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Drug use as religious practice? *Employment Division v. Smith*

The First Amendment to the United States Constitution contains two fundamental and unequivocal prohibitions pertaining to religious matters: the Establishment Clause ("Congress shall make no law respecting an establishment of religion") and the Free Exercise Clause ("Congress shall make no law (…) prohibiting the free exercise thereof").[1] These provisions are not only closely connected, but intertwined. On the one hand, the setting up of a national church or any sort of blurring of institutional boundaries between churches and governmental structures can in many instances negatively influence an individual's right to pursue their religious convictions without legal or political interference; on the other hand, the introduction of regulations criminalizing certain religious practices or beliefs can lead to at least a *de facto* outlawing of particular religions and create a situation where only one religion (or only some religions) is recognized as legal by the system. The United States Supreme Court's consistent opinion – though there are quite a lot of the very vocal opponents of this position, including a few of the Justices – is that "the clause against establishment of religions by law was intended to erect a 'wall of separation between Church and State'".[2] These words by Justice Hugo L. Black perhaps in the most adequate and precise manner reflect a general understanding of the Establishment

1 M. Harrison, S. Gilbert (eds.), *Freedom of Speech Decisions of the United States Supreme Court*, San Diego 1996, p. 1. By the virtue of the Fourteenth Amendment, these provisions are also relevant to states' activities.

2 Everson v. Board of Education of Ewing Township, 330 U.S. 1, 16 (1947).

Clause as conceived by the Supreme Court. The conceptual and axiological link between two analyzed provisions is illustrated by the fact that this metaphor is also applicable in the Free Exercise Clause field of impact: the wall of separation between church and state clearly means that government cannot perform the function of a moral *brachium saeculare* that promotes virtue, stamps out sins, persecutes heretics and imposes religious commandments and values upon a general population based on a non-secular rationalization. Putting it differently, to allow political institutions to introduce religiously-motivated regulations is – at the very least – to punch an enormous hole in the "wall of separation"; it may reasonably be argued that taking such a step would even dismantle the wall completely. Notwithstanding the interconnectivity between two religious provisions, it has to be said that the level of controversy surrounding their exact meaning and sociopolitical consequences was often significantly diverse during the course of American history. As Michael W. McConnell correctly remarks, "interpretation of the establishment clause has been a source of continual and often acrimonious public dispute – not just in the courts but in the scholarly journals and books, the churches and synagogues, the popular electoral campaigns and even the streets. There are few more heated subjects of debate and few more muddled areas of legal doctrine." This observation is also valid today. By contrast, as McConnell states, since more or less the early to mid-sixties, "while individual cases sparked disagreement, the interpretation of the free exercise clause has settled into a basic framework and remained essentially undisturbed for more than twenty-five years."[3] This last factor was about to quite drastically change with the landmark case *Employment Division v. Smith*,[4] which is the subject of this article.[5]

Before we delve into the legal issues inherent in the decision, the Free Exercise Clause is worth examining from a teleological standpoint. The

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3 M.W. McConnell, *Free Exercise as the Framers understood it*, [in:] E.W. Hickok, Jr. (ed.), *The Bill of Rights: Original Meaning and Current Understanding*, Charlottesville and London 1991, p. 5.

4 494 U. S. 872 (1990), further quoted as Employment…

5 The article is purposefully limited in scope inasmuch as it does not analyze in detail to which degree, in any, the Court's decision conformed with the principles of *stare decisis* ant to which it signifies the deviation from previous precedents. Apart from descriptive objectives, the author's focuses primarily on the soundness of Justices' legal reasoning and on the moral-and-political consequences of the decision.

