AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Calvary Chapel Dayton Valley v. Sisolak, \_\_ U.S. \_\_ (2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 17, 2020, Nevada Governor Steve Sisolak ordered all non-essential businesses, including casinos, to close for thirty days. On March 24, the governor prohibited all public gatherings of more than ten people. At the end of May, the governor announced that the state would enter “phase two” of its reopening plan, which would allow casinos to reopen on June 4 at fifty percent capacity and with guests encouraged to wear masks. During phase 2, indoor worship services were restricted to a maximum of fifty people with mandatory social distancing and “strongly encouraged” face coverings. Indoor entertainment venues like bowling alleys could operate at fifty percent capacity, but brothels and live performances with spectators were still prohibited.*

*Calvary Chapel Dayton Valley is a church located in rural Nevada. Fifty percent of its fire code capacity would have been 90 worshippers, and it wished to hold services with that number with mandatory social distancing, shortened services, and other restrictions. Calvary filed suit in a federal district court seeking an injunction allowing it to operate at fifty percent capacity, but was refused. The circuit court denied an application for a temporary injunction, and the Supreme Court did as well. Four justices issued a dissent from that refusal to grant a temporary injunction pending appeal, arguing that the church had a good prospect of winning on the merits of its claim that it was being discriminated against in violation of the Constitution’s guarantee of free exercise of religion.*

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE KAVANAUGH join, dissenting from denial of application for injunctive relief.

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or black-jack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. . . .

That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court’s willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

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For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID–19 pandemic.

But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully ac-count for constitutional rights. . . .

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Under the Free Exercise Clause, restrictions on religious exercise that are not “neutral and of general applicability” must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). . . . Here, the departure is hardly subtle. The Governor’s directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.

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The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow, and the State’s efforts to justify the discrimination are feeble. It notes that patrons at gaming tables are supposed to wear masks and that the service of food at casinos is now limited, but congregants in houses of worship are also required to wear masks, and they do not consume meals during services.

The State notes that facilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos, but obviously that does not justify preferential treatment for casinos.

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Calvary Chapel has also brought to our attention evidence that the Governor has favored certain speakers over others. When large numbers of protesters openly violated provisions of the Directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest. . . . He even shared a video of pro-testers standing shoulder to shoulder. The State’s response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, “‘You can’t spit . . . in the face of law and not expect law to respond.’”

Public protests, of course, are themselves protected by the First Amendment, and any efforts to restrict them would be subject to judicial review. But respecting some First Amendment rights is not a shield for violating others. The State defends the Governor on the ground that the protests expressed a viewpoint on important issues, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment.

Once it is recognized that the directive’s treatment of houses of worship must satisfy strict scrutiny, it is apparent that this discriminatory treatment cannot survive. Indeed, Nevada does not even try to argue that the directive can withstand strict scrutiny.

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JUSTICE GORSUCH, dissenting.

This is a simple case. Under the Governor’s edict, a 10-screen “multiplex” may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each craps table here and a similar number gathered around every roulette wheel there. Large numbers and close quarters are fine in such places. But churches, synagogues, and mosques are banned from admitting more than 50 worshippers – no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.

JUSTICE KAVANAUGH, dissenting.

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In my view, some of the confusion and disagreement can  be averted by first identifying and distinguishing four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations. As I will explain, this case involving Nevada’s reopening plan falls into the fourth category.

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Fourth are laws—like Nevada’s in this case—that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category. Those laws provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category.

For example, consider a zoning law that places some secular organizations (apartment buildings, small retail businesses, restaurants, banks, etc.) in a favored or exempt zoning category, and places some secular organizations (office buildings, large retail businesses, movie theaters, music venues, etc.) in a disfavored or non-exempt zoning category. Suppose that religious properties arguably could be considered similar to some of the secular properties in both categories. What, then, are the constitutional limits and requirements with respect to how the legislature may categorize religious organizations?

In those circumstances, the Court’s precedents make clear that the legislature may place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem. *Walz v. Tax Commission of City of New York* (1970). . . .

The converse free-exercise or equal-treatment question is whether the legislature is required to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category. The Court’s free-exercise and equal-treatment precedents also supply an answer to that question: Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.

In *Employment Division v. Smith* (1990), for example, the Court explained that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to case of religious hardship *without compelling reason*.” . . .

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To be clear, the Court’s precedents do not require that religious organizations be treated more favorably than all secular organizations. Rather, the First Amendment requires that religious organizations be treated equally to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation.

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In seeking to justify the differential treatment in those kinds of cases, it is not enough for the government to point out that other secular organizations or individuals are also treated unfavorably. The point “is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is not regulated.” . . .

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. . . . [T]he State has substantial room to draw lines, especially in an emergency or crisis. But Nevada has not demonstrated that public health justifies taking a looser approach with restaurants, bars, casinos, and gyms and a stricter approach with places of worship.

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. . . . [N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide. Nevada’s rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale “devalues religious reasons” for congregating “by judging them to be of lesser import than nonreligious reasons,” in violation of the Constitution. The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit.

. . . . I agree that courts should be very deferential to the States’ line-drawing in opening businesses and allowing certain activities during the pandemic. For example, courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that it is being treated worse than another business. *Jacobson v. Massachusetts* (1905). Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID–19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.

But COVID–19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech. . . .

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I continue to think that the restaurants and supermarkets at issue in South Bay United Pentecostal Church v. Newsom (2020) (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit. I suspect that many who have frequented all three kinds of establishments in recent weeks and months would agree. So I continue to respectfully disagree with South Bay.

But accepting South Bay as a precedent, this case is much different because it involves bars, casinos, and gyms. Nevada’s COVID–19-based health distinction between (i) bars, casinos, and gyms on the one hand, and (ii) religious services on the other hand, defies common sense. As I see it, the State cannot plausibly maintain that those large secular businesses are categorically safer than religious services, or that only religious services—and not bars, casinos, and gyms—entail people congregating in large groups or remaining in close proximity for extended periods of time. In any event, the State has not yet supplied a sufficient justification for its counterintuitive distinction.

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