AMERICAN JURISPRUDENCE AND THE RELIGIOUS LIBERTY TEMPTATION

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While religious liberty has always been a part of the American political and religious story, there is good reason to believe that we are in a particularly acute season of concern for the religious liberty rights of American citizens. Controversial issues such as same-sex marriage and government-mandated contraceptive health care have revealed deeply held differences about how to balance contested governmental interests and individual and communal religious scruples.

Historically these differences were usually tested when the religion being exercised was somewhat unusual, or cut against the grain of the majority culture. Thus many landmark religious liberty cases involve smaller religious sects: Mormons in 1879, Jehovah's Witnesses in the 1940s, Seventh Day Adventists in 1963, and Anabaptists in 1972. Small religious communities often appeal to the courts because they do not have the political influence to protect their interests in the legislature. Larger churches and faith groups do have this influence, or at least they used to.

Some members of these larger Christian denominations and churches may wonder whether their public influence is waning, and if so, what this means for the future of their involvement in

the public square on issues of moral import. Consider for example the HHS contraception mandate and the campaign to publicly recognize and promote same-sex marriage. Suppose a coalition of traditional Catholics, evangelical Protestants, Orthodox Jews and Latter-Day Saints fails to persuade their fellow citizens on the merits of their positions in the political and cultural sphere. Perhaps their best option is to forgo their public advocacy on the controversial topics themselves and instead work to protect their right to follow their religious beliefs within their own communities. If the battle for the larger public approach to an important issue is all but lost, then the next best thing may be to protect the religious liberty and conscience rights of individual citizens and religious groups. We may not succeed in persuading our fellow citizens that marriage is necessarily a union between a man and a woman, this line of thinking goes, but perhaps we can ensure that our churches will not have to conduct same-sex marriages or our parachurch organizations provide domestic partner benefits.

This tactical response to disappointing electoral and policy outcomes is understandable, but ultimately unwise. The same forces that have contributed to momentous changes in the cultural and political realities of marriage and contraception will not lose steam in the face of a religious liberty firewall. To untangle why this is the case we must ask some fundamental questions about what religious liberty means and consider how our constitutional tradition views religious liberty claims vis-à-vis compelling public interests as determined by legislatures and courts. It is to those questions that we turn.

II

What does it mean to be religious? What is a religious action? What does it mean, in the American political context, to freely exercise one's religion, such that we can know what it means to enjoy religious liberty? Religious freedom includes the right to hold whatever beliefs one finds true, but the scope of this freedom must go beyond mere thought to include actions as well. What actions count as religious?

Surely going to church or synagogue would count as genuinely religious, as would reading holy scripture in one's home or teaching the precepts of a religion to one's children. But what about citizens who open a hospital, or a school, in order to fulfill what they see as a scriptural mandate to care for the least of these? What about an Orthodox Jew who wants to rent a spare room but, for religious reasons, does not want to rent to an unmarried couple? What about a self-insuring Catholic charity that cannot in good conscience provide contraception to its employees through its health insurance? What about a family-owned evangelical business who holds the same convictions? Or a religious university that wishes to hire based on its religious scruples?

There are few religious liberty controversies when the liberties exercised take place in private. It is when citizens exercise their religious beliefs in public venues that potential conflicts arise. This brings us back to a previous question as well as two follow-up questions. What does it mean to be religious, what are the limits to religious freedom, and who decides what these limits are?

These questions reveal a tension within any meaningful attempt to protect and promote religious liberty. One the one hand, the Anglo-American religious liberty tradition has eschewed political interference with religion in part because governments are particularly ill-suited for deciding religious matters. On the other hand, some power must be authorized to determine the limits of religious behavior, else religion act as a cover for activities which would otherwise be universally condemned and prohibited. Any healthy regime for religious liberty must avoid heavy-handed governmental oversight and persecution on the one side, without enabling a religion-inspired, anarchic free-for-all on the other.

