in the real world.

Luckily, the Supreme Court has, through a series of legal precedents, created compromises and balancing tests that largely preserve both the rights guaranteed by the religion clauses of the First Amendment and the laws necessary to an orderly society. These precedents also form the current governing law, and will form the basis for any argument either in favor of or against the anti-theology requirements in the Promise Scholarship program. The program clearly implicates both the Establishment Clause (as the Scholarships might constitute a state establishment of religion if they were directed towards theology coursework) and the Free Exercise clause (as denying Owens the Scholarship might be an unconstitutional suppression of his right to freely exercise his religion).

Lastly, it is important to consider the fact that the two religion clauses are often in conflict with each other. For example, any law that furthers the free exercise of religion necessarily creates some degree of establishment of religion—either of a particular religion over another or of religion over irreligion. Similarly, a true wall of separation between church and state will undoubtedly limit the ability of many individuals to fully practice their religious beliefs. As this conflict plays a major role in the constitutionality of the Promise Scholarship program, it is important to find a way to resolve this tension and find a just and reasonable compromise.

RELEVANT LEGAL PRECEDENTS

Reynolds v. United States, 98 U.S. 145 (1878)

This case was one of the first to deal with the tension between religious liberty and the law.

George Reynolds was a member of The Church of Jesus Christ of Latter-day Saints, also known as the Mormon Church, and was charged with bigamy. He argued before the Court that it was his religious duty to marry multiple times.

The Supreme Court, however, held that religious duty was not a suitable defense to a criminal indictment. That is to say, when one violated the law, he or she cannot escape indictment solely based on religious duty.

The Supreme Court recognized that if that were the case, religious conviction would be a kind of 'get out of jail free' card - man could simply claim that his religious duty is to commit homicide, thus ensuring that he could not be prosecuted for the crime.

Sherbert v. Verner, 374 U.S. 398 (1963)

Adell Sherbert, a member of the Seventh-day Adventist Church, worked as a textile-mill operator. Two years into her employment, her employer switched from a five-day to a six-day workweek, this time including Saturdays. But according to her belief, God absolutely forbade working on Saturdays (the Sabbath). Consequently, she refused to work that day and was fired.

Sherbert could not find any other work and applied for unemployment compensation. Her claim was denied and the lower courts denied her appeals. The Supreme Court, however, decided that the state's refusal of unemployment benefits to her constituted a burden on her right to freely exercise her religion. The Court in *Sherbert* famously noted that no one should be compelled to "make the cruel choice of surrendering their religion or their job."

The Supreme Court also held that the government must demonstrate a compelling government interest in these types of cases. This came to be known as the "Sherbert Test," and required demonstration of such a compelling interest in Free Exercise cases.

Wisconsin v. Yoder, 406 U.S. 205 (1972)

Three Amish students from three different families stopped attending New Glarus High School in the New Glarus, Wisconsin school district at the end of the eighth grade, all due to their religious beliefs. In so doing they were violating a Wisconsin law that required all children to attend at least two years of high school. The three Amish students were convicted in the Green County Court, and that ruling was upheld in the appeals

court. Each defendant was fined the sum of 5 dollars.

The Amish students and their parents argued that attending high school would prevent the free exercise of their religion, since high school curriculum often teaches some ideas completely at odds with Amish religious doctrines. It was proved at the Supreme Court that forcing the Amish students to attend high school would essentially annihilate Amish doctrines and preclude the free exercise of the Amish faith.

Consequently, in a unanimous decision, the Court held that individuals' interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade. In other words, since it was proved that forcing the Amish to go to high school would prevent the free exercise of their religion, the state had to show a compelling interest to make them go to school. The Court held that, in this particular case, such a compelling interest did not exist.

Employment Division v. Smith, 494 U.S. 872 (1990)

Before *Smith*, the Sherbert Test was seemingly perfect. In deciding Free Exercise cases, the Supreme Court would often just balance the state's interest with the claims of the individual.

In this case, however, the Supreme Court introduced a new way to examine whether a law which limits the free exercise of religion is unconstitutional. In his majority opinion, Justice Scalia introduced the following wording, which would become important in future cases: "neutral law of general applicability."

