TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 30
Number 4 *Annual New York State Constitutional Issue*

Article 7

November 2014

Neutral Discrimination – Selective Enforcement of Religiously Neutral Laws and the First Amendment

Jeffrey Gautsche

NEUTRAL DISCRIMINATION—SELECTIVE ENFORCEMENT OF RELIGIOUSLY NEUTRAL LAWS AND THE FIRST AMENDMENT

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Tenafly Eruv Association v. Borough of Tenafly[1]
(decided March 21, 2001)

I. INTRODUCTION

The First Amendment to the United States Constitution protects, among other things, the Free Exercise of Religion.[2] Since its establishment, the Free Exercise Clause has been interpreted, scrutinized, and altered in its application.[3] Courts have found that the strictest form of analytical scrutiny is to be applied to a government ordinance, law, or rule, which is neutral on its face but is not applied neutrally, and consequentially interferes with the free exercise of a religious group's practice.[4] This method of examining the Free Exercise Clause is consistent with the text of the amendment, and is, therefore, acceptable to protect religious groups from laws that, while facially neutral, are enforced in a discriminatory manner.[5]

---

[1] 309 F.3d 144 (3d Cir. 2002).

[2] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[3] While certain aspects of the current and historical interpretations of the Free Exercise Clause will be discussed in this article, the long history of its analysis and enforcement is beyond this article's scope. For more information, see Frederick Mark Gedicks, *On The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief In: The United States*, 19 EMORY INT'L L. REV. 1187 (2005), and Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006).

[4] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 543 (1993) (noting if the application of a law is not neutrally applied to religious and secular conduct, then the law is in violation of the Free Exercise Clause unless it serves a compelling state interest accomplished by means narrowly tailored to that interest).

[5] *See, e.g.*, *Tenafly*, 309 F.3d at 144.

Through a plain language analysis, regardless of what level of constitutional scrutiny is appropriate, a law that clearly interferes with the free exercise of religion would be deemed unconstitutional on its face.[6] Does that make religious discrimination impossible? No—it just adds a requirement of creativity. A law does not need to have been created to discriminate, but if such a law is not being enforced neutrally, it can be construed to have a discriminatory effect.[7] This article focuses on tackling that issue, and it traces the Third Circuit's decision in *Tenafly Eruv Association v. Borough of Tenafly*,[8] using the case as a road map to identify and illustrate how a law or ordinance is scrutinized when it is facially neutral but violates the Free Exercise Clause in its application.

II. BACKGROUND

To properly analyze this method of interpreting the Free Exercise Clause, it is necessary to summarize the events in the *Tenafly* decision, as well as give a brief historical roadmap as to the prevailing law surrounding First Amendment interpretation.

A. *Tenafly Eruv Association v. Borough of Tenafly*—What Happened?

The dispute in *Tenafly* arose when the Tenafly Borough government (the "Borough") ordered the removal of lechi, which were posted on utility poles that created an eruv.[9] This eruv allowed Orthodox Jewish citizens to freely move between their homes and the Synagogue on the Sabbath and holidays.[10] Normally, pushing carts, such as baby carriages, without the eruv would have been in violation

---

[6] U.S. CONST. amend. I.

[7] *Tenafly*, 309 F.3d at 153.

[8] 309 F.3d 144.

[9] Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 146-47 (3d Cir. 2001).

> An *eruv*, under Jewish law, is an unbroken physical delineation of an area. In tangible terms, it is a defined area created from either natural barriers or artificial means, such as from wires strung across poles. The boundaries of the *eruv* must resemble a series of doorways. In this case, the *eruv* consists of existing horizontal wires and vertical black rubber coated castings, known as "lechis," which serve as the sides of the symbolic "doorway."

Id. at 146.

