12 Harv. J.L. & Pub. Pol'y 246

Harvard Journal of Law & Public Policy
Winter, 1989

Recent Development
The Supreme Court, 1987 Term

FREE EXERCISE OF RELIGION AND INDIAN BURIAL GROUNDS--**LYNG** v. **NORTHWEST** INDIAN **CEMETERY** PROTECTIVE ASSOCIATION, 108 S. CT. 1319 (1988)

Christopher A. Crain

Sounding suspiciously similar to their supposed ideological opponents, the conservative members of the Supreme Court proved themselves amenable to expansive interpretation of the First Amendment last term in *Hustler v. Falwell*.[1] But students of the Court should hardly expect a broadening of all First Amendment protections in future cases. Whatever general First Amendment trend *Hustler* suggests, *Lyng v. Northwest Indian Cemetery Protective Association*[2] largely rebukes. Adopting a narrow, almost rigid, construction of the Free Exercise Clause,[3] the Court held in *Indian Cemetery* that a group of **Northwest** Indians could not prevent construction of a federal highway through an area held sacred by several tribes for more than two centuries.

The disputed area in *Indian Cemetery* included a six-mile strip of land known as Chimney Rock lying between two previously-completed stretches of a proposed 75-mile roadway between two California towns, Gasquet and Orleans. As a prelude to its plans to complete the "G-O road," the Forest Service commissioned a study of the impact such a project would have on area Indians, who have long considered Chimney Rock sacred territory. The 1979 report recommended against the completion of the G-O road because all available routes would cause irreparable harm to the sanctity of Chimney Rock: ritualistic use of the area required "'privacy, silence, and an undisturbed natural setting'."[4] The Forest Service rejected the commission's recommendation, proceeded with plans to complete construction along a route that avoided all archeological sites and "was removed ***247** as far as possible from the sites used by contemporary Indians for specific spiritual activites,"[5] but further announced a "management plan" that would allow harvesting of timber in the area surrounding Chimney Rock, with only a one-half mile buffer zone.[6]

These Forest Service decisions were jointly challenged in federal district court by an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the state of California. The plaintiffs claimed that the decisions violated not only the Free Exercise Clause, but also the Federal Water Pollution Control Act,[7] the National Environment Policy Act of 1969,[8] and the federal government's fiduciary responsibility to Indians living on the adjacent Hoopa Valley Reservation.[9] The district court found for the plaintiffs on both constitutional and statutory grounds and issued a permanent injunction against completion of the Chimney Rock stretch of the G-O road as well as against the harvesting of any area timber.[10] The Ninth Circuit affirmed the district court's ruling that the proposed construction violated the plaintiffs' free exercise rights, applying a balancing test that set infringement of the Indians' religious practices against the less compelling interest of the government in completing the roadway.[11]

***248** Despite the sympathetic fact pattern, Justice Sandra Day O'Connor wrote for a five-to-three majority [12] that free exercise claims are limited to two types of cases involving government coercion: (1) those in which the government affirmatively coerces individuals into violating their religious beliefs, or (2) those in which the government penalizes individuals for adhering to such beliefs. [13] Admitting that the construction of the proposed roadway "could have devastating effects on traditional Indian religious practices," [14] the Court nevertheless ruled that because the government action would only negatively interfere with the Indians' ability to practice their religion, it does not unconstitutionally prohibit free exercise. [15] The balancing test approach adopted by the Ninth Circuit [16] and endorsed by the dissent, [17] weighing "central" or "indispensable" religious beliefs against the governmental interest in the proposed activity, was dismissed by Justice O'Connor and the majority absent an initial showing of a free exercise claim. [18] The majority feared that this balancing approach would require the court "to weigh the value of every religious belief and practice" and ultimately lead the Court "to rule that some religious adherents misunderstand their own religious beliefs." [19] There is clearly some question as to whether a ruling in favor of the claimants in this case would have necessarily forced upon the Court such an unprecedented and awkward role; indeed, the majority adverts to the requirement in free exercise jurisprudence that a court pass on the sincerity of the religious beliefs affected. [20] The majority's rather formalistic approach to the free exercise claim leaves little doubt that the Court was choosing ***249** to err on the side of caution and restraint, two rather conservative appeals.