Scalia claimed that if a law was, on its face, neutral with respect to religion—if it did not obviously try to prevent the free exercise of religion—and if it applied generally, or equally, to every person in the country, then the law would probably never be an obstruction to the free exercise of one's religion. Consequently, it should, he argued, be necessary to strike down only the laws that specifically target religion.

"It would doubtless be unconstitutional," Scalia wrote, "to prohibit bowing down before a golden calf." A law which, on its face, targets a religion which bows down before golden calves would probably be unconstitutional.

In *Employment Division v. Smith*, a small group of Native Americans were punished by the state for ingesting illegal drugs. The Native Americans appealed to the Supreme Court, arguing that the drugs were part of their religion. In this case, the Supreme Court stressed that the Oregon statute banning drugs was "a neutral law of general applicability." The law did not

say, 'Native Americans may not ingest peyote during religious ceremonies'; instead, the law said 'No one shall ingest or possess any hallucinogenic drugs in the state of Oregon.' Because the law did not target religion, in other words, it was probably constitutional.

This case did not eliminate the Shebert Test, nor did it create a new test (i.e. there is no such thing as the 'neutral law of general applicability' rule). Instead, it introduced a new *idea*. It stressed that in cases where a law is generally applicable, seemingly equitable, and does not specifically target religion, there is probably no first amendment claim.

Finally, the most important consequence of this idea—that there is probably no unconstitutionality when laws are neutral—is that when there is in fact a lack of neutrality in the law, there probably is a first amendment claim—that when a law targets religion it probably does violate the first amendment right to free exercise of religion.

That is why Justice Scalia says it is 'doubtless' that to prohibit bowing down before a golden calf would be unconstitutional—because it is not neutral.

To reiterate, laws which are neutral are not *necessarily* constitutional, and laws which are not neutral are not *necessarily* unconstitutional. But in this case the Court highlighted that they probably are.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

The Church of Lukumi Babalu Aye was a church which practiced a religion called "Santeria." One of the most important parts of the practice of Santeria was a ritual in which participants from the Church of Lukumi Babalu Aye would cut the throat of an animal and then eat it.

When it was announced that a Santeria church would open in Florida, the City Council of Hialeah, Florida convened and adopted several ordinances addressing religious sacrifice. The ordinances, or city laws, prohibited the practice of ritual animal sacrifice.

The question in this case was whether the city of Hialeah's ordinance prohibiting ritual animal sacrifice violated the First Amendment's Free Exercise Clause, since it was a law which prevented the members of the Santeria church from practicing their religion.

While using similar reasoning as in *Smith*, the Court in this case found the law to be unconstitutional. In *Smith*, the

Court recognized that laws which are neutral and generally applicable are probably not unconstitutional. And by the same token, it observed that laws which are *not* neutral to religion and *not* generally applicable are probably unconstitutional. The ruling in this case reinforced Scalia's idea in *Smith*—that laws which are not neutral to religion or generally applicable to all are probably unconstitutional: "[a] law burdening religious practice that is not neutral ... must undergo the most rigorous of scrutiny," *id.*, at 546.

In the concurring opinions, Justice Blackmun and O'Connor even went so far as to suggest that any law which is not neutral to religion is necessarily unconstitutional: "[w]hen a law discriminates against religion as such, ... it automatically will fail strict scrutiny." *Id.*, at 579. And Justice Souter endorsed the idea that neutrality is a "necessary conditio[n] for free-exercise constitutionality." *Id.*, at 563.

In other words, in this case the Court seemed to suggest that one of the most important elements in the constitutionality of a given law is its neutrality with respect to religion.

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Lemon is a crucial precedent relating to the Establishment Clause. It dealt with a Pennsylvania law which allowed government funds to be used to reimburse private schools for teachers' salaries, textbooks, and other expenses. The potential problem with the law was that more than 95% of the private schools in Pennsylvania were Catholic schools. Consequently, the law was challenged as violating the Establishment Clause of the First Amendment.

