

SPECIAL SOLICITUDE: RELIGIOUS FREEDOM IN HIGHER EDUCATION

William E. Thro, General Counsel, University of Kentucky



INTRODUCTION

Mr. Thro presents in his personal capacity and not on behalf of
the University of Kentucky

Religion Clauses Of The First Amendment Constitution

1. Establishment Clause—Prohibits Government From Favoring A Religion, Forcing Citizens To Attend Or Support A Religion, And Interfering With The Religious Organization's Internal Affairs.
2. Free Exercise Clause—Allows Individuals To Believe Whatever They Want, To Associate With Those Who Have Similar Beliefs, And, In Many Circumstances, To Act Or Refuse To Act Based On Their Beliefs

“Special Sollicitude”

Rejecting The Obama Administration’s Argument That The First Amendment Requires Identical Treatment For Religious Organizations And Secular Organizations, The Supreme Court Held Such A “Result Is Hard To Square With The Text Of The First Amendment Itself, Which Gives Special Sollicitude To The Rights Of Religious Organizations.”

Three Takeaways From The Presentation

1. At A Minimum, Religious Individuals And Religious Organizations Must Be Treated The Same As Secular Individuals And Organizations
2. With The Court's Expansion Of Religious Liberty, Religious Individuals And Religious Organizations Receive "Special Solicitude" Or Additional Rights
3. The Supreme Court's Of Religious Liberty And The Equal Dignity Of LGBTQ Individuals Promotes "Constitutional Sovereignty" And "Constitutional Grace"

Overview Of The Presentation

I. Religious Freedom At Public Institutions

II The Supreme Court's Expansion Of Religious Liberty

III. Implications Of The Supreme Court's Expansion Of Religious Liberty

IV. Supreme Court's Promotion Of Constitutional Sovereignty And Constitutional Grace

I. RELIGIOUS FREEDOM AT PUBLIC INSTITUTIONS

Student Religious Organizations
Individual Conscientious Rights
Employees

STUDENT RELIGIOUS ORGANIZATIONS

Recognition (*Healy*)

Public University Must Recognize Student Organizations
Regardless Of The Viewpoint Advocated

No Establishment Clause Violation When Public University
Recognizes Religious Organization

Access To Facilities (*Widmar*)

If A Public University Allows Student Groups To Use Facilities, Then It Must Allow Student Religious Groups To Use The Facilities On The Same Terms And Conditions.

No Establishment Clause Violation When Student Religious Organization Gets Access

Funding (*Rosenberger*)

If Public University Provides Funding, It Must Provide Funding For All—Regardless Of Viewpoint Advocated

No Violation Of The Establishment Clause To Fund Student Religious Organizations

Refusal To Fund Of Religious Activities

Many Public Institutions May Refuse To Fund “Worship”
Or “Proselytizing”

Often Justify The Refusal On State Constitutional
Grounds

Student Objection To Funding Religious Organizations (*Southworth*)

Students Object To Paying Mandatory Student Fees (A Tax) And Then Having Those Fees Go To Pay For Promotion Of Religion Or Political Viewpoints

If The Distribution Of Funds Is Viewpoint Neutral, The Fact That Other Students Are Offended Is Irrelevant

Associational Rights

There Is A Right To Associate Together For Expressive Purposes

There Is A Right For A Group To Exclude Those Who Disagree With The Groups Aim

Limitations On Associational Rights (*Christian Legal Society*)

Some Public Institutions Impose An “All Comers” Policy Where Student Organization Has To Admit Everyone (I.E. Democrats Have To Admit Republicans)

If An Institution Has An “All Comers” Policy, It Force Religious Organization To Admit Those Who Disagree (I.E. Muslim Organization Has To Admit Jewish Students; Catholic Organization Has To Admit Protestants)

State Law May Provide Additional Protections

State Religious Freedom Restoration Acts

State Constitutional Provisions

Other State Laws

INDIVIDUAL CONSCIENCE RIGHTS

Required Professional Speech

Adhering To Professional Ethical Standards May Cause People Of Faith To Violate Religious Beliefs

Universities May Require Current Professional And Aspiring Professionals To Conform To The Ethics And Violate Their Beliefs

Lower Courts—Students Must Conform To Ethics, But All Students Must Be Treated The Same Way

EMPLOYEES

General Considerations In Employment

No Religious Requirement for Public Employment (Constitution)

No Religious Discrimination (Title VII)

Requirement Of Religious Accommodation (Title VII)

State Religious Freedom Restoration Act

II. SUPREME COURT'S EXPANSION OF RELIGIOUS LIBERTY

Hosanna Tabor (2012)

Both Religion Clauses Require A “Ministerial Exception” To Federal Employment Laws

Private Religious School Teacher Could Not Sue

Decision Focused On The Characteristics Of The Teacher’s Job (Clearly A Minister)

Hobby Lobby (2014)

Federal Law Mandating Businesses Provide Certain Forms Of Contraceptives To Employees Violated The Religious Freedom Restoration Act.