The focus of the majority's opinion, and the crucial point of contention between the majority and the dissent, was whether free exercise claims are limited to those government actions forcing a moral choice upon the claimant. If the government action affirmatively forced individuals to act contrary to their religious beliefs or penalized them for following their religious beliefs, all agreed that ample precedent indicated such an action would unconstitutionally infringe upon the free exercise of those beliefs. [21] The majority argued, however, that when a government action forced no moral choice and instead had only the effect of infringing upon an individual's ability to practice religious beliefs, the action could not be said to prohibit free exercise.

In reaching this distinction, the Court relied heavily on its earlier decision in *Bowen v. Roy*, [22] in which a couple applying for welfare claimed unsuccessfully that their free exercise right was unconstitutionally infringed by the governmental requirement that their two-year-old daughter be given a Social Security number before they could receive benefits. According to their religious beliefs, such a "numerical identifier" would "rob the spirit of their daughter and prevent her from attaining greater spiritual power." [23] Justice O'Connor argued forcefully that *Roy* spoke for the proposition that individuals complaining merely that a government practice or action made it *more difficult* for them to practice their religion had no constitutional claim and that on this pivotal issue, the fact patterns in *Roy* and *Indian* ***Cemetery*** could not be meaningfully distinguished. [24]

The dissent attempted to distinguish *Roy* on the ground that it involved a purely internal government operation with internal effects, while the decision of the Forest Service in *Indian* ***250** ***Cemetery*** had serious external effects on the Indian claimants. [25] This dichotomy between internal and external effects is consistent with the balancing test proposed by Justice Brennan. [26] While Mr. Roy might be seen to have a free exercise claim of infringement of a "central" religious belief, there is a compelling governmental interest in maintaining the government's use of social security numbers in its internal operations. In fact, that governmental interest could be seen as so compelling that, along with any other purely internal procedure, it overwhelms a free exercise claim so much as to render it noncolorable. Justice Brennan's approach would therefore leave the *Roy* reasoning and result intact but would not compel the Court to apply the *Roy* reasoning to the *Indian* ***Cemetery*** case. At best, however, this interpretation of *Roy* is a revisionist attempt to justify a case that was correctly decided but that was based on formalistic reasoning and that has left a somewhat dubious precedent.

The *Roy* precedent aside, the *Indian* ***Cemetery*** Court's primary concern appeared to be that if claims of any interference--no matter how unintentional or incidental--on the ability to practice religious beliefs are accepted into the framework of a free exercise jurisprudence, inevitably judgments will have to be made on the value of certain religious beliefs in the face of a proposed government activity.[27] Unwilling to risk that prospect, and recognizing the crippling effect it could conceivably have on the government's ability to develop its own land,[28] the majority rejected the claim altogether--not because it underestimated the impact of the government action, but because it ***251** preferred to decline to recognize the right altogether rather than allowing the possibility of administering it improperly.

The effect of the Court's hesitance is the denial of a compelling claim in this case and the development of a rather formalistic test for free exercise claims in general. Because the Court feared how a balancing test might operate, it was forced to justify its result by formalistically attempting to define the Free Exercise Clause as only prohibiting governmental actions coercing a moral choice. That questionable constitutional interpretation has already left the Court in the untenable position of admitting that even if the proposed governmental action in *Indian* ***Cemetery*** would "'virtually destroy the Indians' ability to practice their religion,"' there is no colorable free exercise claim.[29] If "free exercise" is to mean anything, then any governmental interference that threatens to extinguish a religion altogether must raise a legitimate free exercise claim--even if it is to be balanced against a competing claim of compelling governmental interest. The Court has entertained in the past claims that a proposed practice endangers an entire religion,[30] and its unwillingness to act in *Indian* ***Cemetery*** removes constitutional protection from governmental action that incidentally prevents the practice of particular religious beliefs. One can hardly imagine a more direct challenge to free exercise.

Footnotes

1 108 S. Ct. 876 (1988).

2 108 S. Ct. 1319 (1988).

3 U.S. CONST. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion].").

4 108 S. Ct. at 1322 (quoting the commissioned study at 181).

