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ARE THERE LIMITS TO RELIGIOUS FREE EXERCISE?

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Religious freedom is one of the fundamental liberties in American constitutional jurisprudence. It was placed first in the text of the first 10 amendments of the U.S. Constitution, the Bill of Rights (1790): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This indicates that the religion clauses were solely intended to limit the law-making power of *Congress* and not any other branch of the state or federal governments. Beginning in the early-twentieth century, however, the Supreme Court began applying the First Amendment in a piecemeal fashion to *all* governments in the United States through the Fourteenth Amendment (1868). They did so by means of an interpretative technique called *incorporation*: because the Fourteenth Amendment refers to "liberty" that a state government should not abridge without due process of law, and because a state citizen is also a U.S. citizen, the Fourteenth Amendment incorporates the liberties found in the Bill of Rights, including religious liberty.

Current Jurisprudence and the Limits of Religious Liberty. Are there limits to this liberty? Should fundamentalist Mormons receive the state's official approval for their polygamous unions? Ought the government allow Muslim citizens to operate under Sharia law, or Christian theonomists under "biblical law"? Should these groups be allowed to operate contrary to, or independent of, the law of the land?

It is important to recognize that some laws in fact include exemptions. For example, soon after the Supreme Court denied the right of Native American religionists in Oregon to be exempted from the state's narcotics laws that prohibited the smoking of peyote (*Employment Division v. Smith* [1990]), the state legislature changed its drug laws to include a religious exemption. In addition, the Supreme Court has allowed religious exemptions to generally applicable laws. For example, in the case of *Wisconsin v. Yoder* (1972), the Court, employing the free exercise clause, carved out an exemption to the state's mandatory school attendance law and allowed Amish students to opt out after eighth grade. The Court reasoned that since the Amish community has a stellar record of rearing its children, the state had to prove that it had a compelling interest in abridging the free exercise rights of Amish parents. The Court concluded that Wisconsin failed to meet this burden.

In *Yoder*, the burden was on the state to provide really good reasons for not allowing the Amish to educate their children consistent with their own religious tradition. In *Smith*, the Court shifted the burden from the state to the person who was suing the state. So, all the state had to show in *Smith* was that its law is generally applicable (i.e., it applies to all citizens similarly situated) and neutral (i.e., it does not single out or target a specific religious practice). The fact that the law impeded a group's religious liberty was an incidental result of the law, and thus the law could not be declared unconstitutional simply for that reason.

So, under the Court's current understanding of religious free exercise, as long as a law is generally applicable and neutral, all the state needs is a rational basis (i.e., any remotely plausible reason) for a law that forbids or limits the practices of religious polygamists, theonomists, Muslims committed to Sharia, and others.

Free Exercise as a Dead Letter. The problem with this understanding is that it seems to make the free exercise clause a dead letter. That is, with the exception of a blatant case of the government targeting a

religion, a jurist can never effectively employ the free exercise clause to overturn generally applicable laws that are neutral but nevertheless limit or totally inhibit a citizen's religious free exercise. Many citizens think that the government ought not permit polygamists, theonomists, or Muslims to have their own legal system that is parallel to, and not under the authority of, U.S. or state law; but they also think that the government should have a greater burden in justifying its laws if those laws encumber one's religious free exercise.

Take, for example, *Catholic Charities v. State of California Department of Managed Health Care* (2004). Under California's Women's Contraception Equity Act, all employers in the state who offer their employees coverage for prescription drugs must also provide coverage for contraceptives. Catholic Charities (CC) did not want to provide contraceptive coverage as part of its prescription drug coverage because Catholic moral theology forbids the use of artificial contraception. Even though the law allowed for "religious exemptions," the exemptions were defined in such a way that they did not protect organizations like CC. These groups are religious in their origin, affiliation, and mission, but fall outside the scope of these exemptions because they employ and provide care for many outside their faith and do not engage in evangelism or preaching. When before the California Supreme Court, CC argued, among other things, that these exemptions were written in such a way that CC's free exercise rights were violated because it defined for CC and similar groups what counted as state-defined religious practice. Appealing to *Smith*, the Court rejected CC's case and ruled that the organization had to provide its employees with "benefits" that are used for purposes that CC's moral theology teaches are sinful.

The sole dissenter was Justice Janice Rogers Brown, who offered this blistering analysis:

> Here we are dealing with an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission. The government is not accidentally or incidentally interfering with religious practice; it is doing so willfully by making a judgment about what is or is not religious. This is precisely the sort of behavior that has been condemned in every other context. The conduct is hardly less offensive because it is codified….This is such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity.

Here's the problem: how do we protect the religious liberty of groups like Catholic Charities while allowing the government to pass apparently good laws that do restrict the religious practices of others? I believe that the answer lies in the American Founders' understanding of religious free exercise.

The Founders, Free Exercise, and Its Limits. America's founders were wise enough to understand that religious freedom could not be limitless. They also understood that this precious liberty should not be restricted unless the state could provide good reasons why these restrictions are justified. This is why the wording of free exercise provisions in state constitutions at the time of the founding of America typically allowed for the limitation of religious liberty if the prohibited actions would interfere with some aspect of the community's good. New York State's Constitution (1777) is typical in this regard: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, with this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

The reasoning is similar to what the Supreme Court employed in 1878 when it rejected the argument of Mormons that the free exercise clause protected their religious practice of plural marriage. In 1862, the U.S. Congress had passed the first of several antipolygamy statutes for the purpose of stopping the growing population of practicing Mormon polygamists in Utah. Because Utah was a U.S. territory at the time, the federal government had jurisdiction over Utah, and thus the First Amendment of the federal constitution could be applied to the antipolygamy statutes. (Today, because of incorporation, it would not matter whether it was a state or federal statute.)

In *Reynolds v. United States* (1878) the Court rejected the Mormons' free exercise argument on the grounds that even though "Congress was deprived of all legislative power over mere opinion,…[it] was left free to

reach actions [such as polygamy] which were in violation of social duties or subversive to the public good." What the Court meant by this is that certain institutions and ways of life, such as marriage and the family, are essential to the preservation of civil society. The government may craft its laws in such a way that certain practices receive a privileged position in our social fabric, and actions contrary to them should be prohibited or at least discouraged, even if they have religious sanction. Such practices as polygamy, same-sex marriage, adult incest, and child sacrifice, therefore, may be forbidden even if they arise from a religious understanding of the world; for they are actions that are deleterious to the public good.

On the other hand, the public good is undermined when citizens are forced to choose between the law and their religious practices when those practices do not undermine, and may very well advance, the public good. For example, when the Supreme Court in *Yoder* gave a free exercise exemption to the Amish, the public good was advanced. When Catholic Charities was forced by the California Supreme Court to pay for its employees' contraceptive use, however, CC was literally required to underwrite sexual practices that are overtly hostile to its own theological understanding, an understanding that is integral to a well-established tradition in moral philosophy. This ruling runs counter to the public good.

The Courts should return to the reasoning of the founders. It is a reasoning that allows for the widest possible religious free exercise consistent with preserving and protecting the public good. This, of course, will not eliminate debates on controversial questions over which reasonable citizens disagree. What it will do is provide us with a conceptual framework that puts teeth back into the free exercise clause while reintroducing us to the language of natural law, one that places a premium on the government's obligation to protect the intrinsic dignity of the person and advance the public good.

— Francis J. Beckwith