

Two Views of Religious Liberty

Scott J. Ward, Esq., Gammon & Grange, P.C.

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	<u>The Emerging “Post-Liberal” View</u>	<u>The Traditional or “Permanent Things” View</u>
WHO?	<ul style="list-style-type: none"> - The character of the religious claimant limits the scope of religious liberty. - Churches – full <i>exemption</i>. - Other religious nonprofits – limited <i>accommodation</i>. - For-profits – <i>neither</i> exemption nor accommodation. - Individuals? - where is the religious exercise occurring? 	<ul style="list-style-type: none"> - The “free exercise of religion” is constitutionally and statutorily protected, regardless of who exercises religion and where and when that religious exercise occurs.
WHAT?		
<i>Religion</i>	<ul style="list-style-type: none"> - Religion is primarily a private activity, similar to a hobby. 	<ul style="list-style-type: none"> - Religion is an essential element of human experience.
<i>Religious Exercise</i>	<ul style="list-style-type: none"> - First Am. & RFRA protect only religious “worship.” 	<ul style="list-style-type: none"> - First Am. & RFRA protect all “free exercise of religion.”
<i>Religious Rights</i>	<ul style="list-style-type: none"> - Religious speech is protected mainly by the Free Speech Clause; little or no distinct protection under Religion Clause. 	<ul style="list-style-type: none"> - Religious exercise is protected primarily by the Religion Clause, but also implicates Free Speech, Free Press, and Free Association doctrines under the First Amendment.
WHERE?		
<i>Private vs. Public</i>	<ul style="list-style-type: none"> - Religious exercise occurs in private (compartmentalized). - Occurs primarily in religious settings (e.g., churches). 	<ul style="list-style-type: none"> - Religious exercise may pervade all of an adherent’s life - Occurs outside as well as inside religious settings.
<i>Common Civic Life</i>	<ul style="list-style-type: none"> - All of the “public” sphere / civil society / common civic life is a “governmental” sphere subject to government control. 	<ul style="list-style-type: none"> - Much of the “public” sphere / civil society / common civic life is properly <i>outside</i> government control.
<i>Commercial Spaces</i>	<ul style="list-style-type: none"> - By entering “commercial” contexts, individuals voluntarily and substantially waive or curtail their religious rights as a condition for entry and participation. 	<ul style="list-style-type: none"> - Individuals retain their religious liberty rights even in “commercial” contexts. What controls is whether the <i>exercise</i> is religious, not whether the <i>context</i> is religious.
WHEN?	<ul style="list-style-type: none"> - Religious exercise is a private activity that occurs primarily during religious services and other expressly religious activities. 	<ul style="list-style-type: none"> - Religious exercise pervades all of an adherent’s life and includes religious activities at times and in contexts outside of religious services and private religious settings.
HOW?		
<i>Claims</i>	<ul style="list-style-type: none"> - Most current religious claims (e.g., Hobby Lobby) are “complicity” claims. (“I don’t want to be complicit in X.”) 	<ul style="list-style-type: none"> - Most current religious claims involve government efforts to coerce religious belief, to compel (or forbid) religious speech or expression, or to burden or limit religious exercise.
<i>Injuries</i>	<ul style="list-style-type: none"> - The primary (or only) injury to the religious claimant is purely a “dignitary” injury to the claimant. But exempting or accommodating the religious claimant’s religious exercise imposes equal or greater “dignitary” injuries on third parties. 	<ul style="list-style-type: none"> - First Amendment does not require balancing of all possible “dignitary” injuries but rather prohibits coercion of religious exercise. Only balancing is express RFRA LRM/CSI test.