5 *Id*.

6 *See id*. The Court noted that the route selected was deemed preferable to "[a]lternative routes that would have avoided the Chimney Rock area altogether ... because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id*.

7 33 U.S.C. § 1251 (1982 & Supp. IV 1986).

8 42 U.S.C. § 4321 (1982).

9 *See* 108 S. Ct. at 1322.

10 *See* **Northwest** Indian **Cemetery** Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983).

11 *See* **Northwest** Indian **Cemetery** Protective Ass'n v. Peterson, 795 F.2d 688, 694. The circuit court also affirmed in part the district court's ruling on statutory grounds. The portion of the district court injunction relating to harvesting was largely rendered moot by an act of Congress passed while the case was pending before the Ninth Circuit. The California Wilderness Act of 1984, Pub. L. 98-425, 98 Stat. 1619, prohibited all commercial activity (including timber harvesting) in the area, with the exception of the narrow stretch of land required for the construction of the G-O road. *See id*. at 1322-23.

The dissenting opinion in the Supreme Court argued that the congressional action recognized by the Ninth Circuit had the effect of rendering the result in the case all the more offensive. Whatever compelling interest the government might claim in completing the roadway, the dissent argued, the prohibition of harvesting in the area severely limited its usefulness. *See id*. at 1332-3 (Brennan, J., dissenting).
The circuit court also rejected the district court's ruling relating to the government's trust duties to the Hoopa Valley reservation but otherwise accepted the district court's statutory ruling. *See id*. at 1323. The Supreme Court did not consider the statutory claims, as the government appealed only the constitutional issue, claiming it would cure any statutory defects before beginning construction. *See id*.

12 Chief Justice Rehnquist joined Justice O'Connor, as did Justices White, Stevens, and Scalia. Justice Brennan, joined by Justices Marshall and Blackmun, filed a dissenting opinion. Justice Kennedy did not participate.

13 *See* 108 S. Ct. at 1325.

14 *Id*. at 1326.

15 *See id*. at 1325.

16 *See supra* note 11 and accompanying text.

17 *See* 108 S. Ct. at 1333-34 (Brennan, J., dissenting).

18 *See id*. at 1329.

19 *Id*. at 1329-30. Such a role, the majority observed, "cannot be squared with the Constitution or with our precedents" and "would cast the judiciary in a role that we were never intended to play." *Id*. at 1330.

20 *See id*. at 1324 ("It is undisputed that the Indian respondents' beliefs are sincere ....").

21 *See id*. at 1326 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school-attendance statute and accompanying penalty violate free exercise right of Amish to educate children at home); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits to applicant refusing to work on the Sabbath violates free exercise rights); Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707 (1981) (denial of unemployment benefits for religion-based refusal to work on a weapons production line violates Free Exercise Clause)).

22 476 U.S. 693 (1986).

23 *Id*. at 696.

24 *See* 108 S. Ct. at 1324-25.

25 *See id*. at 1336-37 (Brennan, J., dissenting). The processing of information, implicated by the Social Security number system challenged in *Roy*, is an internal record-keeping procedure, the dissent argued, and thereby brings it outside the purview of the Free Exercise Clause; Mr. "Roy could 'no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.'" *Roy*, 476 U.S. at 700, *quoted in Indian* ***Cemetery***, 108 S. Ct. at 1336 (Brennan, J., dissenting). By contrast, the road construction plan in *Indian* ***Cemetery*** is "likely to have substantial external" public effects, and as such is "subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not." *Id*. at 1336 (Brennan, J., dissenting). The differences between the contested practice in *Roy* and that in *Indian* ***Cemetery***, the dissent concluded, are "of constitutional magnitude." *Id*. at 1336 n.5 (Brennan, J., dissenting).

26 Justice Brennan, however, did not discuss this dichotomy in the context of his balancing test.

27 *See supra* note 19 and accompanying text.

28 *See* 108 S. Ct. at 1327.

29 *See id*. at 1326-27 (quoting 795 F.2d at 693 (opinion below)).

30 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 209 (1972) (considering "the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today").

12 HVJLPP 246

End of Document