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Was Scalia Right or Wrong?

Michael Sean Winters | May. 31, 2012 Distinctly Catholic

I am not a lawyer, still less a legal scholar, and my friend Rick Garnett is both. Therefore, I do not disagree with him lightly. But his defense of Justice Scalia?s decision [1]in *Employment Division v. Smith* nonetheless strikes me as misplaced.

Garnett writes that, ?First, there is the claim -- which, I admit, is widely accepted, and accepted by many I respect -- that it is the *Smith* case, and not the recent acts and decisions of the current administration, that should be regarded as an unprecedented and dangerous assault on religious freedom. Some make this claim because they believe that Smith represents a wrong interpretation of the First Amendment, I know, but I think that some make it just because it's kind of fun to put Justice Scalia in the religious-freedom-villain hot-seat.? Here I am completely willing to cop to the charge. I find it delicious that the legal hurdle in the way of those of us who want to vindicate the rights of the Church in the HHS controversy is an opinion authored by Scalia. That fact alone is a complicating one, it upsets the narrative, and far too many people addressing the topic of the HHS mandate have been unwilling to set aside their various narratives ? the bishops are always wrong, Republicans can be counted on to protect religious liberty, the issue of religious liberty is merely a partisan tool ? and actually engage the issues involved.

So it is not merely a sense of irony that makes my heart warm to Scalia?s role in this debate. That role challenges people?s political and ideological identities, it forces them to think of themselves as not merely belonging to this group or that but as attracted to many different cultural values. Many years ago, Leon Weiseltier, in his masterful essay ?Against Identity,? wrote these powerful sentences: ?Not my identity, but: my identities. There is a greater truth in the plural. There is also a greater likelihood of decency. The multicultural individual is a figure of moral friction. In such an individual the mocker, and the hater, and the killer, may hit a bump.?

Furthermore, as the quote from Garnett above demonstrates, the issues involved in these religious liberty cases are complicated and far from easy. Very smart people can disagree on the relative merits of the competing interests. Very learned lawyers would put a slightly different emphasis on one side of the ledger, tipping the scales of justice in ways other find impermissible. And the decision itself indicates that for all the talk about principles, for all the various legal theories, the facts of a given case undoubtedly have an impact on the outcome. In the Smith case, Scalia faced the claims of peyote smoking Native Americans in Oregon, not the claims of Holy Mother Church!

This last point is essential in grasping the heart of the decision. Scalia held that the government need not demonstrate that it entertained a ?compelling governmental interest? and that the methods prescribed by the law to advance that interest were so narrowly tailored as to impose the least possible burden on the religious freedom rights of citizens. A ?neutral law of general applicability? admits no ?free exercise? exemption unless a legislature chooses to mandate such a standard. Certainly, the government has a compelling governmental interest in regulating or banning the use of illicit drugs. But, in the Volstead Act introducing Prohibition, the government stated that it had a compelling governmental interest in banning the use or sale of spirits. The

Congress included an exemption for Communion and Passover wine. But, what if they had not included such an exemption? Could the Catholic Church have sustained a First Amendment claim against the Volstead Act? Such hypothetical questions are precisely the kind of questions asked in oral arguments so this is no quibble.

On the other hand, one can easily see what made Scalia nervous. If religion can be invoked to excuse anyone from a law, every man could become a law unto himself. As Garnett explained to me in an especially compelling analogy, a prisoner could easily claim to belong to a religion that requires he eat chocolate ice cream every Wednesday. It should not matter if a religion is adhered to by many people and has long-standing traditions. As a matter of history, at one time, there were only twelve Christians. Further, minority religions are precisely those which demand governmental protection. Nor would we want a court deciding which religious practices are constitutionally protected, which are ?central? to the belief system, &c. We do not want the courts, in their distinguishing between valid religious claims and their counterfeits, concluding, as they did in the case of pornography, that they ?know it when they see it.?

I will grant that Scalia marshaled a fair amount of case law to defend his position. Still, I do not think it is asking too much of our government that they be able to sustain, in a court of law, proof that a given law both advances a compelling governmental interest and, critically, that they tailored the law in such a way as to make it as little burdensome to religious liberty as possible. I would also point out, as I have done previously, that in the matter of the HHS mandates, Secretary Kathleen Sebelius admitted before Congress that she had not concerned herself with what she contemptuously referred to as ?nuances of constitutional balancing tests.? Is it really too much to expect of our legislators and executive officials that they DO consider such nuances in making their decisions and that when they fail to do so, their decisions can be overturned by the courts?

To my untrained eyes, the most bizarre part of the Scalia decision in *Smith* is the bit about ?hybrid? rights. Scalia argues that the Court has only vindicated ?free exercise? claims when those claims are linked with other First Amendment rights, such as the right to free speech or the right to peaceable assembly. This makes no sense to me. Certainly, I am unaware of any free speech or free press case that had to be linked with another First Amendment right to gain the attention of the Court. Again, I am no legal scholar, so perhaps there is such a decision. But, in researching my biography of Jerry Falwell, I had to learn a fair amount about the case *Falwell v. Flynt*, an important free press case in which Falwell sued Larry Flynt for publishing a parody that claimed Falwell had lost his virginity to his mother in an outhouse. In a unanimous decision, written by Chief Justice Rehnquist, the Court held that however contemptible the speech contained in the parody, it was constitutionally protected. That protection was not the result of Flynt?s claims being linked to freedom of speech or the free exercise clause of the First Amendment. Why should the free exercise clause be denied the right to stand on its own while the other rights enumerated in the First Amendment can do so? Scalia, of all people, with his penchant for originalism, should be made to fashion some legal doctrine based on the intent of the founders to sustain such an interpretation.

Garnett also chides me for my understanding of *Dignitatis Humanae*, the Second Vatican Council's Decree on Religious Liberty. I will leave that for another day. But, on this issue of *Employment Division v. Smith*, I would agree with Garnett that it is a good thing for legislatures to enact provisions that exempt religious institutions from generally applicable laws as needed. But, when they don?t, I think it is not asking too much from the courts that they strike down laws that unduly burden religious liberty. That adverb ?unduly? is made to carry a lot of weight. Court decisions cannot foresee all circumstances. Jurisprudence advances one case at a time. Different principles clash, but different principles will clash differently at different times and with the different factual bases. This is the price we pay for living in society, and in a pluralistic society like ours, the clashes are more numerous, if not more essentially complicated: Less pluralistic societies have busy court dockets too! Still, I wish Scalia had made the government work harder than he did to make its case.

A propos of the current debate over religious freedom, I think it would be more historically accurate and

politically honest if everyone admitted that the difficulties surrounding the interface of religion with civil law did not begin with Barack Obama. It did not begin with Scalia?s decision in *Employment Division v. Smith*. The difficulties began long, long ago and are found in every culture. As a wise man pointed out to me last week, there is a reason the Church had concordats with kings and governments in yesteryear, and it was not because those relationships were free from friction. As long as we Catholics must live in one kingdom while belonging to another, this friction will continue, but it is good for Catholics and all Christians to recall that it is the heavenly kingdom to which we belong, and not the terrestrial kingdom in which we live, that has first claim on our hearts and our minds. On that point, I am sure, Garnett and I are in complete agreement.

Links:
[1] http://mirrorofjustice.blogs.com/mirrorofjustice/2012/05/a-quick-response-to-winters-on-conscience-and-smith.html