purpose of constitutional provisions contained in the Bill of Rights, be it in either the originalist or the activist sense, is one of the crucial factors that need to be taken into account in the process of judicial interpretation. While it is often possible to ignore the *telos* of other parts of the Constitution, of statutes, of bills, of ordinances *etc.*, and to limit oneself to strictly textual or at most systemic analysis, first ten Amendments cannot be fully construed without at least a basic recognition of their doctrinal purpose if we want to keep a two-hundred-year old document living and relevant (which is what American citizens generally would like to do). The flow of time and unavoidable ambiguity of the Bill of Rights would render the document obsolete and limited in range if we ignored the vision of society the particular provisions aim to achieve. For this reason, while evaluating U.S. Supreme Court decisions on religious issues, it is imperative to remember that the underlying principle of the relevant clauses "was to ensure that individuals could pursue their religious convictions without impediment."[6] As George W. Spicer very eloquently elucidates: "It was the purpose of the free exercise clause of the First Amendment to allow everyone under the jurisdiction of the United States to hold such beliefs respecting his relation to the Deity and his obligations thereunder as meet the approval of his judgment and conscience ant to express his beliefs in such form as he may think proper, so long as there is no injury to the rights of others"[7]. In my opinion, the enigmatic condition of "not harming others" should currently be construed widely as meaning "not interfering with the legitimate governmental legislation." Spicer also notes that the individual liberty to exercise one's religion includes two distinct, though connected, rights. The first one is an absolute freedom of belief; the second one is a – by social necessity – limited freedom of action based upon religious considerations.[8] There are two crucial justifications for establishing such a political-and-legal order.[9] The first one is of purely deontological and axiological nature. Rooted primarily in the principles of classical liberalism, as espoused

6 R.A. Rossum, G. Alan Tarr, *American Constitutional Law: Cases and Interpretation*, New York 1991, p. 416.

7 G.W. Spicer, *The Supreme Court and the Fundamental Freedoms*, New York 1959, p. 61.

8 *Ibidem*, p. 63.

9 See D.A. Farber, *The First Amendment*, New York 1988, p. 246–247 (below, the fragments in quotation marks come from this book).

by John Locke, John Stuart Mill, John Rawls (from the *Theory of Justice* period), Ronald Dworkin and others, the argument states that "individuals are free to form their own basic plans in life, living out their own vision of the good. The function of the state is to establish a fair set of ground rules, including (…) methods of protecting the rights of each individual from infringement by others. Religion plays a particular role in this vision. Historically, religion has offered the most compelling visions of the proper human life (…) The upshot is that religion is considered a core example of the kind of personal autonomy which the liberal state is pledged to protect." The personal freedom to pursue various religious convictions and beliefs involves therefore "central aspects of personal autonomy." This line of reasoning can also be conceptualized in more communitarian terms, stressing the necessity of protecting the right of individuals to freely associate and participate in social groups founded on shared moral views. The second justification is of consequential and pragmatic character (which by no means lessens its significance). It can be called a *modus vivendi* argument (its proponents include, for example, the Founding Fathers and John Rawls – from the *Political Liberalism* period). Religious pluralism–particularly in the United States – is simply a fact of life; "the religious diversity of modern society has meant that people with different fundamental values have had to learn to live together in peace." If we decide to forgo the axioms of religious tolerance, we run a serious risk of shattering the fragile social peace.[10] At the same time persecution is not an efficient – especially, if we are not inclined to resort to mass murder – way to establish God's Kingdom on Earth because "suppression merely drives dissident religion underground, provides them with martyrs, and sets the stage for increasingly bitter conflict." All in all the advocates of this theory claim it is much better to "defuse the [potentially explosive – Ł.M.] situation through an attitude of genial tolerance. A related argument is that we ought not to force people into corners where they will be forced to rebel or practice civil disobedience." Cit? As Farber concludes, religious tolerance contributes to social order and stability. The consequences of an alternative approach may be destructive for the social fabric. At best it will lead to incessant conflicts, divisiveness and retributions; at worst it may cause violence, bloodshed, civil war and an absolute implosion of social system.

