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PERSPECTIVE

2020: COVID-19 versus the First Amendment

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In 2020, the COVID-19 pandemic challenged, tested and transformed nearly every facet of American life. Constitutional jurisprudence was not immune to these forces. Governments attempted to slow the virus through bans on gatherings and shutdowns of "nonessential" activities, including worship. In an evolving series of cases, these restrictions compelled the U.S. Supreme Court to clarify prior precedent and confront the extent to which the government may use its police powers to place limits on religious gatherings during an emergency.

In 1990, the Supreme Court held in *Employment Division v. Smith* that laws infringing the free exercise of religion will be subject to only rational basis scrutiny, so long as the laws are neutral and generally applicable. 494 U.S. 872. Laws that are not neutral and generally applicable are subject to strict scrutiny. The impact of the *Smith* dichotomy cannot be overstated: Laws subject to rational basis will almost always be upheld and laws subject to strict scrutiny will almost always be struck down. Nonetheless, neither *Smith* nor later opinions provided much guidance regarding what it means for a law to be "neutral and generally applicable."

COVID, however, has forced the Supreme Court to repeatedly confront the meaning of *Smith* and consider whether its 1905 decision in *Jacobson v. Massachusetts* stands for the proposition that the government should be given greater deference to infringe constitutional rights during an emergency. 197 U.S. 11. The court's reasoning on both issues evolved during the course of the pandemic.

Soon after states began implementing COVID lockdowns, the Supreme Court began hearing constitutional challenges. In May and July, the court denied emergency applications for relief in two cases challenging restrictions on churches. In *South Bay United Pentecostal Church v. Newsom*, California's orders prohibited churches from operating at more than 25% capacity or 100 attendees. 2020 DJDAR 4844. In *Calvary Chapel Dayton Valley v. Sisolak*, Nevada restricted churches to 50 attendees, while casinos operated at 50% capacity. 2020 DJDAR 7842.

Although these cases were evaluated under the higher burden applicable to emergency applications, observers — including lower courts — took these cases as a sign that the Supreme Court was prepared to give a liberal interpretation to neutrality/ general applicability and was willing to afford the government great deference to take measures to combat the pandemic. There was ample support for this view. In both cases, the restrictions on churches were upheld despite the fact that secular activities — for example, casinos and malls — were subject to less restrictive measures. Chief Justice John Roberts' concurring opinion in *South Bay* suggested that such restrictions on churches could still qualify as neutral and generally applicable, so long as similar restrictions applied to *some* categories of secular conduct, such as theaters. Furthermore, the chief justice's citation to *Jacobson* was taken as suggesting that, during a pandemic, strict scrutiny should give way to deference to the executive.

However, in November— shortly after Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg — the Supreme Court issued more thorough opinions giving a contrary reading to *Smith* and *Jacobson*. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the court addressed a legal regime pursuant to which New York severely limited attendance at worship services in certain "zones." 2020 DJDAR 12626. Finding the regime to not be neutral and generally applicable, the court enjoined enforcement of the laws. In so holding, the court relied on the fact that secular businesses — including garages, acupuncture facilities, and other activities deemed "essential" — were subject to less restrictive measures than houses of worship. Unlike in *South Bay*, it did not matter to the court that some comparable secular activities — such as theaters — were subject to similar restrictions. The opinion may suggest that the court is of the view that the First Amendment confers on religion the equivalent of most-favored-nation status: Religious activities cannot be treated less favorably than any secular conduct that endangers the same interest being advanced by the state. The court also rejected — implicitly in the per curiam opinion and explicitly in Justice Neil Gorsuch's concurrence — the concept of *Jacobson* deference.

The decision in *Brooklyn* had a significant effect on the lower courts. In the two months after *Brooklyn* was decided, at least five circuit courts and fourteen district courts cited to the decision. For example, in *Calvary Chapel*, the 9th U.S. Circuit Court of Appeals cited *Brooklyn* as its reason to enjoin Nevada's restrictions on houses of worship because *Brooklyn* "represented a seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020).

Interestingly, while the Supreme Court was willing to occasion a "seismic shift" in *Brooklyn*, the court later declined to further parse the boundaries of *Smith*. Just three weeks after the decision in *Brooklyn*, the court handed down a decision

in *Danville Christian Academy Inc. v. Beshear*, 2020 DJDAR 132409. The court refused to decide whether Kentucky's restrictions on religious schools were neutral and generally applicable when the same restrictions applied to secular schools but did not apply to a host of other secular conduct, including restaurants, gyms, and bars. The court held that it was unnecessary to reach the question, because the governor's school closing order would soon expire.

The Supreme Court's decision in *Danville Christian* following a year of substantial activity on free exercise issues may seem odd, but it could be a reflection of what is to come in 2021. This year the court will decide the continued validity of *Smith* in *Fulton v. City of Pennsylvania*. It could be that the court was reluctant to spend time further defining the contours of neutrality and general applicability in *Danville Christian* during a time when the viability of that test was under active discussion. It is uncertain what the court will do in *Fulton*. But — whether the court provides greater clarity about the *Smith* test or whether the court overrules *Smith* in its entirety — it is clear that 2021 will be another historic year for the free exercise clause. ■

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