ARE *SMITH* AND *HIALEAH* RECONCILABLE?

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I

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court held that the Free Exercise Clause does not mandate religious exemptions from "generally applicable law."[1] In *Smith*, the law of general applicability was one banning the use of various drugs, including peyote. The religious exemption in question was one for the Native American Church, which uses peyote in its rituals. So long as the law of general applicability has a legitimate secular purpose, i.e., as long as it is not so arbitrary as to be a denial of due process, its burdening of religious practices does not violate the Free Exercise Clause. Put differently, the state's denial of a religious exemption need not serve more than a legitimate secular interest, contrary to what the law prior to *Smith* had been, at least as stated. Prior to *Smith*, the black letter law required that denial of a religious exemption be supported by a compelling governmental interest. Not so after *Smith*.

If we can schematize the free exercise doctrine after *Smith*, it would look like this: For any secular value V, the state may rank V above any religious value R (so long as R is manifest in conduct and not merely belief or expression). Or, $V > R$ is constitutionally permissible.

II

The citizens of Hialeah, Florida apparently find the ritual sacrifice of chickens by the Santerian religious sect a disgusting and perhaps immoral practice. In 1987, Hialeah passed an ordinance banning the slaughter of animals but making so many exceptions that, for practical purposes, only the Santerians and perhaps wanton animal killers came within the ordinance. The

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1. 494 U.S. 872, 878 (1990).

Supreme Court found the ordinance to be violative of the Free Exercise Clause.[2] Unlike the law of general applicability in *Smith*, this law discriminated against a religious practice.

III

According to *Smith*, so long as Hialeah wants to protect the lives of chickens or other animals for secular reasons, e.g., Hialeah values the lives of animals, it may pass a law banning the slaughter of animals and need not exempt the Santerians. The value of animal life (V_A) may trump the Santerians' religious value R without violating the Free Exercise Clause.

IV

Any other (secular) V can trump R as well. (This follows from I.) For example, suppose there were a religious sect whose practices required that wild animals be left undisturbed by humans. A law allowing the hunting of wild animals, perhaps for sport, perhaps for food, would be constitutionally permissible under *Smith*. For the secular value of hunting (V_H) can permissibly trump the religious value R.

V

Now suppose Hialeah bans all killing of animals but makes exceptions for sport hunting and for slaughtering animals for food but not for religious rituals. Hialeah has now ranked the value of animal life (V_A) above the Santerians' religious value (R), and has ranked the values of hunting (V_H) and meat-as-food (V_M) above the value of animal life (V_A). Schematically, the result is $(V_H \ \& \ V_M) > V_A > R$. Since the Free Exercise Clause permits $V_A > R$, $V_H > R$, and $V_M > R$, logically it should permit Hialeah's statute.

VI

But now it is hard to see exactly what the constitutional wrong is in *Hialeah*. The Court treats Hialeah as "hostile" to the Santerians. Perhaps the Court is relying on Hialeah's affirmative ill will toward Santerians rather than Hialeah's mere ranking of their religious practices as of lower value than any secular value. This is a fine line to draw. It would seem to require hostility toward beliefs and not just hostility toward conduct, so that not

2. *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993).

making a religious exception to laws against homicide for sacrifices of vestal virgins is constitutionally permissible so long as the state is antagonistic only to the homicidal conduct and not to the beliefs that motivate it. Of course, if the state were motivated by hostility to the beliefs, it would arguably be violating the speech clause of the First Amendment, and the Free Exercise Clause would be doing no work.

VII

But if having too many exceptions by itself takes a law out from under *Smith* and places it under *Hialeah*, then *Smith* must not be read to deny that religion carries some affirmative weight on the scales, even against a law of general applicability.

This point can be made from two different angles. If exceptions for values like hunting or food but not for religion require a compelling government interest, then it must not be true that those values can always trump the religious value. Rather, they can do so only if they are much more valuable than the religious value. This means religious values have an affirmative (and compelling) weight, contrary to the implication of *Smith* that religious values can be subordinated to any legitimate secular value.