10 The old maxim *fiat iustitia, pereat mundis* comes to mind.

Bearing these conclusions in mind, let us now turn to *Employment Division v. Smith*. It seems sufficient for our purposes to present a simplified version of the legal problems posed by the merits of the case. The facts were quite clear and basically undisputed.[11] Two members of the Native American Church, Alfred Smith and Galen Black, were discharged from their jobs at a drug rehabilitation clinic (their occupation certainly provided additional piquancy to the proceedings). The reason for the termination of their employment contract was that they ingested peyote for sacramental purposes during a religious ceremony in accordance with the tenets and practices of their religion. When they applied for unemployment compensation, Oregon refused to pay it, arguing that Smith and Black were fired because of the work-related misconduct. This misconduct was defined as a violation of the relevant state law that prohibits knowing or intentional possession of a controlled substance (including hallucinogen like peyote) unless it was prescribed by a medical practitioner. The legal issue was therefore straightforward: if the mentioned law was to be declared unconstitutional, the misconduct charge would not stand and the benefits would be granted. The central question was whether Oregon law (or, to be precise, its application in this case) conformed to the Free Exercise Clause. After a lot of judicial back-and-forth, the Oregon Supreme Court decided that the lack of an exception for sacramental use of peyote was constitutionally invalid. The Supreme Court in a 6-3 ruling reversed this decision. The opinion – joined by four other members – was written by Justice Antonin Scalia; Justice Sandra Day O'Connor filed a concurring opinion; the dissent – supported by two other Justices – was prepared by Justice Harry Blackmun. Let us examine their reasoning more closely.

Justice Scalia started by affirming that "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such."[12] Quoting earlier precedents, Scalia wrote that this prohibition prevents the

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11 Detailed description of the facto of the case and of judicial decisions up to – and later including – the Supreme Court's final determination can be found in: C. Cookson, *Regulating Religion: the Courts and the Free Exercise Clause*, New York 2000, p. 118–138.

12 Employment…, 877

government from compelling affirmation of religious belief, punishing the expression of religious doctrine deemed to be false, imposing special disabilities on the basis of religious views or supporting one of the sides of the debates concerning religious issues. This religious liberty also extends to religiously-motivated conduct: "The 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation (…) State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes' or to prohibit bowing down before a golden calf."[13] Nevertheless, the case in point remains different. According to Scalia, respondents make the claim "that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[14] From an interpretive standpoint, such a reading, though justified, is by no means necessary. This construction would entail, for instance, that forcing citizens to pay taxes if they consider organized government to be an immoral institution would be tantamount to violating their religious liberty. Scalia maintained that the Supreme Court has never held that an individual's religious beliefs excuse him from complying with an otherwise valid law prohibiting conduct that the State is generally free to regulate. In other words, Scalia thought that the crucial issue in determining the outcome of the case was incidentality, not substantiality, of the burden imposed upon religious freedom.[15] As Robert C. Fuller concludes, in this the Jus-

13 *Ibidem*, 87–88.

14 *Ibidem*, 88.

15 See J.B. Baskin, *Overruling Democracy: the Supreme Court vs. The American People*, New York 2007, p. 224.

tice places the emphasis on the "state's need to ensure the general public welfare rather than the individual's unrestricted free exercise rights."[16] He substantiated this position by providing quotes from two earlier decisions (which were not exactly landmark rulings in a relevant respect). The first one concerned the legality of compelling schoolchildren to salute the American flag and recite the Pledge of Allegiance; the second one dealt with the constitutional validity of anti-polygamy laws:

1: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[17]
2: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices (…) Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[18]

It is therefore clear that Scalia rejected an absolutist construction of the Free Exercise Clause. For reasons elucidated earlier, such a stand is fundamentally correct and in fact unavoidable. Citizens cannot be given total immunity from obeying ostensibly neutral laws just because said regulation offends their moral beliefs and sensibilities. Apart from raising serious doubts concerning the "equal protection of laws" proviso of the 14th Amendment to the Constitution, such an interpretation would certainly lead to dangerous and unforeseeable consequences regarding public order. In order not to be bound by some legal constraint, an individual would simply have to show that a certain regulation forces him to act in a way that contradicts his religious convictions (possibly manufacturing them). Nevertheless, the truly problematic part of Scalia's opinion lies elsewhere. The main controversy was that the Justice refused

16 R.C. Fuller, *Stairways to Heaven: Drugs in American Religious History*, Boulder 2000, p. 186.
17 Minersville School District Board of Education v. Gobitis, 310 U.S. 586, 594–595.
18 Reynolds v. United States, 98 U.S. 145, 166–167 (1879).

