



1994

Religious Liberty in the Balance

Mark G. Yudof

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Mark G. Yudof, *Religious Liberty in the Balance*, 47 SMU L. Rev. 353 (1994)
<https://scholar.smu.edu/smulr/vol47/iss2/6>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

RELIGIOUS LIBERTY IN THE BALANCE*

Mark G. Yudof**

Religious Liberty Luncheon
American Jewish Congress (Dallas, Texas)
May 25, 1993

I am delighted to be able to help the American Jewish Congress honor Professor Neil Cogan, a staunch defender of civil liberties and a first-rate legal educator. When Neil was appointed as an Associate Dean at SMU, I was certain that he was an exception to Dean Erwin Griswold's rule that an associate dean is a mouse studying to be a rat. Now that he is leaving to go to Bridgeport, I am not so sure.

The topic of "Religious Liberty in the Balance" has long been an interest of Professor Cogan. My brief remarks today concern the nature of law and the place of rules in the quest for justice. In my view, a flawed concept of legal rules is the root cause of the Supreme Court's misguided reformulation of principles of free exercise of religion.

Justice Oliver Wendell Holmes once stated that "[t]he law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them."¹ God weighs the good and evil in each person, probing moral worth, penetrating the mind and soul, and ignoring surface characteristics. Judgment is passed on each mortal, one soul at a time, and God need not be evenhanded or consistent or bound by prior decisions. He assesses a whole person and a whole life, not particular deeds.

Judges of this world, however, are less insightful, more circumscribed, and, perhaps, less forgiving. They are incapable of judging total human worth—even if they had the hubris to do so. They aspire only to treat people with equal dignity and respect, or, if you will, with equal protection. The core idea is that society will treat similarly situated individuals in the same manner, and this commitment is embodied in general rules, impartially enforced. If a Mexican American, a Jew, or a senior citizen owns a \$100,000 home in Dallas, their property taxes should be the same as for a young white

* Dean Yudof and the *SMU Law Review* dedicate this essay to Neil H. Cogan, Dean of Quinnipiac School of Law in Bridgeport, Connecticut. Before being appointed Dean at Quinnipiac, Dean Cogan served as professor and associate dean of the SMU School of Law. During his time at SMU, Dean Cogan's contributions to the school were immeasurable. The *SMU Law Review* wishes Dean Cogan well in his new endeavor.

** Dean, University of Texas School of Law.

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (Little Brown 1946) (1881).

Christian with a home of identical value. If it is illegal for me to park within twenty feet of a fire hydrant, it should be illegal for you. We frequently argue about when two individuals are similarly situated—for example whether a young child should be treated like an adult under the law—but if we are to achieve fairness, uniformity of result, and predictability we must adhere to general rules. Sometimes we moderate the rules. But the impulse to be treated like others competes with our impulse to have our individuality and distinctiveness recognized.

How then should the judges of this world approach legal rules? One simplistic way of classifying judges is to say that they are divided between idealists and agonizers. The idealists appear to have fixed rules and to reject an approach that seeks to balance different interests. Justices Douglas and Black, generally liberal justices, were idealists, holding, for example, that freedom of speech is absolutely protected. Justice Powell, on the other hand, was the consummate agonizer. His vote was often difficult to predict, and he tended to focus on the specific facts of a case and to weigh carefully the competing harms and benefits. On the Warren Court, the liberals tended to be idealists and the conservatives the agonizers. Today, however, on the Rehnquist Court, the roles are reversed. Conservatives like Justices Scalia and Thomas tend toward idealism; moderates or liberals like Justice Blackmun, Justice Souter, and Justice O'Connor tend to be the agonizers.

In my own judicial philosophy, I confess that I am a card-carrying agonizer, and I believe it is a mistake for judges to ignore the contextual variables in determining whether the state or an individual should prevail in some controversy over the scope of constitutional rights. For example, freedom of speech, is not now, nor has it ever been, absolute. We still punish people for perjury, solicitation of a felony is a crime, and false and misleading advertising does not receive legal protection. We also hold individuals accountable for written and oral contracts. All of these matters involve the regulation of speech. So too, I believe it is a mistake in the context of the free exercise of religion. Two specific examples illustrate this point. First, in *Employment Division v. Smith*² the Supreme Court adopted a crabbed vision of the free exercise of religion that undermines our religious freedoms. Second, the enactment of hate crimes legislation is a useful technique for protecting religious liberty.

The *Smith* case arose out of Oregon's attempt to deny Alfred Smith and Galen Black, both members of the Native American Church, unemployment compensation. Smith and Galen were dismissed by their employer, a drug rehabilitation agency, because they used peyote in the sacraments of their church. Peyote is a controlled substance in Oregon. Under the circumstances, Oregon law did not allow them to receive their unemployment benefits. The Oregon Supreme Court held that the law was unconstitutional as applied to Smith and Black because it violated the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibit-

2. 494 U.S. 872 (1990).

ing the free exercise thereof.”³ A six-person majority of the U.S. Supreme Court reversed the Oregon Supreme Court and held that the plaintiffs’ rights had not been violated.⁴

In some ways the Court in *Smith* was presented with a conventional free exercise problem. The law for many years had been that when a state interferes with a person’s religious liberty the state must show a compelling state interest and that there is no less burdensome alternative for it to achieve its objective.⁵ The courts were to weigh competing interests, but the judicial thumb was clearly on the side of the free exercise of religion. Within this framework, it is clear that laws against murder would be applied to a religious group that insisted on its constitutional right to sacrifice a virgin at each summer solstice. On the other hand, Amish parents were allowed a partial exemption from compulsory public schooling for their children after the eighth grade; the norms of the modern high school were counter to their religious way of life.⁶ Thus, in the context of *Smith*, the Court might reasonably hold that Oregon’s interest in preventing drug abuse outweighed the individual’s interest in the sacramental use of peyote. Perhaps you disagree—indeed, many states have exempted religious and medical uses of particular illegal drugs from the scope of their criminal laws. The particular outcome, however, is not the critical element of *Smith*. Rather its importance lies in the reformation of the calculus for decision.