The other way to get to the same conclusion is to note that the law in *Smith*, the paradigm case of a law of general applicability, can be looked at as making an exception for one secular value but not for a religious value. For example, why was peyote banned but not alcohol (which is, of course, used as a sacrament in some religions)? And why were drugs banned but not other activities that could be harmful? If the state had to show a compelling interest, and not merely some legitimate secular interest to justify these distinctions, *Smith* would be directly contradicted. All laws of general applicability can be looked at as exceptions within a more general class of activities. The drug laws in *Smith* surely are, as the question about the alcohol exception indicates. If *Smith* means that Oregon does not have to justify the "peyote but not alcohol" distinction by showing more than a mere legitimate interest, and that has to be what *Smith* means, then *Hialeah*'s analysis turns murky.

VIII

The preceding arguments also refute the account of the Free Exercise Clause recently put forward by Professors Eisgruber

and Sager.[3] They defend *Smith* with an excellent case against the special privileging of religiously-based conduct. If there is some secular value, V_1, that is impaired by a law advancing another secular value, V_2, and the state grants no exemption from the law where V_1 is impaired, the state need not grant an exemption for a religious value, V_R, that is also impaired. For any V_2 that the state ranks above V_1, the state may also conclude $V_2 > V_R$.[4]

On the other hand, Eisgruber and Sager also argue that once the state grants exemptions for some, it must not "discriminate" against religious claimants but must treat them with equal regard. But an equality theory needs a metric, a currency, by which different claimants can be compared. If the legislature criminalizes alcohol but not peyote, or exempts golf courses but not churches from zoning laws, how is the equality claim to be assessed? One way would be by comparing intensity of preferences—do golfers desire their exemption more intensely than churchgoers? Eisgruber and Sager come close to endorsing this view when they argue that the state must adopt the religious believer's perspective in order to appreciate the gravity of his interest in an exemption.[5] But this looks like the intensity of preference test that they reject in their argument against privileging religious exemptions.[6]

More importantly, the distinction they draw between forbidding inequalities among possible claimants for exemptions and

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3. Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994). See also Christopher L. Eisgruber and Lawrence G. Sager, *Unthinking Religious Freedom*, 74 Tex. L. Rev. 577 (1996).

4. Eisgruber and Sager illustrate this point by comparing the case of an Army officer refused permission to wear a yarmulke, as his religion requires, because of the Army's interest in uniform appearance with the case of another Army officer refused permission to go tieless, as a skin disorder requires, because of the same interest in uniform appearance. They argue that the Free Exercise Clause should not be read to privilege the former's claim (by requiring an exemption) over the latter's. Eisgruber and Sager, 61 U. Chi. L. Rev. at 1264-65 (cited in note 3).

At the core of Eisgruber and Sager's case for *Smith* is their argument that religious claims for exemptions can only be assigned a value by the legislature in two ways. The first is to assign a value based on the intensity of the desires with which they are held. This allows the religious claims to be weighed against competing secular claims based on secular values, which can also be reduced to that currency. Eisgruber and Sager reject the idea that the Free Exercise Clause is nothing but a signpost pointing toward preference-utilitarianism as a constitutional mandate. In any event, legislatures are surely preferable to courts in terms of assessing the intensity of the electorate's desires.

The alternative way that religious claims can be assigned a value is from a sectarian standpoint. But that standpoint is, according to Eisgruber and Sager, one that the Establishment Clause rules out of bounds.

5. Id. at 1285-86.

6. See supra note 4.

not demanding privileging does not withstand analysis. In every case of a religion's seeking an exemption, it is demanding that its religious value V_R not be subordinated to the secular value V_S. The state has ranked $V_S > V_R$. The religion wants "equality." *If the Free Exercise Clause does not forbid the ranking $V_S > V_R$ in the Smith context, it cannot forbid the exact same ranking in the context of granting exemptions for V_S but not for V_R.* Only if all values are reduced to a common currency, such as intensity of desire, and only if the Constitution requires the legislature to deal exclusively in that currency, can we have a principled comparison of V_S and V_R. But that comparison can be made in *both* the *Smith* and the *Hialeah* contexts.

IX

Leaving aside cases where the government is motivated by hostility to a religion's *beliefs*, arguably a free speech issue, *Hialeah* cannot be good law if *Smith* is and vice versa. *Smith* and *Hialeah* raised the identical issue: Do religious values have to be given any positive weight when put in the balance against secular values? *Smith* says "no." *Hialeah* says "yes." They cannot both be correct.