

Religious Liberty and the Compelling State Interest Test

by Neil Markva

(This is an email that was sent by Neil December 20, 1999 to U.D. Roberts and others)

There are two types of lawyers today—Constitutional lawyers and Supreme Court opinion lawyers. The former hold that the Court has no authority to make law, so that a Supreme Court opinion is merely an opinion of men that binds only the parties to the particular cause of action.

The majority rule in the so-called Christian legal community (of which I consider myself a member) has rejected this premise, however, and has decided to play on the enemy's playing field, use their equipment, and operate according to their rules. When they seem to be making some headway, the enemy simply changes the rules and we believers remain on the outside looking in. And God is further isolated from the fray. Some of us do not agree and refuse to buy into this point of view.

Members of the bar who think and reason in accord with the 18th century principles of law and government as embodied in our nation's state and federal constitutions are marginalized, repudiated, shunned, and in short, simply treated as outcasts. Believe me. I'm not complaining or whining. I'm simply stating facts. At the same time, I'm most encouraged because people like you DO understand English and are willing to do what has to be done to promote the TRUTH.

At the heart of the matter is the compelling State interest test, which presupposes that no fixed laws of right and wrong exist. Consequently, all courts now "balance the interests" allegedly involved in the particular controversy before a court. The rejection of an objective, fixed law is a rejection of God, the Creator, and His laws of nature and of nature's God as the common law that governs all things (whether we believe it or not). In place of the Creator and the fixed laws of the Created Order, public policy in America simply substitutes custom, tradition, and court decisions as the common law.

Our Christian "leaders" acknowledged and accepted this new common law after God's law was completely rejected once and for all in 1962 by Justice William Brennan who invented the "compelling State interest" test out of whole cloth. When Justice Scalia rejected the compelling State interest test in the 1989 Smith (peyote) case in favor of the jurisdictional test that recognizes God's exclusive jurisdiction over our religion, the Christian lawyers joined the ACLU, People for the American Way, and a collection of other Marxist organizations. Clearly, Marxists aka Socialists do not want any State recognition of Scalia's attempt to restore the exclusive jurisdiction of God over our free exercise of religion.

In their quest to override the Smith case and its jurisdictional argument underpinnings, our “leaders” opted to reject it and promote the “balancing test” unconstitutionally devised by the Supreme Court. And of what does the “balancing test” consist? With no absolute, fixed law, they start with the consideration of the “interests” of the parties involved in the case or controversy. The State’s interest is always brought into the mix for, after all, the court is now a primary maker of public policy having successfully eliminated the common law of God and having assumed complete power over any legislative act by judicial fiat. Any decision is generally recognized and accepted as law by everyone unless, of course, it undermines the socialist agenda.

The State’s interest invariably supports the interests of one of the parties. If you think of a first party’s interest as the thesis and the second party’s interest as the antithesis, then it is the State that will determine the synthesis that will become the starting point in the next court case on the subject. This, of course, is simply the direct application of the Hegelian dialectic applied to the law thus making every court case an example of dialectical materialism in the best Marxian sense.

Few understand what is going on. But I do not think this analysis is an extreme position. I challenge anyone to show me where my understanding is wrong.

I personally know the people involved. In one instance, after sitting through a seminar presentation of one friend who rejected the jurisdictional test of the Smith case, I told him that I thought we were turning our back on God by supporting the “compelling State interest test.” For the jurisdictional argument recognizes our religious freedom as an unalienable right so that the State has no authority whatsoever to restrain our exercise of the duty which we owe to our Creator. He simply turned his back on me and refused to discuss the matter.

It is particularly unnerving when you realize that our Lord commanded us to “teach the nations to obey all that He commanded us” (Matthew 28:18-20). Instead, with respect to the civil magistrates of America, we simply ignore this command and accept the State as the new found sovereign in our lives. We have no king but Caesar!

Our opposition is directed toward the wholesale rejection of the concept of unalienable rights with respect to numerous subjects including, but not limited to, our religious liberty, the education of our children, and the use of our private property. Some of us are convinced that there is a remnant that agrees with us. And we believe that things can be done to get our Lord more involved in the battle that is raging.

He is involved. But, in my opinion, His hands are significantly tied by the confusion that reigns in the Body of Christ with respect to these matters. He will do nothing to butt into the work of His people unless they want Him to do so. And only in those situations where there is agreement. Our friends in the legal community who favor the compelling State interest test make it clear where they stand. It will take the concerted efforts of others of us to see His TRUTH ultimately prevail in this particular matter.

To make sure that we are within His will, we must operate within the authority structure of our Lord if we are to see healing and restoration in our land. We are working toward that end. We cannot make personal attacks on anyone. But it is essential that we come down hard on any idea that is a rejection of God and His laws.

When considering whether or not to support any legislation concerning any matter, we recommend that you look for any “exception” clause and reference to a compelling State or governmental interest test. If the latter is involved, don’t support it. For this reason, none of the particular pieces of legislation that you have on the website should be supported.

We have much work ahead. But it is good to see that others are moving along parallel paths.

Hopefully, the foregoing is helpful.

In His service,

Neil Markva