BYU Law Review

Volume 1993 | Issue 1 Article 13

3-1-1993

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Already in this Conference, one thing has become obvious. Religion Clause jurisprudence creates strange and shifting alliances and there is little predictability as to how one's political stance will affect one's approach to specific religion clause issues.[1] For example, I note that Professor Pepper is aligned with former Solicitor General Starr in a combined attack on *Smith*;[2] yet, I suspect, these two would disagree on most other constitutional issues, including those decided in *Lee v. Weisman*.[3]

Smith, of course, has been roundly attacked elsewhere and the previous presentations of Pepper and Starr suggest that it is likely to receive significant negative comment here. I am therefore tempted, as one of *Smith*'s few supporters, to spend my time defending the *Smith* decision. I do not plan to do so, however. Rather, I will test *Smith*'s validity by applying my understanding of the case to Establishment Clause issues. Specifically, I will attempt to reconcile how the rationale that I believe justifies *Smith* (i.e., the principle of equality of ideas) can be found inapposite when applied to Establishment Clause issues. To state the issue as succinctly as possible, I will discuss whether it is consistent to single out religious belief systems for adverse treatment under the Establishment Clause

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* Galen J. Roush Professor of Law, Case Western Reserve University. I would like to express my appreciation to Cole Durham and Fred Gedicks for organizing this Conference and honoring me with their invitation. I am especially grateful because Professors Durham and Gedicks are two of the most thoughtful and respected constitutional law professors in the country, and their work is some of the best there is. It is always a privilege to meet with them and exchange ideas. I am also pleased to once again be on the same panel as Steve Pepper. Professor Pepper and I have been disagreeing over religion clause issues for ten years, and I always learn much from our debates. Finally, it is an honor for me to be here with the former Solicitor General of the United States, Mr. Kenneth Starr.

1. *See* Michael W. McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987).
2. Employment Div. v. Smith, 494 U.S. 872 (1990).
3. 112 S. Ct. 2649 (1992).

if all belief systems are purportedly equal, as I have argued in my *Smith* defense.[4]

Of course, in one sense, this purported inconsistency is easily avoided. After all, the First Amendment's commitment to the equality-of-ideas principle applies when the ideas in question are those of private actors—not the government. The establishment restriction, on the other hand, applies only to government speech. Nevertheless, I think it fair to say that to the extent the establishment prohibition singles out religious ideas for adverse treatment, it runs counter to the general theory of the equality of ideas even if it does not run counter to specific constitutional prohibitions.

In any event, before addressing my central subject, let me quickly step back and explain how an equality-of-belief-systems notion works to justify *Smith*. My point, I believe, is best made by reference to two free exercise decisions decided prior to *Smith*.

The first case is *Wisconsin v. Yoder*.[5] In *Yoder*, the Court granted the Amish a free exercise religous exemption from compulsory school attendance. In its opinion, however, the Court was equally clear that persons who objected to compulsory education based upon secular principles would not be entitled to constitutional relief.[6] The second case is *Thomas v. Review Board*.[7] In *Thomas*, a person who protested, on account of his religious beliefs, having to work in an armament factory was granted a free exercise exemption from unemployment insurance requirements. Again the Court declared that if a person's objections were based on moral, philosophical, or political principles, she would not be entitled to constitutional relief.

My thesis, in defending *Smith*, was that these results were inappropriate in that they preferred one type of belief system (i.e., religious) over all others.[8] Why should religious objections to compulsory education or armaments work receive

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4. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) [hereinafter, Marshall, *Defense*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90).

5. 406 U.S. 205 (1972).

6. The Court used the example of followers of Henry David Thoreau to illustrate those who would not be entitled to constitutional exemption. *Id.* at 216.

7. 450 U.S. 707 (1981).

8. Marshall, *Defense*, *supra* note 4, at 319-20.

constitutional exemption from neutral laws of general applicability, while parallel secular objections based upon political, philosophical, or moral principle do not? Such a result, I argued, not only creates bad policy under the Free Exercise Clause, but also offends the central principle of freedom of speech—that there is an equality in the realm of ideas.[9] Under this principle, all ideas, regardless of whether they are based on religious or secular beliefs, should be entitled to equal constitutional status.

This "equality of principle," it should be noted, does not always work to the detriment of the religious claimant as it did in *Smith*. In other circumstances, it may work to vindicate the religious claimant. For example, in *Widmar v. Vincent*[10] the Court held that the equality principle prohibited religious speech from being singled out for disfavored treatment under the Free Speech Clause. Indeed, the lesson after *Smith* and *Widmar* might well be that the commitment to the principle of the equality of ideas exists in two of the clauses of the First Amendment—Free Exercise and Free Speech. As we shall see, however, the principle has not been applied to the Establishment Clause.

