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The dynamic between liberty and equality may be observed in the dialogue among the Justices of the Supreme Court, especially in recent Religion Clause cases. At the outset, it is useful to recall the newness of this Court. Since 1986, Chief Justice Rehnquist has been elevated to his present responsibility and four new Justices have joined the Court. For the Supreme Court, seven years is a relatively brief period; but during this period the Court has become unstable, especially since the departures of Justices Brennan and Marshall. Their views on a wide range of issues were not and, most likely, will not be accepted by any of the six Justices appointed or elevated during the 1980s and 1990s.[1] While Justices Brennan and Marshall sat on the Court, their liberal jurisprudence tended to drive those more centrist and conservative Justices into one another's arms. Their departure seems to have had a balkanizing effect, magnified by the activity of the ever-questioning Justice Scalia. The result has been a series of splintered decisions with only one unifying theme—surprise.[2]

Recent years have also witnessed vigorous debate within the Court about the themes of liberty and equality, especially the efficacy of equality in rebuffing free exercise challenges. In *Employment Division v. Smith*,[3] Justice Scalia championed the no-special-favors approach. He relied on equality of legal

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1. For example, no one on the Court would embrace the position that capital punishment is unconstitutional under any and all circumstances. That view, which Justices Brennan and Marshall embraced so vigorously and with such moral force in case after case, notwithstanding the concerns of stare decisis, clearly struck those with more moderate impulses as extreme.

2. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Lee v. Weisman, 112 S. Ct. 2649 (1992).

3. 494 U.S. 872 (1990).

applicability to rebut the suggestion that special exemptions, or at least a fair accommodation of religious liberty and expression, were needed in order to permit religious beliefs to be translated into action. As Justice Scalia saw it, the democratic process must be permitted to work. As long as they discipline themselves through the equality principle, legislatures must be permitted to act and legislate in an across-the-board fashion[4]—no special favors, tempered by the golden rule. In fashioning this result, concerns over judicial competence and power guided Justice Scalia and the majority to invoke such ancient no-special-favors cases as *Reynolds v. United States*[5] and, ironically, Justice Frankfurter's short-lived triumph in *Minersville School District v. Gobitis*,[6] the classic no-special-favors case. Relying on the no-special-favors rationale, Justice Scalia wrote:

> 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.[7]

All are equal under the law with no favors or dispensations.

Religious minorities need not fear, according to Justice Scalia, because democracy works. Arizona, Colorado, and New Mexico, states with significant Native American populations, had each crafted statutory exceptions for the sacramental use of peyote.[8] The implicit message of assurance was that Oregon would likely follow suit once the press had publicized the plight of the Native American Church membership.[9] Gone forever, Justice Scalia and the majority seem to be saying, are the bad old days in Oregon when the Oregon legislature might decide, in a fit of anti-Catholic fervor, to effectively abolish parochial schools through generally applicable legislation.[10]

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4. *Id.* at 879-82.
5. 98 U.S. 145 (1878).
6. 310 U.S. 586 (1940).
7. *Smith*, 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594-95).
8. *See* ARIZ. REV. STAT. ANN. §§ 13-3402(B)(1)-(2) (1989); COLO. REV. STAT. § 12-22-317(3) (1985); N.M. STAT. ANN. § 30-31-6(D) (Michie Supp. 1989).
9. Oregon has since enacted an exemption for the sacramental use of peyote. *See* OR. REV. STAT. § 475.992(5) (1991).
10. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). As an aside, Judge

In *Smith*, the principle of equality was employed to defeat a liberty claim under the Free Exercise Clause. However, this result should not mask two benefits that flow from a judicially enforced equality regime. The first is illustrated by the Equal Access Act,[11] passed in the wake of *Widmar v. Vincent*.[12] *Widmar* established that religiously based clubs may hold activities on university grounds on an equal basis with other extracurricular groups. Equality is such a powerful normative principle that a broad political consensus can be achieved in favor of a nondiscrimination measure. Warring factions on Capitol Hill with respect to voluntary prayer in public schools came together under the equality banner in overwhelming bipartisan support of equal access. As demonstrated by *Board of Education v. Mergens*,[13] students who attend public high schools now enjoy federal statutory protection if they desire to engage voluntarily in Bible study groups, so long as the school permits any extracurricular clubs to operate.

Equality can thus be quite protective of free exercise values when an assault on religious expression or activity in public institutions is premised, as is frequently the case, on Establishment Clause grounds. With the public mind, and to a great extent the judicial mind, filled with images of Jeffersonian metaphors of high impregnable walls,[14] the equality principle is a useful tool for those who believe that they have been singled out for disparately unfavorable treatment because of their religious beliefs. The unsuccessful effort of the Lamb's Chapel group in New York State to show the *Turn Your Heart Toward Home* film series on public school premises during the evening hours illustrates this point rather nicely.[15]

Bork, responding to concerns over his approach to substantive due process during his confirmation hearings in 1987, suggested that the Oregon law of general applicability requiring all students to attend schools created and operated by the state could perhaps be invalidated under the Free Exercise Clause. 14 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987, at 190, 352 (Roy M. Mersky & J. Myron Jacobstein comps., 1990); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971).

11. Pub. L. No. 98-377 § 802, 98 Stat. 1302 (codified at 20 U.S.C. § 4071 (1988)).

12. 454 U.S. 263 (1981).