[10] *Id.*

of traditional Jewish Law, thereby forcing Orthodox Jewish parents to stay at home on holy days.[11] There was an ordinance in the Borough of Tenafly that stated: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough."[12] Ordinance 691 was not brought to the attention of either the Borough or the Tenafly Eruv Association (the "Association"), but, nonetheless, the lechi used to create the eruv were ordered to be taken down.[13]

After several meetings between the Association and the Borough, the Borough's chairman finally pointed out that there was, in fact, a local ordinance that would support their decision to remove the lechi.[14] The ordinance had been in place for quite some time, but it had not been enforced against house numbers, lost dog signs, and a number of other objects commonly posted on local utility poles.[15] With the ordinance as its backing power, the Borough quickly ordered the removal of all of the lechi; the Association sought an immediate injunction to stop the removal based on claims that the ordinance was in violation of the Jewish community's First Amendment rights.[16] The Association alleged both freedom of speech and Free Exercise violations, as well as a violation of the Fair Housing Act.[17] The trial court held that the Association would not prevail on its First Amendment or Fair Housing claims and, therefore, no injunction would be granted; the Association appealed.[18]

B. Interpreting the Free Exercise Clause Historically

It has been well established that in order for the government to impose any restriction on the free exercise of religion, that restriction must survive a heightened scrutiny analysis—there must be a compelling government interest being served by the restriction, and it must be accomplished by narrowly tailored means.[19] However, the

---

[11] *Id.*

[12] *Id.* at 159-60 n.15. TENAFLY, N.J., ORDINANCE 691 art. VII (7) (1954).

[13] *Tenafly*, 155 F. Supp. 2d at 159-60.

[14] *Id.* at 168-69.

[15] *Id.* at 169.

[16] *Id.* at 170-71.

[17] *Id.* at 145.

[18] *Tenafly*, 155 F. Supp. 2d at 191.

[19] To survive strict scrutiny, the law in question must serve a compelling government in-

level of scrutiny applicable, and when it should apply, has undergone changes over recent years.

1. Smith *and the Laws that Followed*

A Free Exercise claim is either subject to a rational basis or strict scrutiny review, depending on the particular facts of the case.[20] The most prominent case that created such a distinction was *Employment Division v. Smith*.[21] In *Smith*, the Supreme Court was asked to rule on whether a state that had laws forbidding the smoking of peyote was required to make an exception for Native Americans who used the substance during religious rituals.[22] The Court held that the state was not required to make such an exception.[23] *Smith* established that when a law is neutral on its face, but in its general application it burdens the free exercise of religion, the government need only show a rational relationship to a legitimate state interest for the law to survive scrutiny.[24]

The holding in *Smith* essentially limited Free Exercise rights for any religious group that had traditional practices interfered with because of laws that only incidentally affected the religion.[25] This decision garnered enough criticism that Congress passed a law to effectively negate it—the Religious Freedoms Restoration Act ("RFRA") of 1993.[26] RFRA stated that the act was to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened,"[27] thus, plainly negating the holding in *Smith*.[28] Four years later, the Supreme Court undermined RFRA significantly through its decision in *City of*

terest and be accomplished by narrowly tailored means. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' ") (internal quotations omitted).

[20] *See, e.g.*, *Tenafly*, 309 F.3d at 165.

[21] 494 U.S. 872 (1990).

[22] *Id.* at 874.

[23] *Id.* at 882.

[24] *Id.* at 890.

[25] *Id.*

[26] 42 U.S.C. § 2000bb (1993).

[27] 42 U.S.C. § 2000bb(b)(1).

[28] 42 U.S.C. § 2000bb(a)(4).

