The Supreme Court and the “Exercise” of Religion

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On March 6, 2019, the New Yorker posted an article by Jeffry Toobin: The Supreme Court is Quietly Changing the Status of Religion in America Life. Mr. Toobin, who has followed the Supreme Court for many years, has taken notice of an important development in the law. That the most active area of constitutional jurisprudence today is the dramatic expansion of the freedom of religion, taking these rights beyond the church walls and into the marketplace.

The First Amendment of the United States Constitution states that Congress shall make no law respecting “an establishment of religion”, or “prohibiting

the free exercise thereof." These constitutional prohibitions are extended to the States through the 14th Amendment. So that no State law can either favor religion, or restrict its free exercise.

Religious Liberty in the Marketplace

Over the past five years, the Roberts Court has decided several cases concerning religious liberty in the marketplace. Similarly redefining and expanding the "exercise of religion" from matters limited to conscience and worship, and toward recognizing that an active faith that impacts your work and your business.

This position is commanding substantial majorities on the Court, with cases on religious freedom coming down with votes of 7 -2, 8 -1, and even 9 – 0 in favor of religious liberty. Almost every year has seen an important case decided, further expanding the scope of this constitutional freedom. Consider:

Burwell v. Hobby Lobby Stores, Inc.

In 2014 was decided *Burwell v.* Hobby Lobby Stores, Inc., which concerned the Affordable Care Act, commonly called Obamacare.

Hobby Lobby is a craft store chain owned by the Green Family, who operate the business "according to a set of Christian principles." One aspect of their faith is the committed belief that human life begins at conception. As such, the owners all agree that it is immoral to facilitate the destruction of a human embryo.

The health care coverage mandated by the Affordable Care Act requires there to be insurance for 20 different means of birth control. The owners of Hobby Lobby agreed to provide insurance coverage for 16 of these 20, but objected to those measures that are effective after conception, such as the IUD and Plan B.

Right to the Free Exercise of Religion

Hobby Lobby sought a court ruling that the law violated its right to the Free Exercise of Religion. The case advanced to the Supreme Court which ruled in favor of Hobby Lobby, holding that the government cannot require it to pay for the insurance coverage for those contraceptive devises that violate the religious beliefs of its owners.

The Court viewed this case as one that concerned the religious rights of employers: "*In these cases [the owners of Hobby Lobby] deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations.*"

The Court held that a closely held for-profit company can legally object to laws that require the owners to violate their religion. As a result seeing the business as the extension of its owners, and saying that the law does "*not discriminate* … against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs."

There were two key points:

- First, that the Court held expressly for the first time that a for-profit corporation has the religion of its owners for purposes of exercising constitutional rights.

> *"A corporation is simply a form of organization used by human beings to achieve desired ends … When rights … are extended to corporations, the purpose is to protect the rights of people."*

- Second, that law which makes businesses choose between violating their religious beliefs or paying penalties is a substantial burden on the exercise of religion.

> "*A law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion.*"

EEOC v. Abercrombie & Fitch

In 2015 was decided *EEOC v*. Abercrombie & Fitch. Samantha Elauf, a Muslim woman, applied for a job with Abercrombie & Fitch. For religious reasons, she wore a head scarf. The company's decision not to hire her was based on its desire to avoid accommodating her Hijab. Specifically, the Hijab was inconsistent with the company's sale image.

The Supreme Court saw the case as religious discrimination in hiring. "This is really easy" said Justice Scalia in announcing the decision from the bench. The Court ruled that an employer cannot make an adverse employment decision based on the employee's or applicant's religious practice "*whether this derives from actual knowledge, a well-founded suspicion or merely a hunch*."

Trinity Lutheran Church v. Comer.

In 2017 was decided *Trinity Lutheran Church v*. Comer. Trinity Lutheran Church in Columbia, Missouri operates a licensed preschool and day care center on church premises. The preschool and day care have an open admission policy, meaning that there is no preference shown based on a family's religion. In this case, the Church sees the preschool and day care as part of its ministry and outreach into the community. It actively teaches the children from a Christian perspective, and incorporates religious instruction into its daily activities.

The Missouri Department of Natural Resources offers Playground Scape Tire Surface Material Grants, with provides recycled tires to resurface playgrounds. Equally important, the grants are available on a competitive basis. The DNR disqualified Trinity Lutheran from State funding. Consequently, because the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section, or denomination of religion."

The Supreme Court ruled that this violated the Free Exercise clause, because *"the Free Exercise Clause protects religious observers against unequal treatment"*; and that *"denying a generally available benefit solely on*

account of religious identity imposes a penalty on the free exercise of religion.”

The case opens the door for churches and religious institutions to seek government funds without compromise of their religious beliefs, and requires States to consider them eligible for all government benefits that any secular organization is entitled to.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

In 2018 was decided *Masterpiece Cakeshop, Ltd. v*. Colorado Civil Rights Commission. Jack Phillips, a Colorado baker and the owner of Masterpiece Cakeshop, declined to bake a cake for a same sex wedding. Given that based on his Christian faith and religious conviction that marriage was ordained by God as between a man and a woman.

The Colorado Civil Rights Commission and the Colorado courts ruled that Masterpiece Cakeshop had violated the State’s law against discrimination based on sexual orientation. The Supreme Court reversed the Colorado judgment, with the majority opinion authored by Justice Anthony Kennedy. Justice Kennedy had authored the opinion in *Obergefell v. Hodges,* in which the Supreme Court announced the right of same-sex couples to marry, and he has long championed that cause. But he was also very protective of religious freedom.

The Court ruled that the Colorado Civil Rights Commission and the Colorado courts had failed to give respect and consideration to the freedom of religion claim, saying that *“the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality*”; and that the treatment of this case shows “*a clear and impressible hostility toward the sincere religious beliefs*” that motivated Mr. Phillips objection.

To quote the Supreme Court’s majority decision:

> *At several points during its meeting, commissioners endorsed the view*

> *that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe" but cannot act on his religious beliefs" if he desires to do business in the state.*

This summarizes exactly the issue by which (to borrow the phrase from Mr. Toobin) "the Supreme Court is quietly changing the status of religion in American life." The Court is changing the "exercise of religion." The change is from "you can believe what you want to believe" to the right to act on that religious belief in your business dealings.

The exact parameters of the law will continue to be defined on a case by case determination. Which is the way constitutional law is developed. In other words, the direction is clear. A new course is being set.

Category: Faith