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January 3, 2011: The Incredible Shrinking Free Exercise Clause

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1/3/2011—We don’t know who will win the case about anti-homosexual protests at military funerals that was argued on October 6. The Supreme Court will probably rule sometime this Spring. But we already know the loser—-the Free Exercise Clause of the First Amendment.The case, Snyder v. Phelps, pits the right of protest by Westboro Baptist Church against family privacy rights. The family sued the Church and won $7.9 million in compensatory and punitive damages, which was later reversed by the Fourth Circuit Court of Appeals on the ground of freedom of speech. (The protesters stayed on public property the entire time of the protest).While probably most law professors, myself included, believe that the Court must rule for the Church, there is precedent for upholding privacy rights even against protests on public property if a family home is targeted. The problem is it is difficult to see how a ruling based on privacy could possibly be limited. Nevertheless, the free speech aspect of the case is not the most important thing in terms of the Constitution. The important question is how this became a free speech issue at all. During oral argument, counsel for the Church, who is also the daughter of the pastor, made it clear that these protests are held to promote a religious message. The protesters are giving a warning of God’s wrath for the sin of homosexuality and they feel they are religiously bound to deliver that message.Thus the case seems tailored made for a claim under the Free Exercise of Religion Clause of the First Amendment. And the Church did in fact raise that defense, but that claim not only added nothing to the free speech claim, the religious claim was probably pretty weak.The problem is that the Supreme Court held in 1990, in Employment Division v. Smith, that religious belief is never a defense to the violation of generally applicable law, that is, law that is not aimed at religion. Thus, for example, during Prohibition, religious believers requiring wine for religious ceremonies, such as communion, would have no constitutional right to an exception from the general ban on alcohol.The odd thing is, many constitutional rights, for example free speech, can be asserted against generally applicable laws. So, a law that banned all gatherings of more than 20 people, whether for a party or for a demonstration, could be challenged as a violation of the right of free speech and assembly, but not as a violation of the right to religious worship. Or, as in an actual case, parents might have a right as parents to keep their children from required education past a certain age, but there would not be a specifically religious right to do that.So there is a hierarchy of rights in which, surprisingly, religion is a minor right. There is nothing in the Constitution to justify this second class status. Nor is it clear why the Court treats religious claims as so insubstantial.