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Is Constitutional Jurisprudence Hostile to Religion?

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IS CONSTITUTIONAL JURISPRUDENCE HOSTILE TO RELIGION?

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The question facing this panel is whether the First Amendment is hostile to religion. My initial response to that question is that the First Amendment is not hostile to religion. To the contrary, as Dean Edward Gaffney notes, the words of the First Amendment are favorable to religion by expressly stating that the government may not abridge the free exercise of religion.[1] On the other hand, the First Amendment is hostile — although I would prefer to say "unfriendly" — toward government establishment of religion, which is expressly prohibited by the words of the First Amendment. And I think it is worth repeating a point that was addressed by other participants of this Conference, and in other places, and that is that the unfriendly stance that the First Amendment takes toward government establishment of religion may actually be favorable to religion in some respects. Certainly many deeply devout persons believe that government and religion should be kept apart because government involvement in religion, in any religion, tends to degrade its spiritual vitality. As James Madison put it: "[R]eligion and Government will both exist in greater purity the less they are mixed together."[2]

A dramatic example of that is school prayer. I do not mind admitting that I went to school in the days before the Supreme Court ruling that prayer in school was unconstitutional.[3] And back in those times, we would come to school every morning, report to our homerooms — I think we had to be there by 8:45 — sit down, and then promptly say the Pledge of Allegiance, have a reading from the Bible, and recite the Lord's Prayer in unison. In fact, in tenth grade I had the honor of being elected chaplain of my homeroom. Being

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1. Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).

2. Letter from James Madison to Edward Livingston (July 10, 1822), *in* 3 THE JAMES MADISON LETTERS 273, 275 (New York, Townsend MacCoun 1884).

3. *See* Engel v. Vitale, 370 U.S. 421 (1962) (holding that nondenominational school prayer constitutes establishment of religion in violation of the First Amendment).

totally unqualified for that post, I think that my classmates' vote was some sort of perverse antireligious joke. In any event, it was actually my job for an entire school year to read the Bible every morning and to lead my classmates in prayer each day. And from that experience I can assure you that while I was reading the Bible, all of my classmates were either trying to get their homework done at the last minute, writing notes to one another, or gazing out the window in a sleepy reverie that turned a deaf ear to the Bible reading for the day. As far as the Lord's Prayer was concerned, we mumbled our way through it in a rote, mechanical fashion, mispronouncing words and paying no attention along the way. If anything, the entire exercise was demeaning to religion, and demonstrates that any hostility the First Amendment has towards government establishment of religion actually is quite beneficial to religion itself.

The First Amendment, however, like many other constitutional provisions, is rather general. So, of course, the real question that is posed to this panel is whether the First Amendment as interpreted and applied by the Supreme Court is hostile to religion. Unquestionably, in recent years, the Supreme Court has become less tolerant of the free exercise of religion — especially the exercise of minority religious practices — while on the other hand, the court has become more sympathetic to government establishment of religion.

In free exercise cases, the tide turned dramatically last year when the Supreme Court decided *Employment Division v. Smith,*[4] which held that it does not violate the Free Exercise Clause for a state to punish members of the Native American Church for engaging in a practice fundamental to their religious beliefs — the sacramental use of peyote.[5] In reaching the decision, five members of the Court, speaking through Justice Scalia, announced a new approach to free exercise issues. According to that approach, as long as a law is within the authority of government and is a neutral law of general applicability, it may be applied to individuals to prohibit them from engaging in behavior that is fundamental to their religious beliefs.[6]

The approach in the *Smith* case seems to do away with any constitutional religious exemptions from generally applicable laws, which is something that Professor Marshall has advocated in several

4. 494 U.S. 872 (1990).
5. *Id.* at 903-07.
6. *Id.* at 876-78.

articles prior to the *Smith* decision.[7] Even before *Smith*, the Supreme Court was rather grudging in recognizing any religious exemption. It rarely did it, but there were a few exemptions prior to *Smith* that the Court had recognized and allowed. One, of course, in *Wisconsin v. Yoder*,[8] exempted members of the Amish faith from compulsory school attendance laws,[9] and on several other occasions, the Court had recognized that Sabbatarians could be exempted from unemployment compensation requirements.[10] In *Smith*, the court attempted to distinguish *Yoder* rather than overrule it[11] and barely stopped short of overruling the unemployment compensation cases.[12] But it is doubtful that any of these cases, including *Yoder*, would be decided the same way today.

Professor Gerald Gunther has described the *Smith* approach as "obviously mark[ing] a significant departure in free exercise adjudication."[13] Professor Michael McConnell has described it as "undoubtedly the most important development in the law of religious freedom in decades."[14] The *Smith* approach is so significant because it abandons a previous rule that required the government to demonstrate a compelling state interest for laws that seriously impinged upon the free exercise of religion.[15] And the *Smith* case also is significant because it forsakes the approach championed by Justice

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7. *See, e.g.*, William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90) [hereinafter Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*]; William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 547 (1983).

8. 406 U.S. 205 (1972).

9. *Id.* at 234-36.

10. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

11. Employment Div. v. Smith, 494 U.S. 872, 881 & n.1 (1990). The *Smith* court stated that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children, see *Wisconsin v. Yoder* . . . .

Id. at 881 (citations omitted).

12. The Court in *Smith* stated that "in recent years we have abstained from applying the *Sherbert* test . . . at all." *Id.* at 883.

