Constitutional Religious Liberty in the Age of COVID-19

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How Does the Constitution Protect Religion?

Relevant text of the First Amendment: “Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof.”

Broken down, this language includes two important Constitutional Clauses: Free Exercise and Establishment.

The Free Exercise Clause concerns individual liberty:

- Freedom of belief and the freedom to perform or abstain from certain conduct.

The Establishment Clause restrains the government:

- The government cannot act with the primary purpose or effect of advancing or inhibiting religion.

What Does Religion Mean for Constitutional Purposes?

- Religion must be construed broadly.
- Conscientious objector cases concerning the draft:
  - Religion must be something more than purely secular beliefs;
  - Religion does not require belief in the existence of a deity or deities, but it must hold a parallel position of importance.
- Religious beliefs must be "sincerely held," although courts usually defer to individuals' stated claims on this point.

When Does the Government Unconstitutionally Violate Religious Liberty?

- The answer has changed over the years depending on the Court's ideological makeup.

- *Sherbert v. Verner* stood for the governing rule from 1963 – 1990.
  - Strict Scrutiny: When the government discriminates against religion or substantially burdens an individual's religious exercise, the government must prove that it has a compelling interest and that its action is narrowly tailored to achieving that interest.

Strict Scrutiny Applied in Two Religious Contexts from 1963-90:

- **Discrimination**: i.e., the government expressly or intentionally treats religion unfavorably.
  - Strict Scrutiny requires the government to prove that it has a compelling interest and that there are no less discriminatory means to achieve it.

- **Religiously Neutral Law that Substantially Burden Religion Practice**:
  - Strict Scrutiny requires the government to prove that it has a compelling interest and that an accommodation or exemption from the law would not seriously undermine its interest.

RELIGIOUS LIBERTY FROM 1990 – 2020

Employment Division v. Smith (1990)

- Did not disturb the holding that Strict Scrutiny applies to religious discrimination.

- Overruled the aspect of *Sherbert* that held that Strict Scrutiny applies when religiously neutral laws substantially burden an individual's religious exercise.

Smith: “To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’” . . . is “permitting him, by virtue of his beliefs, ‘to become a law unto himself.’”

To apply Strict Scrutiny when religiously neutral laws substantially burden an individual’s religious exercise “would produce . . . a private right to ignore generally applicable laws,” which would be a “constitutional anomaly.”

Religious Liberty: 2020 and Beyond

- The Court may eventually overrule *Smith* and reinstate the rule that Strict Scrutiny applies to religiously neutral laws that substantially burden individual religious exercise.
  - The Court heard a case this term that presents this question as it relates to a religious foster care agency that does not want to work with same-sex potential parents in violation of an anti-discrimination law prohibiting discrimination against LGBTQ people.

- In the alternative, the Court may expand the concept of governmental religious *discrimination*, since courts continue to review instances of religious discrimination under Strict Scrutiny even after *Smith*.
  - This is the path the Court seems to be taking in the COVID era regarding limited capacity orders affecting religious institutions.

***Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)**

- This case involved NY headcount limits that applied to in-person and indoor gatherings in places of worship. The headcount limit differed depending on which "zone risk" for COVID transmission the institution fell.

- The Court found that the NY headcount rules likely discriminated against religion because religious institutions are treated unfavorably compared to businesses deemed "essential."

- Strict Scrutiny applied, and the NY rules were not narrowly tailored. I.e., there are less discriminatory means of preventing COVID transmission.

“Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as ‘narrowly tailored.’ They are far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants’ services.” *Roman Catholic Diocese.*

- What seems different about these cases is how the Court now understands religious discrimination.
- Seemingly, any governmental effort to include religious entities among different risk categories amounts to religious targeting if ***any*** other entity is treated more leniently than religious entities—including those deemed essential.
- The very act of differentiation amounts to religious discrimination, which triggers the most searching form of judicial review.