Closely Held For-Profit Corporation Can Assert Rights Under The Religious Freedom Restoration Act

Trinity Lutheran (2017)

Missouri Program Provided Grants to Secular Daycare Centers,
But Not to Religious Daycare Centers

Court Found The Discrimination Against Religious Day Care
Centers Violated the Constitution

Although Holding Logically Applies Broadly, But Four Justices
Joined Footnote Saying It Was Limited To This Particular
Context

Masterpiece Cake Shop (2018)

Colorado Civil Rights Commission Punished Religious Cake Decorator Who Refuses To Prepare A Customized Wedding Cake For A Same-Sex Wedding

Court Found That Commission's Hostility Toward Religion Violated Free Exercise Clause

Opinion Has Language Reaffirming The Rights Of Both LGBTQ Americans And Religious Americans.

National Institute Of Family & Life Advocates (2018)

The Court Held California's Legislature Violated The Constitution By Requiring Professionals, "To Inform Women How They Can Obtain State-subsidized Abortions."

Espinoza (2020)

Court Invalidated A Montana State Constitutional Provision Prohibiting Aid To Religious Organization.

If A State Chooses To Subsidize Private Education, Then The State Cannot Exclude Religious Schools From The Subsidy Solely Because They Are Religious

Extended *Trinity Lutheran* To All Contexts.

Invalidating Blaine Amendments

Anti-Catholic Bigotry In The Late 19th Century

State Constitutions Went Further Than Federal Constitution's Establishment Clause

Secular Organizations Were Favored Over Religious Organizations

Our Lady (2020)

Expanded The “Ministerial Exception” To Teachers Who Were Not Ordained Ministers, Had No Religious Training, And Who Taught Secular Subjects

Government Must Acknowledge A Religious Organization’s “Autonomy With Respect To Internal Management Decisions That Are Essential To The Institution’s Central Mission. And A Component Of This Autonomy Is The Selection Of The Individuals Who Play Certain Key Roles.”

When A School With A Religious Mission Entrusts A Teacher With The Responsibility Of Educating And Forming Students In The Faith,” The First Amendment Prohibits “Judicial Intervention Into Disputes Between The School And The Teacher.

Our Lady (Thomas Concurrence)

While The Court Gave Significant Deference To The Religious Organization's Assertion Of The Ministerial Exception, Justice Thomas, Joined By Justice Gorsuch, Would Give Absolute Deference To Good Faith Claims.

“The Religion Clauses Require Civil Courts To Defer To Religious Organizations' Good-faith Claims That A Certain Employee's Position Is 'Ministerial.'”

Tanzin (2020)

Muslims Who Were Placed On “No Fly List” Sued Individual Officials For Religious Discrimination

Religious Freedom Restoration Act Provides Damages Against Individual Officials

Covid Church Cases (2020 & 2021)

Supreme Court Invalidates Orders Of New York (2020) And California (2021) Governors That Treated Religious Services Differently From Similarly Situated Secular Activities

It Does Not Matter Why People Gather, It Matters How They Gather (Size Of Facility, Social Distancing)

III. IMPLICATIONS OF THE EXPANSION OF RELIGIOUS LIBERTY

Public Institutions

Private Institutions

PUBLIC INSTITUTIONS

Undermining Christian Legal Society

No Funding Limitations

Freedom of Conscience

Undermining *Christian Legal Society*

Impossible To Square *Hosana Tabor* And *Our Lady* With *Christian Legal Society*, But Supreme Court Decisions Cannot Be Overruled By Implication

Religious Group Would Have A Strong Argument That State University Cannot Interfere With The Group's Internal Policies Regarding Membership And Leadership

No Funding Limitations For Student Religious Groups

Trinity Lutheran And *Espinoza* Suggest That If Institution Chooses To Fund Expenses For Secular Groups, It Cannot Refuse To Fund The Same Activities For Religious Groups (I.E., Refreshments, Books, Advocacy Measures)

Freedom Of Conscience

After National Institute Of Family And Life Advocates, Government “Must Not Be Allowed To Force Persons To Express A Message Contrary To Their Deepest Convictions. Freedom Of Speech Secures Freedom Of Thought And Belief.” (Kennedy, Concurring)).

All Members Of The University Community Are Free From Compulsion.

PRIVATE RELIGIOUS INSTITUTIONS

What Constitutes Religious Instruction
Who Instructs Students in Religious Faith
Exemption from employment laws
Bostock

What Constitutes Religious Instruction

Institution May Decide That All Aspects Of Life Are Bound Up In Religion

Institution May Draw The Boundary Anywhere It Wants

Who Is Responsible For Religious Instruction

Institution Can Decide Who Has Responsibility For Religious Instruction

- Faculty (All Or Some)
- Student Affairs Administrators
- Coaches
- Senior Administrators

Exemption From Employment Laws

If The Religious Institution Says The Individual Is “Educating Young People In Their Faith, Inculcating Its Teachings, And Training Them To Live Their Faith Are Responsibilities,” Then That Position Is Exempt From Employment Laws

Bostock

For Purposes Of Title VII, “Sex” Includes Both “Sexual Orientation” And “Gender Identity.”