Justice Scalia, idealist that he is, eschewed any balancing of governmental and religious interests.

[I]f prohibiting the exercise of religion . . . is not the object of [a tax or general regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . . [T]he right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability.”⁷

Thus, the specific facts of the case are not decisive. If the law is one that applies across the board, including religious practices, then the law is constitutional irrespective of its “incidental” effect on a person’s ability to practice his or her religion. It simply does not matter whether the religious practice involves the maiming of children or some obscure provision of a building code; the state always prevails if it has a legitimate interest and expresses that interest in broad enough terms.

What is wrong with this approach? There are many problems. First, the constitution does not say that a person is free only to believe in his religion; it says that he or she has the right to exercise their religion. To exercise is to act, and yet the Court holds that the state’s rules always trump the individual’s conduct. The textual support for the *Smith* opinion is weak.

3. U.S. CONST. amend. I.

4. *Smith*, 494 U.S. at 890.

5. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BRIG. YOUNG UNIV. L. REV. 221, 231-33.

6. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

7. *Smith*, 494 U.S. at 878.

Second, we already have an equal protection clause. The First Amendment does not say that the state may not favor some religions' practices over others; it says that everyone, of whatever religion, may exercise his or her religion. If the constitution contained a provision that everyone had the right to play a sport, how is that right protected by a rule that the state may not favor tennis players over wrestlers?

Third, how is one to know whether the lawmaker was motivated by an animus against a particular religion if the law is facially neutral? For example, suppose a state passes a law regulating the slaughtering of animals in such a way that no kosher meat can be produced. How does one ascertain whether the motive was to punish the Jews or to protect the animals? And what if state law forbade all surgery by those without medical licenses or simply forbade circumcision by the unlicensed? If the state's larger objective can be achieved by an alternative or narrower law, why should the state's interest automatically prevail over the serious infringement of the rights of observant Jews?

Fourth, the *Smith* formulation leaves non-mainstream or atypical religions in the most vulnerable position. Literally read, if a state passed a law prohibiting the sale and consumption of all alcoholic beverages on Sunday, Justice Scalia would have to hold that that general law could be applied to sacramental wines in Christian communion services. But the point is that this is very unlikely to happen. Mainstream religions with many adherents are likely to receive sensitive treatment from state legislative bodies and to be granted exemptions. Politicians respond to strong constituent groups. Hari Krishnas, Muslims, and Mennonites are much more likely to fail in garnering legislative support. Thus, in operation, the neutrality principle tends to protect the politically powerful at the expense of the politically weak.

How does one explain the *Smith* result? The explanation is fear, fear of anarchy, fear of operating without rules, fear of judicial discretion. Justice Scalia is fearful that every individual—or at least too many—would try to put his or her conscience above the civil law. Obviously, no system of government could survive in such a regime. He also is fearful that judges will be unable to distinguish a genuine and central religious tenet from an insincere or peripheral aspect of religious dogma. And finally he perceives that the compelling interest test, involving a balancing of the different interests, sets judges free to do their own will and not to conform their decisions to law. In other words, the law becomes indeterminant and unpredictable.

I understand these fears, and to some extent, share them. This is why we need rules, and judges should not be free to do whatever they think is best or to dispense justice in accordance with divine revelation. But the old balancing test, weighing the individual's religious liberty more heavily than the state's interest, is such a rule, and it is a rule that comports with the text of the constitution and the necessities of ordered liberty.

The *Smith* approach, justifiably, is under fire, and, I applaud the enact-

ment by Congress of the Religious Freedom Restoration Act.⁸ I also applaud the efforts of the American Jewish Congress to secure that enactment.⁹ But there are many arenas in which the quest to protect religious liberty is being fought. In my judgment, common sense tells us that the selection of a crime victim on the basis of his or her race, ethnicity, or religion is a greater harm than just the harm to the individual, however heinous the crime. In today's jargon, it does not take a rocket scientist to understand that drawing a swastika on a synagogue wall is different than drawing a tulip on the wall of an apartment complex. Both may be vandalism, both may be defacement of private property, but the harm to each of us is greater when the crime also involves discrimination. The crime rooted in prejudice tears more at the social fabric; it threatens the end of tolerance and the instigation of further intolerance. If the punishment should fit the crime, the polity should be able to protect itself and its people from such incremental societal harms by enhancing the punishment over garden-variety maledictions. A hate crime is not a matter of speech, an effort to punish bigots for their thinking, an attempt to create favored classes of victims, or a departure from general rules; rather it reflects our collective dismay at the collective harm emanating from hate crimes.

In the real world, balances must be struck, accommodations reached. There simply is no refuge in a false retreat into formalism and rule myopia. Our constitution and laws should reflect the realities and complexities of religious liberty. Judges should recognize that the law is no less the law for protecting particular groups or lacking in absolute certainty. Perhaps they should look to the words of Benjamin Cardozo:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. . . . As the years have gone by . . . , I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the [judicial] process in its highest reaches is not discovery, but creation.¹⁰

The judicial process requires judgment and from this there is no escape.

8. Pub. L. No. 103-141, 107 Stat. 1488 (1993); see Laycock, *supra* note 5.

9. See Hilltel Kuttler, *U.S. Senate Passes Religion Law*, JERUSALEM POST Oct. 28, 1993; Larry Witham, *Religious Freedom Restoration Act*, WASH. TIMES Oct. 28, 1993, at A5.

10. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