The Supreme Court invalidated the law, holding that in order to be constitutional, a law must not result in "excessive government entanglement with religion." However, the question of what exactly constitutes "excessive government entanglement" remains somewhat murky and open to interpretation.

OPINIONS OF THE NINTH CIRCUIT

Rehnquist, C. J., delivered the opinion of the Court, in which Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined

The State of California established the Promise Scholarship Program to assist academically gifted students with college education expenses. Students may not use the scholarship at an in-

stitution where they are pursuing a degree in theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

Respondent, Jason Owens, was awarded a Promise Scholarship, and chose to attend Trinity Life Bible College. Trinity Life Bible College is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Owens had "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." App. 40. To that end, when he enrolled in Trinity Life Bible College, he decided to pursue major in pastoral ministries. *Id.*, at 43. There is no dispute that the pastoral ministries degree is theological and therefore excluded under the Promise Scholarship Program.

At the beginning of the 2004-2005 academic year, Owens met with Trinity's director of financial aid. He learned for the first time at this meeting that he could not use his scholarship to pursue a theology degree. He was informed that to receive the funds appropriated for his use, he must certify in writing that he was not pursuing such a degree at Trinity Life Bible College. He refused to sign the form and did not receive any scholarship funds.

Owens brought an action under 42 U. S. C. §1983 against various state officials (hereinafter State) in the District Court for the Western District of California. He argued the denial of his scholarship based *solely* on his decision to pursue a theology degree violated, his First Amendment rights.

* * *

Respondent Owens urges us to use the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*. In that case, we decided that laws which are not facially neutral with respect to religion—that is to say, laws which seem to specifically single out religion—are probably unconstitutional. Owens urges us to use that case here since the California statute which specifically singles out theology majors does not appear to be neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however.

To begin, the circumstances of this case are much different from those of *Lukumi*. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to specifically suppress rituals of the Santeria religion. 508 U. S., at 535. In that case, the state clearly did not think the Santeria's practice of animal slaugh-

ter was acceptable, and so outlawed it. In that case, in other words, the state made a law to stop a religious practice it did not agree with. And that, we have held, is unacceptable.

But in the present case, the State's disfavor of religion is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service. It does not deny to ministers the right to participate in the political affairs of the community. See *McDaniel v. Paty*, 435 U. S. 618 (1978). And it does not require students to choose between their religious beliefs and receiving a government benefit. See *ibid.*; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert v. Verner*, 374 U. S. 398 (1963). The State has merely chosen not to fund a distinct category of instruction.

In *Lukumi*, there was definite hostility to religion; yet in this case, there is no such hostility. In fact, the Promise Scholarships accommodate some religious study. First, the program permits students to attend pervasively religious schools, so long as they are accredited. As Trinity Life Bible College advertises, its "concept of education is distinctly Christian in the evangelical sense." App. 168. It prepares all of its students, "through instruction, through modeling, [and] through [its] classes, to use ... the Bible as their guide, as the truth," no matter their chosen profession. *Id.*, at 169. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses.

Owens notes all students at Trinity are required to take at least four devotional courses, "Exploring the Bible," "Principles of Spiritual Development," "Evangelism in the Christian Life," and "Christian Doctrine," Brief for Respondent 11, n. 5, and some students may have additional religious requirements as part of their majors. Far from prohibiting the free exercise of ones religion, the California law actually *permits* people to study religion. Students are simply not allowed to major in theology—to receive a degree in theology.

* * *

So why disallow students from receiving degrees in theology? Does the state of California actually have a *compelling interest* to not allow theology degrees?

Since the founding of our country, there have been uprisings against using taxpayer funds to support church leaders. In fact, most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the

ministry. E.g., Ga. Const., Art. IV, §5 (1789), reprinted in 2 Federal and State Constitutions, Colonial Charters and Other Organic Laws 789 (F. Thorpe ed. 1909) (reprinted 1993) ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own"); Pa. Const., Art. II (1776) in 5 id., at 3082.

