Religious Liberty *in the* Age of COVID

United States Constitution

"Congress shall make no law ... prohibiting the free exercise [of religion]."[1]

Government Responsibility

Limit the devastation of COVID-19 by restricting religious gatherings that may become "super-spreader" events.

Value of Religious Liberty

Because their ancestors had escaped religious persecution in Europe, the founding generation saw the need to protect religion and viewed morality as necessary to the nation's success.[2]

The Declaration of Independence exemplifies fundamental religious values by stating "[a]ll men are created equal and endowed by their Creator with certain inalienable rights."[3]

Religious Liberty Precedents

The Supreme Court reviews discriminatory laws under a 'strict scrutiny' standard. In short, [officials] must prove that the law is "'narrowly tailored' to serve a 'compelling' state interest."[4]

Laws that are neutral or laws that apply to both religious and non-religious sects can "incidentally burden religious conduct."[5] Under these circumstances, the Supreme Court decreed that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[6]

The Supreme Court is revisiting this standard in *Employment Division v. Smith* to make it more protective for religious freedom.[7]

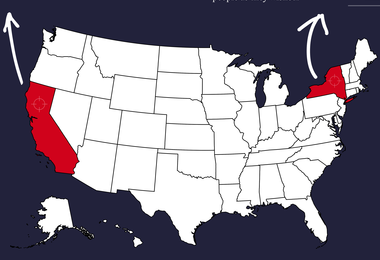
Targeting Religion During a Pandemic

Because of the pandemic, governments across the United States have passed strict laws restricting personal freedoms, including gathering together for religious worship.

The laws in New York and California are examples of discrimination against religious freedoms.

In California, the court granted an injunction against prohibitions on all indoor worship services because similar laws allowed 'businesses to remain open' where scores of people were 'in close proximity' for 'extended periods' of time.[8] The court held that California's laws "obviously target[ed] religion for differential treatment."[9]

In New York, the Supreme Court granted a temporary injunction against the state's restrictions on attending religious services because the restrictions "singled out houses of worship."[10] For example, churches in "red zones" were limited to 10 worshippers whereas businesses including "acupuncture facilities" were considered essential thus open to as many people as they wished.[11]



Overturning the *Smith* Case?

With few exceptions, most laws restricting freedoms due to the pandemic treat religious activities equally with secular ones. Yet, some believe their First Amendment right to freely worship is violated. Under *Smith*, these rules are likely to be upheld because courts review these laws deferentially.

Therefore, the Supreme Court is unlikely to overturn the *Smith* case this year because crafting a workable substitute rule is difficult without upending decades of case precedent. In effect, neutral COVID laws that incidentally impact religious practices are likely valid.

Challenge Discriminatory Laws[12]

Various non-profit organizations specialize in the defense of religious liberty:

- First Liberty (Plano, Texas),
- Becket (Washington, D.C.),
- Alliance Defending Freedom (Scottsdale, Arizona), and
- Thomas More Society (Chicago, Illinois)

FIRST LIBERTY

The Becket Fund FOR RELIGIOUS LIBERTY

ALLIANCE DEFENDING FREEDOM

THOMAS MORE SOCIETY OF AMERICA

REFERENCES

1. U.S. CONST. amend. I.
2. See, e.g., Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798) (noting the Constitution must govern "a religious and moral people").
3. The Declaration of Independence para. 2 (U.S. 1776).
4. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) (per curiam).
5. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).
6. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).
7. See *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104 (2020) (granting review of a case seeking to overturn *Smith*).
8. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021).
9. *Id.*
10. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 65-66 (2020) (per curiam).
11. *Id.*
12. Non-profit organizations that specialize in defending religion and take clients nationwide include First Liberty (Plano, Texas), Becket (Washington D.C.), Alliance Defending Freedom (Scottsdale, AZ), and The Thomas More Society (Chicago, IL).

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