to apply in this case the so-called Sherbert test, which requires that governmental actions that substantially burden a religious practice must be narrowly tailored and justified by a compelling public interest.[19] Tad G. Jelen correctly explains that "under the compelling interest standard, governments can regulate protected activities only if such regulation is absolutely essential to the functioning of government. Clearly, this is a very high standard, which most government regulations fail to meet."[20] Scalia argued that this test should not be the yardstick by which we measure the constitutional validity of an across-the-board criminal prohibition on a particular type of conduct. He elaborated: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, to become a law unto himself – contradicts both constitutional tradition and common sense (…) a private right to ignore generally applicable laws (…) is a constitutional anomaly."[21] Scalia was willing to apply compelling interest standard only if apart from Free Exercise Clause other important constitutional rights were also implicated (e. g. parental rights or right to free speech), making a case a hybrid. All in all, the sweeping language of Scalia's opinion meant that, in almost every case involving incidental governmental abridgement of free exercise rights, narrowly conceptualized rationality is the only constitutional barrier against legislative action.[22] The Justice also expressly refused to apply the compelling interest standard only in such situations when the circumscribed conduct is central to tenets of a particular religion. For Sca-

19 Herbert v. Verner, 374 U.S. 398, 402–403 (1963)

20 T.G. Jelen, *To Serve God and Mammon: Church–State Relations in American Politics*, Boulder 2000, p. 68. I disagree with John T. Noonan (for reasons pointed out in the dissenting opinion of Blackmun) that "it would not have been a stretch to hold that Oregon had a compelling interest in supplementing its criminal laws against drugs by refusing aid to those who violated them", in: J.T. Noonan, *Narrowing the Nation's Power: the Supreme Court Sides with the States*, Berkeley 2002, p. 23–24.

21 Employment…, 885–886 (internal quotations omitted).

22 See F.S. Lane, *The Court and the Cross: the Religious Right's Crusade to Reshape the Supreme Court*, Boston 2008, p. 178.

lia, taking such a question under advisement would be an inappropriate extension of judicial discretionary power, miring the courts in subjective inquiries. Scalia's known adherence to the principles of judicial restraint and his philosophically anti-activist stance (arguably only in theory) was also observable in his statement that while states are entitled to set exceptions to general rules of criminal law due to religious considerations, it is not a constitutional requirement; the political process must determine which option is exercised. While "it may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in (…) that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[23] As Rodney A. Smolla observes, the decision accepted institutional limitations upon the Supreme Court's powers permitting "the domains of the larger democracy – the presidents and governors, the legislators, the lobbyists, the talk show hosts" to conclusively determine the shape of law as far as an accommodation of religious practices with generally applicable rules is concerned.[24]

In summation, Scalia pointed out that to accept a compelling interest test in a relevant cases would inevitably lead (if we do not want to radically dilute its protective power in other areas of constitutional jurisprudence) to exempting some citizens "from civic obligations of almost every conceivable kind," including compulsory military service, payment of taxes, adhering to health and safety regulations (concerning, for instance, child-neglect or even manslaughter), compulsory vaccinations, paying employees a minimum wage, obeying anti-drug, traffic, anti-animal cruelty or anti-discrimination laws, etc. The slope would indeed be very slippery. According to Scalia, "any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference', and precisely because we value and protect that

23 Employment…, 890.

24 R.A. Smolla, Introduction: Personality and Process, [in:] R.A. Smolla (ed.), *A Year in the Life of the Supreme Court*, Durham 1995, p. 23–24.

religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[25] John E. Semonche accurately surmises that the natural corollary of Scalia's position is that "fringe religions, and its [*sic*] adherents, by necessity, will be less protected by the free exercise clause than the mainstream sects."[26] Nevertheless, the Justice was ready to accept such consequences.

In her concurring opinion, Justice O'Connor did not mince words and did not abstain from serious criticism of the majority's arguments; in parts, her discourse reads more like a fierce dissent. She vociferously claimed that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups."[27] O'Connor strongly emphasized that "a law that prohibits certain conduct – conduct that happens to be an act of worship for someone – manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns."[28] She added that "there is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[29] This is particularly true since "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such (…) If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets

25 Employment…, 888.

26 J.E. Semonche, *Keeping the Faith: a Cultural History of the U.S. Supreme Court*, Lanham 1998, p. 349.

27 Employment…, 902.

28 *Ibidem*, 893–894.