In *Lee v. Weisman*,[11] Justice Kennedy, comparing freedom of religion and freedom of speech, wrote as follows:

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.[12]

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9. *Id.* at 312-13; *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 25 (1975).
10. 454 U.S. 263 (1981).
11. 112 S. Ct. 2649 (1992).
12. *Id.* at 2657 (citations omitted).

In short, secular ideas can win, while religious ideas cannot.

Justice Kennedy's opinion, for the most part,[13] is descriptively accurate. The question is how can this announced inequality, supposedly mandated by the Establishment Clause, be justified? Two possible answers are immediately apparent. The first is textual. The Establishment Clause applies only to religion. The second is common sense. I am aware of no one who actually believes that an anti-establishment provision is not, at least in some sense, beneficial. No one is arguing for theocracy. Text and common sense, however, while providing quick answers, do not set forth the underlying rationale. What is it that supports the contention that religious ideas may not prevail in the political process while secular ideas may prevail?

A number of nonpersuasive reasons might be offered to support this contention. One such reason might be that religion is not political, and therefore, its exclusion from the political process is not troublesome. This contention, however, fails on a number of counts. First, freedom of speech protects not only political speech, but also other kinds of speech.[14] Second, and more importantly, religion *is* political. The religious idea presented in *Thomas*, that a person should not work in an armament factory, is politically laden. Similarly, the religious belief advanced in *Bob Jones University v. United States*,[15] that it is appropriate to engage in racial discrimination, is, under any definition, political. Moreover, even when religion is not overtly political, religious ideas have political effects. Religious principles inform the morality which in turn informs the political process.

A second justification for excluding religious ideas from the political process might be that such ideas are not dialogic. This contention is also not persuasive, and it is descriptively inaccurate. Religion can, and often is, susceptible to reasoned and dispassionate discussion. Moreover, and in any event, dialogic qualities are not the touchstones of First Amendment

13. While Justice Kennedy is correct that religious ideas may not "win" in the political process, he may have overstated the ability of non-religious ideas to prevail. As Justice Jackson wrote in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943), "[i]f there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

14. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

15. 461 U.S. 574 (1983).

protection. I need not repeat the statement that was protected in *Cohen v. California*,[16] but the utterance was clearly not a model of rational and dispassionate debate.

A third argument for excluding religious ideas from the political process might be that religion depends on a different epistemology than does speech. While speech depends on notions of rationality, religion purportedly depends upon non-rational belief. This is an interesting and complex objection to which we could devote a significant amount of time. Fortunately, however, Professor Gedicks has already done our work for us. In a recent article, he thoughtfully refuted the epistemology contention, and in my opinion he is right.[17] In a postmodern world with no notion of objective truth, one cannot claim that rational precepts are epistemologically superior to non-rational beliefs. The argument simply does not work.

A fourth position might be that religious ideas are especially dangerous. Again this is unconvincing. Although we shall subsequently return to a discussion of how religious volatility may be of special concern,[18] the dangerousness of *ideas* cannot automatically distinguish religion from non-religion. Certainly religious ideas can be dangerous, but so are many non-religious ideas. After all, as Holmes stated, "every idea is an incitement."[19]

A fifth argument might be that religious ideas can threaten religious freedom. Descriptively this is, of course, accurate. There are existing religious systems which profess that their word is the only word, and that every other word is heresy and should be destroyed. Undoubtedly, these ideas threaten religious freedom. But again, in speech clause jurisprudence, the fact that some speech might threaten or attack freedom of speech does not remove that form of speech from constitutional protection.[20]

A sixth justification alluded to by Professor Pepper is that religion should be separated from government because when religion gets involved in government, religion itself is weakened. Under this theory, the anti-establishment mandate

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16. 403 U.S. 15 (1971).

17. Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

18. *See infra* notes 23-26 and accompanying text.

19. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

20. *See, e.g.*, Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

is designed not only to protect government from religion but also to protect religion from government. From this angle, treating religion differently than speech might be defended as a pro-religion position.

This contention does come with a strong pedigree. It was originally raised by Roger Williams and undoubtedly influenced the Framers. The position is also sound. Ideas do become compromised when they enter the political process. Nevertheless, I am not sure that even if government acceptance does dilute ideas, that this alone is a reason to impose a First Amendment restriction upon ideas entering the political marketplace. At best it suggests that religion is best served by imposing the limitation on itself.

Moreover, Justice Kennedy's opinion in *Lee* does not rely on the Roger Williams rationale. Rather, Justice Kennedy's explanation, in his words, "lies in the history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[21] It is in this passage that Justice Kennedy provides the compelling reasons why religion is not allowed to "win" in the political process, or in other words, why an equality-of-ideas principle should not be allowed to trump establishment concerns.