In *Lukumi*, we found no compelling interest. Yet in this case, there is indeed a compelling interest: the *antiestablishment concerns* of the state. In other words, making sure that tax money does not go to paying for the education of members of the clergy certainly is a compelling interest. Indeed, it has been so since the country's founding; and the plain text of the constitutional provisions above prohibited any tax dollars from supporting the clergy. That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is far different from historical instruction, for example.

* * *

In short, we find in the operation of the Promise Scholarship Program, nothing that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently unconstitutional.

The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. The judgment of the District Court is therefore

Reversed.

Justice Scalia, with whom Justice Thomas joins, dissenting

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993), the majority opinion held that "[a] law burdening religious practice that is not neutral ... must undergo the most rigorous of scrutiny," id., at 546, and that "the minimum requirement of neutrality is that a law not discriminate on its face," id., at 533. The concurrence of two Justices stated that "[w]hen a law discriminates against religion as such, ... it automatically will fail strict scrutiny." Id., at 579 (Blackmun, J., joined by O'Connor, J., concurring in judgment). And the concurrence of a third Justice endorsed the "noncontroversial principle" that "formal neutrality" is a "necessary conditio[n] for free-exercise constitutionality." Id., at 563 (Souter, J., concurring in part and concurring in judgment). These opinions

are irreconcilable with today's decision, which sustains a public benefits program that facially discriminates against religion.

We discussed the principle that governs this case more than 50 years ago in *Everson v. Board of Ed. of Ewing*, 330 U. S. 1 (1947): "New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.*, at 16.

When the State makes a public benefit generally available, that benefit should be available to all. When the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause.

That is precisely what the State of California has done here. It has created a generally available public benefit. It has then carved out a single course of study for exclusion: theology. No field of study but religion is singled out.

The First Amendment, after all, guarantees free exercise of religion, and when the State exacts a financial penalty of almost \$10,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything but free.

The indignity of being singled out for on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed.

* * *

One reason the Court thinks this facial discrimination is less offensive is that the scholarship program was not motivated by animus toward religion. That is to say, the majority here believes that the statute is probably constitutional since its makers were well intentioned.

That may be true. But does it matter?

If a State deprives a citizen of trial by jury or passes an ex post facto law, we do not pause to investigate whether it was actually trying to accomplish evil. It is sufficient that the citizen's rights have been infringed. "[It does not] matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens." *Lukumi*, 508 U. S., at 559 (Scalia, J., concurring in part and concurring in judgment). When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of "animus" against blacks, but because of a well-meaning but misguided belief that

the races would be better off apart. It may be that California's original purpose in excluding the clergy from public benefits was harmless; the same might be true of its purpose in maintaining the exclusion today. But the Court does not explain why the legislature's motive matters—and I fail to see why it should.

Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State's policy poses no obstacle to them. Those this law actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far smaller group of people.

One need not delve too far into modern popular culture to perceive a disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, e.g., *Romer v. Evans*, 517 U. S. 620, 635 (1996), its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

I respectfully dissent.

Justice Thomas, dissenting

Because the parties agree that a "degree in theology" means a degree that is "devotional in nature or designed to induce religious faith," Brief for Petitioners 6; Brief for Respondent 8, I assume that this is so for purposes of deciding this case. With this understanding, I join Justice Scalia's dissenting opinion.

I write separately to note that, in my view, the study of theology does not necessarily implicate religious devotion or faith. The contested statute denies Promise Scholarships to students who pursue "a degree in theology." But the statute itself does not define "theology." And the usual definition of the term "theology" is not limited to devotional studies. "Theology" is defined as "[t]he study of the nature of God and religious truth" and the "rational inquiry into religious questions." *American Heritage Dictionary* 1794 (4th ed. 2000). See also *Webster's Ninth New Collegiate Dictionary* 1223 (1991) ("the study of religious faith, practice, and experience" and "the study of God and his relation to the world"). These definitions include the study of theology from a secular perspective as well as from a religious one.

Assuming that the State denies Promise Scholarships only to students who pursue a degree in devotional theology, I believe

that Justice Scalia's application of our precedents is correct. Because neither party contests the validity of these precedents, I join Justice Scalia's dissent.