29 *Ibidem*, 901.

a religious practice."[30] O'Connor advocated a necessity of applying a strict scrutiny test also in "incidental burdens" cases that should focus on the constitutional significance of encumbrances imposed by certain laws upon religious practices, on the nature of governmental interest served by such regulations, and on the character of means used by the state to achieve its objectives. As Stanley H. Friedelbaum concludes, Justice O'Connor "counseled case-by-case determinations to assure survival of the nation's historic commitment to religious liberty. To this end, a vigorously conceived compelling interest test was required, she implored, to protect an extant constitutional norm in a pluralistic society."[31]

In O'Connor's opinion Oregon law ultimately met the strict scrutiny criterion because of two main reasons. First, drug abuse is one of the most serious problems plaguing American society today and affecting the health and welfare of the population; government is fully entitled to target this conduct because it poses a substantial threat to public safety, peace and order. In other words, elimination of this danger constitutes a "compelling interest." Second (referring to the narrow tailoring requirement), exceptionless criminal prosecution of drug use is – though O'Connor expressed certain doubts – essential to accomplish Oregon's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them."[32] The Justice also contended – agreeing with the majority's take on the situation – that the issue of centrality of peyote use for the Native American Church's religious purposes should remain outside of the Supreme Court's province. For these reasons O'Connor accepted final conclusion of Scalia, though reaching the same result by a very different road.

The dissenters represented by Justice Blackmun joined O'Connor's opinion as far as the necessity of applying the strict scrutiny test was con-

30 *Ibidem*, 894.

31 S.H. Friedelbaum, *The Rehnquist Court: in Pursuit of Judicial Conservatism*, Westport 1994, p. 108.

32 Employment…, 905.

cerned. Nevertheless, they firmly stipulated that Oregon law does not meet this standard. First and foremost, Blackmun claimed that "it is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote (…) The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition."[33] At the same time – the Justice argued – there exists no persuasive evidentiary support for a thesis that religious use of peyote causes any material harm. Blackmun even went as far as to recall the testimony and scholarly articles of a number of psychologists and psychiatrists who perceived some significant social or individual benefits flowing from engaging in said practice. Besides, according to the dissent, "the carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns."[34] The Justice also questioned the correctness of Scalia'a slippery slope argument, saying that the state's alleged fear "that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws" is unsubstantiated and "purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups."[35] If the

33 *Ibidem*, 909–911.
34 *Ibidem*, 913.
35 *Ibidem*, 916–918.

circumstances of the case were different (drug use not an essential ritual of a given religion, severity of illegal trafficking in a particular drug, lack of formalized and ceremonial context in which drug use is either permitted or commanded), different decisions would be constitutionally proper. Finally Blackmun stated that the judiciary cannot "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion."[36] As Bette Novit Evans correctly points out, while the majority consciously neglected to recognize the religious significance of a ritual of peyote's ingestion, the dissenters accentuated a need to carefully consider the ceremony's place in Native American religion and to take into account the sincerity and veracity of the respondents' claims; they also refused to ignore the fact that punishing Smith and Black for their "unquestionable" act of religious worship would have a "devastating impact" upon their religious liberty.[37] Obviously, for the dissenters, the question of centrality could not be set aside.

The Supreme Court's decision has been widely criticized in legal (and political) circles as axiologically, legally, historically and institutionally wrong[38] (though it is surely a dramatic exaggeration to maintain that it is "almost universally despised" by constitutionalists).[39] In my view, all judicial opinions presented in this article are defective. Scalia's language is simply too sweeping; its bluntness means that, for example, the Supreme Court should not discern any Free Exercise Clause problems in applying hypothetical Prohibition regulations to the Christian Masses or laws against animal cruelty to the ritual slaughter of animals as demanded by the Jewish religion. Such burdening of religious freedom is,

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36 *Ibidem*, 919.

37 B. Novit Evans, *Interpreting the Free Exercise of Religion: the Constitution and American Pluralism*, Chapel Hill 1997, p. 105.