Boerne v. Flores,[29] where it held that RFRA only applied to federal laws, not the individual states, thus, leaving state laws and ordinances at the mercy of the decision in *Smith*.[30]

With RFRA legally neutered in matters of state law, Congress eventually passed the Protection of Religious Exercises in Land Use and by Institutionalized Persons Act ("RLUIPA") in 2000.[31] The terms in RLUIPA are virtually identical to those in RFRA, though it is more focused on land use regulations.[32] Because this law has yet to be addressed by the Supreme Court as RFRA was, and therefore, still applies to both Federal and State laws, in matters not involving land use regulations the Supreme Court decisions still control.[33]

2. **Lukumi *and the Other Half***

As stated above, the Supreme Court has determined that a rational basis scrutiny applies when a law is neutral and generally applicable, yet incidentally burdens the free exercise of religion.[34] A year after *Smith*, the Court addressed the other half of that issue—laws and ordinances are that not neutral, or not generally applicable, and how those laws are to be scrutinized—in *Church of Lukumi Babalu Ave. Inc. v. City of Hialeah*.[35]

In *Lukumi*, the plaintiffs complained that a city rule that forbade the "unnecessary" killing of animals was not being uniformly enforced.[36] Animal slaughter, as part of the Santeria religion's practices, was considered illegal, but the city allowed hunting of the same types of animals for sport and for food.[37] The Supreme Court stated the ordinance applied in such a way that it "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[38] Therefore, to justify a law that is facially neutral

---

[29] 521 U.S. 507, 511 (1997).

[30] *Id.*

[31] 42 U.S.C. § 2000cc (2000).

[32] *Id.* For more on RLUIPA and the battle between Congress and the Supreme Court over the Free Exercise clause, see Sara Smolik, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723 (2004).

[33] *See* Smolik, *supra* note 32, at 743.

[34] *Smith*, 484 U.S. at 879.

[35] 508 U.S. 520, 524 (1993).

[36] *Id.* at 527.

[37] *Id.* at 537 (noting the ritual animal killings were for both food and religious ritual purposes).

[38] *Id.* at 537-38.

but is not applied neutrally and where the selective enforcement is religiously motivated, the government must show there is a compelling state interest that is being accomplished by narrowly tailored means.[39] The Supreme Court, between *Smith* and *Lukumi*, had, therefore, created a rule stating that rational basis scrutiny applied when a law was written and applied neutrally towards secular and religious groups, and there was an incidental infringement on the free exercise of religion, but if that infringement was not incidental, or the law was not facially neutral, strict scrutiny applied, and the law will likely be struck down as unconstitutional.[40]

III. ANALYSIS

As previously stated, the court will apply strict scrutiny when it comes to free exercise questions when the law is not neutral or generally applicable.[41] The court in *Tenafly* used that criteria and applied strict scrutiny to the village ordinance but also outlined another circumstance where strict scrutiny would apply—a hybrid rights scenario.[42]

A. Hybrid Rights

The court in *Tenafly* stated that strict scrutiny should be applied to laws, rules, and ordinances that are generally applicable and neutral but burden Free Exercise rights along with another constitutional protections.[43] There was an issue regarding freedom of speech that was addressed in the *Tenafly* case, and although that issue was disposed of, both the Free Exercise of Religion and another constitutional protection were burdened, thus triggering a hybrid rights claim.[44] However, because the plaintiffs did not raise such a claim, and the court had already determined that the Tenafly Borough Ordinance was not universally applied, it was only noted that such a claim existed and could have been raised, but it was not analyzed further.[45]

---

[39] *Id.* at 546.
[40] *See generally Smith*, 484 U.S. 872; *Lukumi*, 508 U.S. 520.
[41] *Smith*, 484 U.S. at 879.
[42] *Tenafly*, 309 F.3d at 165 n.26.
[43] *Id.*
[44] *Id.* at 165.
[45] *Id.* at 165 n.26.

