

HOW BROAD IS RELIGIOUS FREEDOM? CONSTITUTIONAL AND LEGISLATIVE PROTECTIONS

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BASIC RELIGIOUS FREEDOM PROTECTIONS

1. Freedom of Speech
2. Freedom of Association (usually for expressive purposes)
3. Free Exercise Clause
4. State Constitution Religious Freedom Provision: where applicable (11 states)
5. General Religious Freedom Legislation: federal RFRA, or applicable state laws (21 states)
6. Specific Statutory Exemptions/Accommodations

FREE EXERCISE CLAIMS (CONSTITUTIONAL AND STATUTORY): 4 CONCEPTS/QUESTIONS

- 1) Under 1st Am Free Exercise Clause: In most cases, government can apply a “neutral, generally applicable law” to religious conduct (*Empl. Div. v. Smith*, 494 U.S. 872 (1990)): so when is a law “neutral and generally applicable”?
- 2) But laws that interfere with “internal governance” of religious organization are unconstitutional (*Hosanna-Tabor v. EEOC*, 135 S. Ct. 694 (2012): right to select ministers): so what is a matter of “internal governance”?
 - Under federal/state RFRA and broad state constitutions, even a generally applicable law cannot substantially burden religious exercise unless it serves a compelling interest by the least restrictive means—so ...
- 3) What is a “substantial burden” on religious exercise?
- 4) When does the government have a compelling interest, and what is the “least restrictive means”?

1) "NEUTRAL AND GENERALLY APPLICABLE"

- For example, a policy that prohibits police officers to wear beards ...
 - a) When done for religious reasons (similar to "no religious garb" statutes?)
 - Strict scrutiny: *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993)
 - b) In all circumstances
 - Neutral and generally applicable: valid under *Smith*
 - c) With several exceptions for secular reasons
 - Cf. *Rader v. Johnston*, 924 F. Supp. 2d 540 (D. Neb. 1996) (1/3 of freshmen exempted)
 - d) With one comparable exception (officers with skin condition)
 - *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)
 - Versus other court of appeals decisions: a circuit split

“NEUTRAL & GENERALLY APPLICABLE” (CONT’D)

- Circuit split unresolved after *Stormans v. Wiesman* (cert. denied June 28, 2016)

2) “INTERNAL GOVERNANCE DECISIONS” (*HOSANNA-TABOR V. EEOC*)

- *Hosanna-Tabor*: Lutheran-school teacher, “commissioned” (semi-ordained); fired for threatening disability lawsuit; sued for retaliation; held for the school
 - “Ministerial exception”—absolute—against lawsuits interfering w/ selection of leaders
 - On these facts, teacher was a minister
- a) Who counts as minister?
 - Regular teacher, not commissioned?
- b) What causes of action are covered?
 - Minimum-wage claim? Slip and fall claim? Contract claim?
 - Issues are: beyond selection, to discipline? Ban on deciding religious questions?
- c) Other governance decisions: membership? Discipline/defamation?

3) (UNDER RFRA...) "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE?

- E.g., the government mandate that employer insurance cover contraception
 - a) With no accommodation: for-profits (*Hobby Lobby*, 134 S. Ct. 2751 (2014))
 - Held: Govt. could not claim connection was too attenuated: must defer to company's belief that coverage would be sinful
 - b) W/ "insurer pays" accommodation: non-profits (*Zubik*, 136 S. Ct. 1557 (2016))
 - Separate contract, no employer payment: can employer still say it violates its beliefs?
 - Objecting to someone else providing coverage?
 - Employer's relationship with insurer? Employer providing insurer's name?
 - c) Suppose regulation applies only if employer receives gov't funding?
 - Cf. *Locke v. Davey*, 540 U.S. 712 (2004): held no substantial burden from withdrawal of funding for student majoring in theology)

4) (UNDER RFRA ...) "COMPELLING INTEREST" AND "LEAST RESTRICTIVE MEANS"

- Elsewhere "strict in theory, fatal in fact," but not here: more like balancing
- "The "compelling interest" and "least restrictive means" prongs interact
 - a) Where to measure the government interest?
 - "In the abstract" (need for the law as a whole) or "at the margin" (this ?)
 - *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (interest in education specifically for Amish teenagers after age 14)
 - *Gonzales v. O Centro*, 546 U.S. 418 (2006) (interest only re. sacramental use of drug)
 - RFRA says consider interest at the margin: "the application of the burden to the person" must serve compelling interest
 - Multiple likely claims?—Tax cases? Self-interested claims? *US v. Lee*, 455 U.S. 252 (1982)
 - Anti-discrimination cases?—E.g. *Bob Jones Univ. v. US*, 461 U.S. 574 (1983)

COMPELLING INTEREST (CONT'D): B) "HARMS TO THIRD PARTIES"

- I.e. individualized third parties (vs. general effects on society)
- No right to violate "private rights" of others (Madison): murder, theft, trespass
- But religious freedom must protect some actions that affect other individuals
 - E.g. *Hosanna-Tabor* (fired minister); draft exemptions; clergy-communicant privilege
 - Given the profusion of laws in modern welfare-regulatory state
- Factors to draw the line?
 - i. Proximity to core religious interest: e.g. commercial vs. religious non-profit
 - *CPB v. Amos*, 483 U.S. 327 (1987) (nonprofit employees); vs. recent wedding-vendor cases
 - ii. Actual degree of harm
 - iii. Again, repeating and accumulated harms

RFRAS (CONT'D): “LEAST RESTRICTIVE MEANS”

- Keeping the law but with an exemption can be the “less restrictive means”
- But also other creative/pragmatic solutions: e.g....
 - Non-profit “insurer pays” accommodation in contraception mandate
 - Self-interest problem? Alternative burdens (e.g. in draft exemptions)
 - Regulating the permitted behavior (e.g. inspecting tea shipments in *O Centro*)
- How much harm to government’s interest is acceptable?
- What if alternative means requires new legislation?
 - E.g. new government subsidies in the contraception case