13. GERALD GUNTHER, CONSTITUTIONAL LAW 1584 (12th ed. 1991).

14. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

15. See Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) for the so-called *Sherbert* test used in free exercise challenges. *See also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). The *Smith* Court refused to apply the *Sherbert* test to this challenge, holding that the test is no longer appropriate in free exercise challenges to generally applicable criminal laws. *Smith*, 494 U.S. at 884-85.

O'Connor which allowed the government to accommodate religious belief in some circumstances.[16] Here is what the student editors of the *Harvard Law Review* have to say about the Supreme Court's new approach in the *Smith* Case:

> This interpretation of the free exercise clause almost completely obliterates the Court's vital role as a protector of minority religious interests. . . . *Smith's* sophistic disregard of decades of precedent marks the arrival of an activist Court characterized by inattention and even hostility toward civil liberties. . . . This holding interprets the free exercise clause as a mere *pro forma* guarantee and effectively abandons the once "fundamental" liberty of religious conscience . . . .[17]

Now, those are pretty strong words, especially from a publication as stodgy as the *Harvard Law Review* — or, at least, that used to be kind of stodgy. Still, I think it cannot be denied that the Supreme Court's ruling in *Smith* does substantially reduce the constitutional protection previously afforded by the Supreme Court to religious practices. It is a change in the law; it is an extremely significant change in the law; it substantially reduces the constitutional protection that the Supreme Court previously had granted to religious practices. Professor Marshall says that the ruling in *Smith* is not hostile to religion because "there is no antagonism in equal treatment."[18] I would suggest, though, that to apply a law or a rule that superficially seems equal, but to apply it to persons who are in unequal positions, results in an inequality and a certain degree of hostility. So I think that the *Smith* case is a significant turn against religious freedom, against the free exercise of religion, that does have a certain hostility toward religious practices.

Turning to the Establishment Clause, if we ask whether the Supreme Court is hostile or unfriendly to government establishment of religion, I think that the answer has to be that the Supreme Court's record here is schizophrenic. For a number of years, the Supreme Court has been severely splintered in Establishment Clause cases and often is unable to produce a majority opinion in these cases. The actual decisions in the cases are ludicrously inconsistent.

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16. In prior decisions, certain religious beliefs could be exempted from a state's general criminal prohibition where the practice did not " 'unduly interfere with fulfillment of the [proffered] governmental interest.' " *Smith*, 494 U.S. at 905 (O'Connor, J., concurring (quoting United States v. Lee, 455 U.S. 252, 259 (1982))).

17. *The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 129, 199-201 (1990).

18. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, *supra* note 7, at 409.

The Supreme Court has held that the government can finance bus transportation for parochial school students to and from school[19] but not on field trips.[20] The Supreme Court has held that the government may loan nonreligious textbooks to parochial school students,[21] but it may not lend other religious instructional materials such as maps, magazines, and tape recorders.[22] It is permissible to loan a book, but impermissible to loan a map. What about an atlas . . . a book of maps? The Court has prohibited state-sponsored prayer in school[23] but has given its approval to state-sponsored prayer in state legislatures, even when the prayer is recited for sixteen years running by the same Presbyterian chaplain.[24] In so holding, the Court is clearly favoring a particular faith, which supposedly is especially contrary to the Establishment Clause. I would like to know why prayer in school is not permissible but prayer in the legislature is perfectly all right; it seems ludicrously inconsistent to me. The Supreme Court has said that the Ten Commandments are "plainly religious"[25] but that the nativity scene is secular as long as it is surrounded by a few reindeer or candy canes.[26] How the Ten Commandments are religious but the nativity scene is secular is simply not clear to me. Of course, if they take away the candy canes and reindeer, then the nativity scene is religious and impermissible,[27] although a Chanukah menorah accompanied by a Christmas tree and a sign saluting liberty is nonreligious and permissible.[28] Obviously, the Supreme Court is not of a single mind in Establishment Clause cases; rather, it is severely splintered and inconsistent. But as previously mentioned, in some decisions the Court has moved toward allowing more ties between government and religion. Certainly, although there is this inconsistency, the trend is toward allowing more government establishment of religion. In 1988, in *Bowen v. Kendrick*,[29] the Supreme Court departed from precedent to uphold the constitutionality of federal grants to religious denomi-

19. Everson v. Board of Educ., 330 U.S. 1, 17 (1947).
20. Wolman v. Walter, 433 U.S. 229, 254 (1977).
21. Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).
22. *Wolman*, 433 U.S. at 229.
23. Engel v. Vitale, 370 U.S. 421, 421 (1962).
24. Marsh v. Chambers, 463 U.S. 783, 786 (1983).
25. Stone v. Graham, 449 U.S. 39, 41 (1980).
26. Lynch v. Donnelly, 465 U.S. 668, 685 (1984).
27. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 598-602 (1989).
28. *Id.* at 613-21.
29. 487 U.S. 589 (1988).

national organizations to provide counseling about premarital sex and pregnancy.[30] I think that decision was a clear departure from precedent that allows more government ties with religion. The Supreme Court is becoming more acquiescent to government-supported religion while becoming less tolerant of an individual's free exercise of religion. In all probability, James Madison would have viewed both of these developments as harmful and prejudicial to religion itself.

30. *Id.* at 617-18.