38 See e.g.: M.W. McConnell, *Free Exercise Revisionism and the Smith Decision*, University of Chicago Law Review, vol. 57, p. 1109 n.; I.C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, Brigham Young University Law Review, 1993, p. 260.

39 Note, *The Best of a Bad Lot: Compromise and Hybryd Religion-Exemptions*, Harvard Law Review, vol. 123, p. 1497. Positive evaluation of the decision can be found, for instance, in: W.P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, University of Chicago Law Review, vol. 58, p. 308 n.; M.A. Hamilton, *Employment Division v. Smith at the Supreme Court: the Justices, the Litigants, and the Doctrinal Discourse*, Cardozo Law Review, vol. 32, p. 1697; D.A. McWhirter, J.D. Bible, *Privacy as a Constitutional Right: Sex, Drugs and the Right to Life*, New York 1992, p. 112.

after all, incidental. At the same time, I cannot condone a position that demands strict scrutiny in every situation when a genetically and facially neutral regulation impinges upon someone's religious convictions. It would cause a dramatic expansion of Free Exercise Clause jurisprudence, progressive muddling of a relevant law, the eruption of frivolous and even fraudulent claims and, last but certainly not least, a watering down of the said standard (as O'Connor's opinion unintentionally demonstrates). I think that some compromise between these two poles must be achieved. Without aspiring to have a definitive solution, I would like to propose an outline of such compromise. First of all, after defining a burden as incidental, the judiciary would have to distinguish those suspect and non-suspect from the perspective of the Free Exercise Clause. The former would trigger a First Amendment scrutiny; the latter would not. Roughly speaking, rules aimed at protecting others from harm (like prohibition against manslaughter) or laws pertaining to actions or states basically deprived of moral or religious undertones (like levying a uniform real estate tax, be it on a football stadium, church, mall or synagogue) would be placed in the first category, whereas regulations establishing "victimless crimes" or abridging parental authority would be included in the second group, for which I would propose some sort of intermediate scrutiny, possibly modeled after the O'Brien test from free speech jurisprudence. Such laws 1) would have to serve a substantial (if not necessarily compelling) governmental interest, 2) would have to be reasonably effective in securing or promoting said interest, and 3) would not unduly burden religious freedom. In my opinion, the Oregon law would not pass such a test, failing its third prong in particular.

STRESZCZENIE

Łukasz Machaj

UŻYCIE NARKOTYKÓW JAKO PRAKTYKA RELIGIJNA? *EMPLOYMENT DIVISION V. SMITH*

Pierwsza poprawka do konstytucji Stanów Zjednoczonych zakazuje Kongresowi ograniczania swobody praktykowania religii. Na mocy poprawki czternastej zasada ta została również rozciągnięta na władze stanowe i lokalne. Według zgodnej opi-

nii komentatorów wspomniana regulacja nie tylko wyklucza penalizowanie samego faktu posiadania określonych przekonań religijnych, ale również – co do zasady – uniemożliwia kryminalizację określonych rytuałów, obrzędów czy ceremonii związanych z praktykowaniem określonego wyznania. Swoboda podejmowania takich działań nie jest jednak – w przeciwieństwie do wolności wyznawania poglądów – absolutna. Najbardziej bodajże problematycznym wątkiem związanym z rzeczoną klauzulą konstytucyjną jest kwestia tzw. incydentalnych ciężarów nałożonych na swobodę praktyk religijnych przez abstrakcyjne i generalne regulacje dotyczące określonych zachowań bądź też stanów faktycznych niezależnie od posiadania przez nie – w konkretnej sytuacji – jakiegoś kontekstu wyznaniowego. Artykuł omawia rozstrzygnięcie przez Sąd Najwyższy Stanów Zjednoczonych precedensowej sprawy *Employment Division v. Smith* dotyczącej zgodności z pierwszą poprawką przepisu stanu Oregon zabraniającego posiadania narkotyków i nieprzewidującego w tym kontekście wyjątków dla używania takich substancji podczas ceremonii religijnej (jak czynią to rdzenni mieszkańcy Ameryki, posługując się peyotlem).