B. The *Tenafly* Application

The Borough Ordinance that gave rise to this claim was neutral on its face; however, the court found that it was not being neutrally applied; therefore, the plaintiffs' claim did not immediately fail.[46] The court stated that the "lack of neutrality eviscerates [the] contention that [a] restriction is narrowly tailored to advance [a] compelling interest."[47] The Borough contended that the law was in fact neutral in its application and that the religious aspect of the eruv created an Establishment Clause[48] issue, the avoidance of which would be a compelling government interest.[49]

First, the court did away with the Borough's contention that the law was neutral because other violations of the ordinance that were not religious in nature and were allowed to remain were not permanent posts to the utility poles, as the lechi would be.[50] The Borough had allowed other permanent attachments, such as house numbers, thus, the court was unconvinced by that argument, and it maintained that strict scrutiny would be applied.[51]

In an attempt to show that, under strict scrutiny, the Borough had a legitimate, compelling interest in removing the eruv, it stated that allowing the lechi to stay in violation of the ordinance would create an Establishment Clause issue.[52] The Borough contended, correctly, that it had a legitimate interest in avoiding the appearance that the town was supporting the Orthodox Jewish Religion.[53] In its analysis, the court relied primarily on the Endorsement Test, which was established by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*,[54] for examining Establishment Clause issues. The test asks, "would a reasonable, informed observer, i.e., one familiar with the history and context of private individuals' access to the public money or property at issue, perceive the challenged government ac-

---

[46] *Id.* at 167.

[47] *Tenafly*, 309 F.3d at 172 (citing *Lukumi*, 508 U.S. at 546-47).

[48] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[49] *Tenafly*, 309 F.3d at 172.

[50] *Id.* at 167.

[51] *Id.*

[52] *Id.* at 172.

[53] *Id.*

[54] 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

tion as endorsing religion?"[55] Ultimately, the court held that a reasonable, informed observer would not view the Borough as endorsing the Orthodox Jewish religion if it allowed the eruv to remain.[56]

When religion is treated neutrally, it is typically held that a reasonable, informed observer would not see that a government body is endorsing religion.[57] Furthermore, while emphasizing neutrality, the Supreme Court has allowed the government to "accommodate religious needs by alleviating special burdens."[58] It is important to differentiate between religiously motivated conduct by private individuals, and conduct initiated or sponsored by the government.[59] Following this principle, the court in *Tenafly* stated, "[n]o reasonable, informed observer would perceive the decision of the plaintiffs to affix lechis to utility poles owned by Verizon and to do so with Cablevision's assistance as 'a choice attributable to the State.' "[60]

Finally, the court went on to state that a violation of the Free Exercise Clause required treatment of religion that is not neutral.[61] Furthermore, it would be an extremely unusual case where complying with free exercise principals could create an Establishment Clause violation.[62] "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion."[63] Thus, the court determined that the Borough lacked a sufficient Establishment Clause claim, and without one, it would not be able to show a compelling state interest being accomplished by narrowly tailored means.[64] Without such, the ordinance failed strict scrutiny, and the Tenafly Eruv Association prevailed.[65]

IV. CONCLUSION

The appellate court in *Tenafly* managed to correct the lower

---

[55] *Tenafly*, 309 F.3d at 174; *see, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 654-55 (2002).

[56] *Tenafly*, 309 F.3d at 177.

[57] *Id.* at 174-75.

[58] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994).

[59] *Tenafly*, 309 F.3d at 177.

[60] *Id.* (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000)).

[61] *Id.* at 177-78.

[62] *Id.*

[63] *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring).

[64] *Tenafly*, 309 F.3d at 178.

[65] *Id.*

court's apparent misstep.[66] The Free Exercise Clause, by its own language, clearly intends to protect citizens and allow them to freely practice their chosen religion. If a law is neutral towards religion but is being enforced in a way that prevents people from practicing their chosen faith, it should not stand. Strict scrutiny is the proper lens to aim and shoot down these discriminatory practices. It follows that a neutral law that is enforced in a manner that discriminates against religion could not reasonably be seen as existing to prevent an Establishment Clause problem. Creative religious discrimination can, and was, combatted by rather straight forward principles—if a neutral law is enforced only against a religious group, that law will not survive.

Jeffrey Gautsche[*]

[66] *Id.*

* J.D. Candidate 2015, Touro College Jacob D. Fuchsberg Law Center; State University of New York at Albany, B.A. in English (2005).