As with so much in the American political tradition, John Locke plays an important role here as he articulates this tension and provides a solution for it. In *A Letter Concerning Toleration*, Locke used scripture and logic to argue that the government has no role to play in regulating religious behavior and rites, given the proper definitions of what the state and the church are to be about.

Locke puts his rule thusly:

> As the magistrate has no power to impose by his laws the use of any rites and ceremonies in any Church, so neither has he any power to forbid the use of such rites and ceremonies as are already received, approved, and practised by any Church; because, if he did so, he would destroy the Church itself: the end of whose institution is only to worship God with freedom after its own manner.

In other words, the magistrate has no competence to rule on religious matters, and thus can't prohibit religious rites merely because they conflict with the magistrate's religious or political priorities. But this rule raises an immediate question that Locke anticipates and answers. What if there arose an odd religion that sacrificed infants, or virgins, or performed sexual rituals as part of its worship? Would not the state have to permit such activities given that they are religious and thus beyond the purview of the magistrate's domain?

> I answer: No. These things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting. But, indeed, if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law.

The reason, Locke continues, is that any man who owned a calf would be allowed to slaughter the calf at home for food or whatever non-religious reason that suited his fancy. Locke believed these acts mentioned in the hypothetical—infant sacrifice, ritual sex, etc.—are clearly wrong given the law of nature, and therefore no special religious knowledge is necessary to outlaw them. If a situation arose in which there was a genuine non-religious reason for a prohibition of animal sacrifice, then the religious as well as the non-religious home sacrifice of the cow could be justly prohibited.

Locke's problem is as follows: given that the state has no competency to judge religious matters, the magistrate should not restrict religious practices. Yet, if this is the case, how can the magistrate restrict abhorrent practices done in the name of religion? Locke's answer is that the magistrate can enforce a law that is enacted for non-religious reasons and that law, so long as it is not targeting acts because of their religious character, is legitimate and equally binding on acts regardless of the actor's motivation.

Religious liberty as practiced, then, is bounded by the larger cultural understanding of sound moral judgment as applied to questions of public policy. For Locke, these sound moral judgments were grounded in a robust version of natural law; a natural law that could provide government officials with moral judgments independent of any one particular religious tradition. So long as one's religious practices did not contravene the natural law, one was free to engage in those practices.

III

If this solution sounds at all familiar, it is because it is quite similar to the formulation developed by members of the United States Supreme Court. Consider the problem faced by the Court and Justice Antonin Scalia in a case involving two Native Americans fired for peyote use in *Oregon v. Smith*. At issue in the case was whether the government had any special obligation to ensure its laws did not hamper the free exercise of religion. The previous position of the court was that the Constitution protected religious activity such that laws had to pass a "compelling interest" test if they were found to adversely impact religious exercise, regardless of whether that religious exercise was targeted by the legislation. This test would only apply if the action under consideration, say wearing a yarmulke in military service or peyote, is "central" to a citizen's religion. If a government law or regulation adversely impacted religious activity without serving a compelling governmental interest, then that law or regulation was deemed unconstitutional and the burden was on the government to accommodate the religious exercise in question.

Scalia's decision struck down this prior understanding. Part of the problem of the case, he noted, is that American jurisprudence recognizes the deeply rooted principle previously mentioned: the government is not competent to judge religious matters. Yet, Scalia asked, how could the government avoid looking into religious matters if what counted was the centrality of a given action in a religion?

The alternative, if the government does not look into the centrality of a religious belief, is to allow for just about any action to be exempt from legal oversight if it is claimed as part of a religious practice. This leads to what Scalia called a "private right to ignore generally applicable laws" and, quoting an earlier case, permits any citizen to "become a law unto himself", contradicting "both constitutional tradition and common sense."