As Justice Kennedy's opinion suggests, when religion "wins," problems arise. The reasons for this were alluded to in two talks that have already been given. Both former Solicitor General Starr and Professor Pepper were concerned about the manner in which religion behaved.[22] Both of them brought up images of Bosnia and the ravages created when one particular religion controls government in a multi-religious society. Yet what is it about the union of religion and government that leads to such devastation? Let us quickly turn to this issue.

The religion clauses of the First Amendment and their history suggest a dichotomy. On the one hand, they represent the principle that religion and religious freedom are important and seminal to a free society. On the other, they suggest there is another side to religion—one that creates a special danger

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21. *Lee*, 112 S. Ct. at 2657.

22. Kenneth G. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 B.Y.U. L. REV. 1; Stephen L. Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV. 7, 61 & n.166.

that is ultimately threatening to freedom.[23] This danger, however, does not stem from the substance of religious ideas. Rather, the danger arises from how the individual utilizes religion in structuring her existence—how in essence the believer uses religion to define herself. The specific tenets of belief (religious ideas) are in many cases wholly irrelevant to the self-defining process. Indeed, religion, for some, is not a method of developing or examining one's beliefs at all. Rather, it is a method used to shield the believer from facing uncertainties. Religion, in the words of one sociologist, becomes a system of holding mechanisms that keep the believer from facing the questions which must terrify humanity—What is God? What is meaning? What is life?[24]

Because of this, some believers develop a passionate adherence to their beliefs which leads to an us-versus-them mentality with respect to those who do not share their belief systems.[25] Competing belief systems are then seen as threats to the individual's sense of self. For some, this means that the competing belief systems must therefore be attacked. When this happens the believer may seek to wholly eradicate the opposing belief systems which she feels are so threatening. In this way, religious persecution and intolerance are created not by the ideas of religion, but by the psychology of adhesion to religious beliefs—a psychology which seeks not to understand or address religious issues but rather to avoid them, paradoxically, by passionate and unquestioned devotion to them. This is the type of religious belief and reaction we have seen surface in India, Northern Ireland, the Middle East, and the Baltics. In this respect, it is worth noting that religious wars are many things, but they are seldom a battle over ideas.

The dangers created by the nature of unquestioned adherence to religious belief, moreover, are exacerbated because the believer becomes particularly susceptible to manipulation by government and political leaders. As I have suggested elsewhere,[26] it is not the religious leaders who advocate crèches at city halls, it is the political leaders. The

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23. *See* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. (forthcoming 1993).

24. JAMES BREECH, THE SILENCE OF JESUS 46 (1983).

25. *See generally* MIRCEA ELIADE, THE SACRED AND THE PROFANE (Willard Trask trans., 1959).

26. William P. Marshall, *Is the Constitutional Concern with Religious Involvement in the Public Square Hostility?* 42 DEPAUL L. REV. 305, 308 (1992).

lesson is clear: there is political hay to be made in appealing to the religious sentiments of the political majority.

It is because of this understanding of the dangers of religion that Justice Kennedy is right in acknowledging that there must be a special limitation which prevents religion from "winning" government. When the state is used to advance religion's self-reinforcement mechanisms, then the danger of coercion and oppression of opposing groups becomes paramount.

For this reason, I would suggest that my *Smith* argument—that total equality among belief systems is required by the First Amendment—is not fully accurate. The Establishment Clause does provide an exception. But I would not retreat from my position that there remains an overall commitment to an equality among ideas. The establishment prohibition is not based upon a concern with religious ideas but with potential religious behavior.

In a sense this is good news. Once it is realized that it is not the inclusion of religious ideas that triggers the establishment prohibition, but rather the attempt by religion to use government to reinforce its own "holding mechanisms" and tools of self-identification, then it makes sense that the establishment prohibition should not be applied to invalidate state laws only because those laws have some religious component. Thus, under this understanding, cases such as *Harris v. McRae*[27] or *Bowers v. Hardwick*,[28] which suggest that there is no Establishment Clause violation simply because the prohibitions on abortion or homosexuality have some religious basis, are correctly decided. Indeed, if religion's attempts to use the political processes to reinforce its self-identity are the crux of the establishment prohibition, then I might agree with former Solicitor General Starr when he said that *Lee v. Weisman* could come out differently if viewed as an equality-of-expression case rather than an attempt to get the government to promote religious practice. The key to the establishment inquiry quite rightly becomes whether government is being used to endorse religion, not whether there is any religious component to the challenged activity.[29]

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27. 448 U.S. 297, 298 (1980).
28. 478 U.S. 186 (1986).
29. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

In sum, the establishment prohibition does in some sense transgress the equality-of-ideas principle. However, the constitutionally imposed inequality is narrow and is not based upon a negative inference as to the inherent value of religious ideas or practices. It is based upon the danger of allowing religion, not religious ideas, to prevail in the political process.