

It was the best of times, it was the worst of times: The Semantic Evolution of "Religious Freedom"

By James Heilpern

I'm grateful for the opportunity to be here at BYU.

In the opening lines of *A Tale of Two Cities*, Charles Dickens wrote "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair." While Dickens was comparing eighteenth century England and France, having listened to the talks over the last three days, I think most of us would agree that those lines are an apt description of the state of religious freedom in the world. There is much to be excited about, but there are many reasons to be concerned.

Let's consider the United States. Over the last five years, the Roberts court has issued an unprecedented string of decisions protecting individual and organizational religious freedom. For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court found that the government could not enforce the Controlled Substances Act against a small religious sect from Brazil that utilized hoasca, a banned narcotic tea, as part of one of its sacramental rites.¹ Then, in 2014 in *Burwell v. Hobby Lobby*, the Court held that the owners of closely-held corporations could not be forced to provide their employees with insurance that covered contraceptives if providing said contraceptives would violate the owners' sincerely-held religious beliefs.² Then, the following year, the Court overturned an Arkansas law prohibiting Muslim inmates from growing a one-inch beard.³ But, during that same time period Religious Freedom Restoration Acts have been attacked and defeated Arizona, Indiana, Georgia, and North Carolina by such disparate forces as LGBTQ groups, the NFL, Apple, and Mitt Romney. Religious and universities, such as this institution, have been attacked in the public sphere, the courts, and pseudo-government organizations such as the ABA for their religious and moral honor codes. Perhaps most troubling, last month, the U.S. Commission on Civil Rights released a report concluding "religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, *significantly infringe upon these civil rights.*" The Commission's chair, Martin Castro, argued that "the phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy, or any form of intolerance."

¹ 546 U.S. 418.

² 134 S.Ct. 2751.

³ *Holt v. Hobbs*, 135 S. Ct. 854 (2015).

It was the best of times, it was the worst of times. It was the spring of hope, it was the winter of despair.

In each of the recent Supreme Court cases I mentioned, the plaintiffs' religious liberties were ultimately protected because of legislative enactments, not the First Amendment of the U.S. Constitution. More than two decades ago, the Court rendered the free exercise clause largely null in *Employment Division v. Smith*, holding that neutral and generally applicable laws that restrict individuals' ability to practice his or her religion are only subject to the rationale basis test.⁴ Thus the two plaintiffs in that case were legally barred from collecting unemployment insurance simply because they smoked peyote, a restricted substance under Oregon law, as part of a religious sacrament.⁵

The Congressional rebuke that followed was quick and decisive. Bipartisan support coalesced behind the Religious Freedom Restoration Act (RFRA) – the brainchild of Senators Orrin Hatch and Ted Kennedy.⁶ President Bill Clinton signed the bill into law on November 16, 1993 after it passed the House unanimously and the Senate with only three dissenting votes.⁷ RFRA effectively circumvents *Smith*, prohibiting the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless it “is in furtherance of a compelling government interest; and . . . is the least restrictive means of furthering that compelling government interest.”⁸ Over the last two decades, nineteen states have legislatively passed their own state RFRA.⁹

These were victories rightly celebrated, and today they are fundamental to the protection of religious organizations and individuals in this country. But we must never take them for granted. Over the summer, two bills were introduced in Congress which, if passed, would have severely curtailed the scope of RFRA protections, and some national media outlets have called for RFRA’s complete repeal. Other than popular opinion, there is nothing preventing a future Congress from acting on such a proposal. As such, the degree of protection of religious freedom in this country remains permanently in limbo, subject to shifts in public opinion, which drives the legislative agenda: even a statute such as RFRA that was passed unanimously can be repealed by a bare majority. As such it is important to keep a finger on the pulse of the public’s opinion about religious freedom in general and these legislative solutions in particular.

In my research, I have utilized the emerging techniques of corpus linguistics to investigate America’s changing attitudes towards religious liberty.

⁴ 494 U.S. 872.

⁵ *Id.*

⁶ Phillip Spare, *Free Exercise of Religion: A New Translation*, 96 DICK. L. REV. 705, 731 no. 264 (1992).

⁷ Simon J. Santiago, *Zoning and Religion: Will the Religious Freedom Restoration Act of 1993 Shift the Line Toward Religious Liberty?*, 45 AM. U. L. REV. 199, 215 (1995).

⁸ 42 U.S.C. § 2000bb-1.

⁹ *States*, RFRA PERILS, (Jan. 4, 2015), <http://rfraperils.com/states/>.

Corpus linguistics studies real language use by electronically analyzing *corpora*¹⁰ – huge databases of texts that provide a representative sample of the speech and writing patterns of a particular community.¹¹ These texts are pulled from a diverse cross-section of written and spoken genres: academic articles, fiction novels, magazines, interview transcripts, and even the scripts of soap operas. Relying on these databases and the empirical evidence that can be derived from them enables researchers to study real language use, without having the results skewed by their own cognitive biases.¹² This is especially helpful when investigating language use *diachronically*, or the gradual evolution of words over time.

Applying these techniques to the terms “religious liberty” and “religious freedom” has yielded some interesting observations about how we, as a society, have thought about religious freedom over the last two hundred years.

Observation # 1

We talk about religious freedom a lot less than we used to. During the 1830s and 1840s, the phrase “religious freedom” appeared in the corpus between 2.9 and 2.99 times every million words. The phrase “religious liberty” appeared even more frequently – 3.93 times per million. By comparison, during the first decade of the new millennium “religious freedom” was used about half as frequently---just 1.69

¹⁰ Corpora is the plural of corpus.