The Court's challenge was to make a ruling that kept the government from deciding what is and is not religious while also avoiding declaring a carte blanche right to avoid any law if the prohibited behavior could be claimed as religious. The Court's solution was that religious activity was not exempt from a generally applicable law that did not target religious activity as such. The previous interpretive position of the court required the government to show either that its laws did not adversely impact a citizen's religious exercise, or that the rationale for this adverse impact was overwhelmingly compelling. Such a position did not ensure the protection of citizens' free exercise, but it created a significant threshold that the government had to pass in order for the offending law to be upheld. The new paradigm changed this understanding such that the only salient issue was whether the legislation in question specifically targeted a religion or religious practice.

The situations faced by the Supreme Court in the peyote case and considered by John Locke in his *Letter* are not quite identical. Locke is much more concerned with the magistrate enforcing his religious views on the populace whereas the Court is dealing with citizens who might use their religious views to exempt themselves from the oversight, religious or otherwise, of the magistrate. Yet, different as the situations are, there is a common assumption that the government has no competence to judge religious matters and

therefore should refrain from doing so and instead protect the religious liberty of its citizens. The same objection is considered in both instances; namely that if the government is incompetent in religious matters, how can it restrict otherwise illegal acts motivated by religion?

Locke answers that the law of reason provides the epistemic means by which the sovereign can prohibit an immoral practice, while Scalia uses the language of "generally applicable" laws. Both mean that the law cannot target the prohibited practice because it is religious. Yet, and this is the crucial point, both approaches appeal to a wider public understanding of morality as grounding and defining the limits of religious behavior.

IV

We are now able to see the difficulties that contemporary religious conservatives may encounter if they proceed to relinquish the public policy debate in the public square and focus instead on a narrower defense of their religious liberties. For Locke's solution to the prospect of religious anarchy, echoed and instantiated in American jurisprudence by Scalia and his colleagues, is to frame the limits of religious freedom within the framework of an alternative and overriding source of morality. The contents of this other source of morality is determined, in part, by those very debates in the public square.

Whereas Locke's source was the natural law, Scalia's source is the will of the people as expressed in legislative statute. Scalia's formulation is more procedural than Locke's, as the law's purpose must be to secure a governmental interest without explicitly targeting a religious minority or religious practice. Locke assumes the magistrate can appeal to natural law to ascertain the morality of a given practice; Scalia assumes that the legislature, by definition, will pass laws that further some legitimate interest, and thus the Court's role is not to question the general morality of a given statute but to determine whether it is "generally applicable" or prejudicially narrow.

The tactical move from lobbying for the traditional definition of marriage in the legislature, to carving out religious liberty exemptions to the soon-to-be prevailing expansive view of marriage

is quixotic. Legislatively enacted religious liberty exemptions are as secure as the current make-up of whatever legislature has enacted them. They can be invalidated by a court ruling, changed by a subsequent legislature after an election or two, or merely left unenforced and undefended by an executive branch that finds the exemptions distasteful or not worth the political capital. Moreover, in the case of the marriage debate, the very political judgment that same-sex marriage is inevitable, given the cultural and political headwinds behind it, should give us cause to doubt that future legislatures will find it in their interests to maintain unpopular and putatively bigoted exemptions.

Of course the American tradition of jurisprudence has often seen the courts as the defender of fundamental rights that ought not be subject to the vagaries and shifting winds of popular opinion. Yet the courts are also a doubtful refuge for religious conservatives and their religious liberty claims. For the courts are just as likely, if not more likely, to find that marriage equality is a fundamental right as they are that religious liberty is a fundamental right. Religious conservatives living without statutory exemptions who go to court to protect their religious liberty claims will find themselves on wrong side of Justice Scalia's ruling in Smith. Same-sex marriage advocates who go to court to claim that religious liberty exemptions violate their right to equal protection of the laws are more likely to find a sympathetic hearing.

What was true in Locke's formulation and repeated in Scalia's opinions remains true now. The success of religious liberty claims, and the effectual limits of religious liberty, depend on the moral understanding of the larger culture. While maintaining a public witness in both the legislative and cultural arenas does not by any means guarantee a widespread renewal of marriage, abandoning this witness in exchange for religious liberty guarantees diminishes the likelihood of enjoying either.

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