13. 496 U.S. 226 (1990).

14. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2668-76 (1992) (Souter, J., concurring); Reynolds v. United States, 98 U.S. 145, 164 (1878).

15. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2d

The second advantage of the equality principle is entirely practical. As Justice Scalia pointed out in *Smith*, turning our growing religious pluralism and diversity to his advantage, a diverse people "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."[16] A related point, for those skeptical of the capacity of the judiciary to engage in a principled and consistent superintendence of the democratic process through an accommodation analysis, is that legislatures are more likely to be aware of, and perhaps even sensitive to, the need to protect minority religious practices. Under this anti-Madisonian view, it is no longer politically acceptable to persecute minorities.

The response to all of this may well be, "So what?" The equality principle may be useful to prevent the excesses of the Westside School Districts of the world, with their legal advisors counseling them to throw Bridget Mergens and her Bible study group off campus,[17] but it certainly does not help the Amish of Wisconsin keep alive their religious traditions in a secular age,[18] nor does it permit religiously inspired home education. Religious liberty is left virtually unprotected in this age of secularist-dominated legislation and regulation.

One can thus reflect on Justice Scalia's opinion in *Smith* with a sense of constitutional wonderment. Have I somehow entered a Narnian world, in which the Turkish delight of equality masks a wintry world where some very evil things are going on?[19] Could it be that communion wine for Roman Catholics, or animal sacrifices for adherents of Santería, both venerable practices going to the heart of religious belief and expression, nonetheless depend on the sufferance of the majority? So what if Arizona, Colorado, and New Mexico permit the sacramental use of peyote? Although this permission exists today, the winds of democracy can change. Skinheads, neo-Nazis, ethnic cleansing in Bosnia, and political turmoil in Russia all remind us of the fragility of democracy. As Donald

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Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

16. Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

17. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990).

18. *See* United States v. Lee, 455 U.S. 252 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972).

19. *Cf.* C.S. LEWIS, THE LION, THE WITCH, AND THE WARDROBE (New York Deluxe ed. 1983) (1950).

Kagan has eloquently reminded us, "[democracy] is . . . one of the rarest, most delicate and fragile flowers in the jungle of human experience."[20] Democracy today may be flowering in Latin America and elsewhere, but can we say with confidence that the racial hatred demonstrated recently in Los Angeles and Crown Heights is not a harbinger of really nasty things to come here at home?

In this sobering context, Justice O'Connor's voice is raised in favor of keeping the judicial watchdog out in the yard and on duty, barking and occasionally biting at the majoritarian heel. Equality alone, she urges, is a hollow promise, the stuff of Orwellian worlds. Equality without more is a snare, a delusion. It is, in essence, a full-scale Daryl Gates-style retreat from the battlefront. So trust the judiciary, she would urge, as a coequal keeper of the constitutional flame of liberty.

Perhaps both sides of the debate should calm down and lower the rhetorical level. But religious liberty, which some of us thought was at stake in *Lee v. Weisman*,[21] is such an important part of the history and tradition of the American people that the level will probably remain quite high.[22] In *Lee v. Weisman* the Court viewed the record as partaking of the same nature as state-ordered prayer in *Engel v. Vitale*.[23] This is not the only reasonable way of looking at the record. I submit as Exhibit A Judge Levin Campbell's very thoughtful dissent characterizing graduation prayer as an act of religious liberty and an appeal to the traditions of an historically religious people:

> I suspect that most Americans of all persuasions—including the increasing numbers who adhere to religions or ethical systems outside the Judeo-Christian framework—find it is appropriate and meaningful for public speakers to invoke the deity not as an expression of a particular sectarian belief but as an expression of transcendent values and of the mystery and idealism so absent from much of modern culture.[24]

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20. DONALD KAGAN, PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY 2 (1991).

21. 112 S. Ct. 2649 (1992).

22. This point was illustrated nicely by President Clinton's choice, as an act of religious liberty, to generously quote from scripture in his inaugural address and his decision to invite the Reverend Billy Graham to deliver a prayer asking for God's blessings on a free people.

23. 370 U.S. 421 (1962).

24. Weisman v. Lee, 908 F.2d 1090, 1098-99 (1st Cir. 1980) (Campbell, J.,

But at the same time, the Supreme Court made it clear in *Weisman* that the State cannot be in the business of suppressing the prayers of an historically religious people. And thus, it would be too much, as some of my friends in the Academy would do, to say that there can be no prayer at graduation ceremonies. A careful reading of Justice Kennedy's opinion, I believe, suggests sensitivity to the concern that religious liberty must be protected, as well as a Madisonian concern for the right of individuals not to participate, to enjoy the freedom of conscience. This was captured in the modern era by Justice Jackson in *West Virginia Board of Education v. Barnette*[25]:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[26]

The vision of the liberty of the individual has never been expressed more eloquently than it was in *Barnette*, the case that overruled *Gobitis*, which, ironically, Justice Scalia saw fit to invoke in *Smith*.[27]

Rejected was the egalitarian, some would say statist, model of *Gobitis*. Maybe, just maybe, constitutional history is about to repeat itself.

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dissenting), *aff'd*, 112 S. Ct. 2649 (1992); *see also* Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987) (upholding nonsectarian prayers at a public school graduation).

25. 319 U.S. 624 (1943).

26. *Id.* at 638.

27. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (citing *Gobitis*).