¹¹ See *Introduction* in CORPUS LINGUISTICS: READINGS IN A WIDENING DISCIPLINE 1 (ed. Geoffrey Sampson and Diana McCarthy 2004) (“A *corpus*, for people who study language and languages, is a collection of specimens of a language as a used in real life, in speech or writing, selected as a sizeable ‘fair sample’ of the language as a whole or of some linguistic genre, and hence as a useful source of evidence for research on the language.”)

¹² For a list of various cognitive biases researchers can fall into, see Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHICAGO L. REV. 1175 (1997). See also, Mouritsen, *supra* note 14.

times per million, while “religious liberty” appeared a paltry .51 times per million, a fourth of its level during the early 19th century. True, this course has reversed course during the last five years during which time “Religious freedom” and “religious liberty” appeared in the corpus 3.77 and 2.29 times per million, respectively. But that might not necessarily be a good thing.

This leads me to observation # 2, which I think is much more important. Over the last few years, both the phrase “religious freedom” and “religious liberty” have lost much of their positive connotations. In the 1830s and 40s, the term “religious freedom” was used in a positive context sixty-two percent of the time. Thus, it was referred to as a “noble endeavor,”¹³ a “prevailing spirit,”¹⁴ a “lively experiment,”¹⁵ and the “undoubted and unquestioned birthright”¹⁶ of every American. It was frequently referred to as both a “great cause”¹⁷ and one of the “central principles of society”¹⁸ representing the “strong feeling and spirit of the colony.”¹⁹ It was described as “perfect,”²⁰ and “absolute;”²¹ “true doctrine”²² that

¹³ W. H., *Magnanimity*, NEW ENGLAND MAGAZINE (Aug. 1834), 135, available at <http://corpus.byu.edu/coha/?c=coha&q=36180037>.

¹⁴ JOHN PENDLETON KENNEDY, *ROB OF THE BOWL: A LEGEND OF ST. INIGOE'S* (1838), available online at <http://corpus.byu.edu/coha/?c=coha&q=36179699>.

¹⁵ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE REVOLUTION* (1833), available at <http://corpus.byu.edu/coha/?c=coha&q=36179862>.

¹⁶ *The Prospects which the Present Age Presents to the Cause of Religious Freedom*, 3 NEW ENGLANDER & YALE REV. 392, available at <http://corpus.byu.edu/coha/?c=coha&q=36180106>.

¹⁷ STORY, *supra* note 31, available at <http://corpus.byu.edu/coha/?c=coha&q=36>.

¹⁸ *Collegiate Education in the Western States*, 4 NEW ENGLANDER & YALE REV. 274, available at <http://corpus.byu.edu/coha/?c=coha&q=36180258>.

¹⁹ STORY, *supra* note 31, available at <http://corpus.byu.edu/coha/?c=coha&q=36180288>.

represented the “great question of the age and of the world.”²³ Authors often waxed eloquent, describing religious freedom reverently in pseudo-religious terms, such as one writer who stated that religious freedom was “the gift of Christ”²⁴ and the “hope of earth.”²⁵

Hard to believe, but the term “religious liberty” was even more positively connotated, appearing in a positive context 77% of the time. Like religious freedom, the phrase “religious liberty” was described in an almost worshipful manner – it was said to be the “great idea of our age” and to be as “vast as the universe, free as the air, and as generous as light”, ushering in America’s “golden age.” You get the point. For both phrases, the remaining examples produced by the database were all neutral, usually in the context of acknowledging that “religious freedom” existed in a particular time or place. During this time period, there’s not a single example of either term being used in a negative context.

Such is not the case today. From 1990 to 2012, “religious freedom” appeared in a positive context just twenty-seven percent of the time. That’s a change of fifty percent from the 1830s. But the real difference is even greater than the numbers suggest. Gone are the days when religious freedom was described in reverant

²⁰ Thomas Arnold, 4 *NEW ENGLANDER & YALE REV.* 364 (1847), available at <http://corpus.byu.edu/coha/?c=coha&q=36180344>.

²¹ *American Puritanism*, 1 *NEW ENGLANDER & YALE REV.* 352, available at <http://corpus.byu.edu/coha/?c=coha&q=36180383>.

²² *The Persecutions among the Armenians*, 4 *NEW ENGLANDER & YALE REV.* 410 (1846), available at <http://corpus.byu.edu/coha/?c=coha&q=36180412>.

²³ *The Evangelical Alliance*, 5 *NEW ENGLANDER & YALE REV.* 102 (1847), available at <http://corpus.byu.edu/coha/?c=coha&q=36180460>.

²⁴ *Theories of the Christian Life*, 3 *NEW ENGLANDER & YALE REV.* 373 (1845), available at <http://corpus.byu.edu/coha/?c=coha&q=36180508>.

²⁵ *Id.*

whispers. The positive connotations attached to religious freedom today are far more mild – it’s described as a “substantive guarantee” that is “enjoyed” “respected” or “appreciated.” Positive? Sure, but it’s a far cry from “vast as the universe, free as the air, and as generous as light.” About sixty-five percent of the time, the phrase is used in a neutral manner, and in about a third of the cases, “religious freedom” was explicitly balanced against some other value such as national security or women’s rights.

It’s important that we recognize these subtle changes in connotation, especially now that our religious freedoms are protected principally by statutes and not by the constitution. With religious freedom being increasingly weighed against other civil and human rights such as sexual freedoms, there is a real risk that the public will come to view these statutes as a hinderence to equality and progress. If that happens, there is a very real chance that the statutes that now protect us will be revoked.

Thank you.

54/87 = 62%
29/101