Significant Victory For The LGBTQ Community

Inapplicable To Those Positions That Would Qualify Under The “Ministerial Exception”

IV. SUPREME COURT'S PROMOTION OF CONSTITUTIONAL SOVEREIGNTY & CONSTITUTIONAL GRACE

Constitutional Sovereignty & Constitutional Grace

LGBTQ Context

Religion Context

The Supreme Court's Vision

**DEFINITIONS OF
CONSTITUTIONAL SOVEREIGNTY
& CONSTITUTIONAL GRACE**

Constitutional Sovereignty

Americans Have An “Obsessive Distrust Of Government — *All* Government — And [The] Elevation Of Law Into The Ruling Power Of The State. Indeed, The Idea Of Law Itself As *Sovereign* Is The Key.”

Madison—“There Is A Degree Of Depravity In Mankind Which Requires A Certain Degree Of Circumspection And Distrust

Angels Do No Govern

The Constitution Is Sovereign (Ultimate Source of Power)

Contrast With Other Nations

United Kingdom—The Parliament Is The Sovereign. Parliament Can Do Anything

China—The Communist Party Is Sovereign

Iran—The Islamic Clerics Are Sovereign

Characteristics Of Constitutional Sovereignty

1. Limitations On Governmental Power (Textual Limitations, Separation Of Powers, Division Of Authority Between States And National Government)
2. Judicial Enforcement Of Limitations (Words On A Page Are Meaningless)
3. Limitations On How Judiciary Interprets The Constitution (Judges Simply Cannot Make Something Up)

Effects Of Constitutional Sovereignty

1. The Legislature Cannot Enact Certain Laws (Facial Challenges)
2. The Executive Cannot Enforce Laws In Certain Ways (As-applied Challenges)
3. Policy–Making Requires A Consensus (Majority Of Population, Majority Of States)

Constitutional Grace

Americans Must Aspire To “Civic Virtue, A Sense Of Domesticity, Natural Love, The Practice Of Human Virtue, The Improvement Of Public Conscience, Mutual Loyalty Among People, And A Feeling For A Piety Leaven Life.”

Madison—”There Are Other Qualities In Human Nature, Which Justify A Certain Portion Of Esteem And Confidence”

Lincoln—”Better Angels Of Our Nature”

Importance Of Constitutional Grace

Our Nation Will Not Function Unless Americans Have A “Spirit” That Is “Not Too Sure That It Is Right; Which Seeks To Understand The Mind Of Other Men And Women; Which Weighs Their Interests Alongside Its Own Without Bias.”

Characteristics Of Constitutional Grace

1. Dignity—Acknowledges “All Humans Are Created In The Image Of God And Therefore Of Inherent Worth.
2. Forgiveness—A “Willingness To Accept Genuine Difference, Including Profound Moral Disagreement.” Forgiveness Requires Us To “Live With Those We Regard As Damned.”

SOVEREIGNTY AND GRACE IN THE LGBTQ CONTEXT

Constitutional Sovereignty

1. *Romer* (1996)
2. *Lawrence* (2003)
3. *Windsor* (2013)
4. *Obergefell* (2015)
5. *Bostock* (2020)

Constitutional Grace

The Net Effect Of These Decisions Is To Ensure That All LGBTQ Americans Have Inherent Dignity And Other Americans Must Forgive Their Disagreements Over Behavior And Marriage.

SOVEREIGNTY AND GRACE IN THE RELIGION CONTEXT

Constitutional Sovereignty

1. *Hosanna Tabor* (2012)
2. *Trinity Lutheran* (2017)
3. *Masterpiece Cakeshop* (2018)
4. *Espinoza* (2020)
5. *Our Lady* (2020)
6. Covid Church Cases (2020 & 2021)

Constitutional Grace

By Invalidating The “Blaine Amendments” In Various State Constitutions, *Espinoza* Ensures That Government Treats All Religious People With Equal Dignity. Born In The Anti-Catholic Bigotry Of The Late Nineteenth Century, The Blaine Amendments Treated Religious Organizations Differently From Similarly Situated Secular Organizations.

THE SUPREME COURT'S VISION

Bostock Embodies The Vision

LGBTQ—Title VII Protects Against Sexual Orientation And Gender Identity Discrimination In Private Sector Employment

Religion—Court Was “Deeply Concerned With Preserving The Promise Of The Free Exercise Of Religion Enshrined In Our Constitution” And Raised The Possibility That Religious Liberty Claims May Result In Different Outcomes In Future Cases.

Court's Ultimate Message—America is “Wide Enough”

Red States And Blue States,

Urban And Rural

The Secular And The Sacred,

The New Immigrant And The Tribal Nations,

The Descendent Of Slaves And The Descendent Of Pilgrims,

People Of Faith And People Of No Faith,

Those Who Remember Pearl Harbor And Those Who Do Not Remember 9-11,

The Critical Race Theorist And The Constitutional Originalist

The Gay And The Straight

Those Who Accept Their Biological Sex And Those Who Think Gender Is Fluid

QUESTIONS?



CONTACT INFORMATION

Email Address: William.Thro@UKy.Edu

Twitter: @WilliamThro

I am also on Social Science Research Network



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