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Restricting Religion by Protecting Speech? Reflections on *Cohran v. City of Atlanta*

Joseph Prud'homme*

Burton Family Chair in Religion, Politics and Culture Director, Institute for Religion, Politics and Culture, Washington College, USA

Article Info

***Corresponding author:**
Joseph Prud'homme
Burton Family Chair in Religion, Politics, and Culture
Director, Institute for Religion, Politics, and Culture
Washington College
USA
E-mail: jprudhomme2@washcoll.edu

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Abstract

The United States is in the grip of an extended debate over the meaning of the free exercise of religion. This is especially true as religious liberty has come increasingly to be viewed as restricting the rights of those not sharing the views of religious liberty claimants. One case that raises challenging questions about the scope of religious freedom is the federal district court case of *Cochran v. City of Atlanta*. In this short piece, I first provide a summary of the *Cochran* decision. Although detailed jurisprudential analysis cannot be provided in this piece, I do work to situate this decision within an emerging trend within American constitutional law: the trend to redefine religious liberty not as a free-standing constitutional protection but as one sub-element of a wider species of rights, specifically, the right of personally expressive speech. Through a short review of salient aspects of English and American legal history, I develop a three-stage argument for suspecting that this move contains the potential to water down the degree to which the federal judiciary provides robust protection of the right of religious liberty.

Keywords: Cochran's freedom; Constitutional law; Legislative limitations; Commentaries.

Case Summary

In December of 2017, Federal District Judge Leigh Martin May in the case of *Cochran v. City of Atlanta, Georgia* [1] rendered a judgment in a matter involving the City of Atlanta's firing of Fire Chief Kelvin Cochran in 2015. Cochran alleged that his firing was unconstitutional as a violation of his First Amendment right to the free exercise of religion as well as his right to freedom of speech. The cause for his termination, the city affirmed, was two-fold: a) that Cochran had written, published and publicized a book (about his Christian faith) [2] without pre-clearance from the City of Atlanta, as the city's policy then required; and b) that the book contained disparaging remarks toward homosexuality, as the book made a few condemnatory comments about homosexual behavior, referring in passing to such behavior as "vile," and homosexuals as "cursed evil-doers"; such statements rendered Cochran unfit in the eyes of the city's leadership to manage the large and diverse work force employed in the city's Fire Department.

The district court ruled that Cochran's firing was unconstitutional, but only on the basis of Cochran's freedom of speech claim, deeming the city's policy of requiring employees in management-level positions to secure pre-clearance from senior city leaders before publishing books or articles to be an impermissible prior restraint on the right to freedom of speech. The court found no constitutional objection to Cochran's firing on the basis of his claim to free exercise of religion. Nevertheless, the city decided in October of 2018 to award Cochran a settlement of $1.2 million to remedy his termination which, as the district court ruled, was, at least in part, the consequence of

an impermissible regulation of Cochran's freedom of speech by a state-imposed pre-clearance rule governing his written material.

Religious Liberty or the Right of Contemporary Free Speech *qua* Expressive Autonomy?

This is an important case, not least because it can be interpreted as an example of the continuing waning of freedom of religion under state and federal law. The speech claim won, but the religion claim did not. This outcome, in fact, is of a piece with a growing legal movement conferring greater weight to freedom of speech than to freedom of religion—a movement which is even coming to assert that religion itself is constitutionally protectable only as a subspecies of freedom of speech, and not as an isolated, free-standing constitutional liberty.

Indeed, this latter trend is proliferating in the legal academy. The late distinguished legal philosopher Ronald Dworkin encapsulated this movement in asserting that we must not "as a community, attach any special value to religion as a phenomenon [3]." This deflationary account of religion "as a phenomenon" entails in turn that it should enjoy no specially protected status under American constitutional law. Chris Eisgruber and Lawrence Sager expand on Dworkin's claim by endeavoring to describe religious liberty as a species of a vague right to personally expressive autonomy—a right which has come to occupy a central place in contemporary free speech doctrine. The extension of speech to include a vast array of expressive conduct is evidenced clearly by the Supreme Court's designation of totally nude erotic stripping and other forms of pornography as expressive speech subject to First Amendment protection. In *City of Erie v. Pap's A.M.* [4], the Supreme Court held that nude commercial dancing designed to stimulate for profit the prurient interest of ticket buyers was speech, yet it upheld the restriction on the dancing at Pap's strip club because the restriction was deemed to be a content neutral ordinance that attended only to secondary effects, such as drunk driving in the vicinity of the club. Speech therefore in contemporary Supreme Court case law has come to include not only the already vast array of more conventional forms of expression, but in effect every form of personal expression of belief or thought (with only such well-known exceptions as child pornography, dangerous incitement to imminent violence, and obscenity).

An Initial cause for Caution: The Long History of No Prior Restraint as the Only Limitation on State Regulation of Free Speech, and the *tu quoque* Objection

There is a reason to be concerned about this trend to submerge religious liberty within the broader category of autonomous speech. The history of American constitutional law discloses a pattern of past dismissiveness of free speech as a judicially enforceable category. As Thomas Tedford documents, in the 19th century, the federal courts' view of freedom of speech was highly deferential to state regulation. Indeed, the federal courts would let stand the Sedition Acts, which criminalized attacks on the Adams administration's foreign policy, as well as limitations on the mailing of abolitionist literature [5]. In fact, it was not until the famous case of *Gitlow v. New York* in 1925 [6] that, in the words of Patrick Garry, "for the first time in the Court's 130-year history…anyone attempted to use the First Amendment as a shield against state governmental prosecution [7]"—a defense which nevertheless failed to protect Gitlow from a criminal conviction based on his political speech.

Tedford's work explains why the federal courts historically were so deferential to legislative restraints on free speech. The predominant view of the First Amendment until the post-World War I era placed emphasis on the word "abridge": Congress is prohibited only from abridging speech, understood as placing any further limitations of speech beyond those already present at the time of the ratification of the Bill of Rights. Because the courts were deferring to prevailing opinion at the time of ratification, the courts effectively were deferring to the ideas on free speech encapsulated in the highly influential work of Sir William Blackstone. In his monumental *Commentaries on the Laws of England*, Blackstone recorded that freedom of speech means only the absence of prior restraint and not any other kind of protection of speech from restrictive legislation.

Although the Supreme Court would in the 20th century modify this view in the era following *Gitlow* [8], the historical fact of a deep legacy of legislative restriction produces a genuine dilemma: deference to legislative restrictions on speech, as long as they avoid prior restraint, could resurface, and not simply because of the shopworn cliché that the past can always repeat itself, but especially owing to the causes which benefitted from the absence of First Amendment judicial enforcement. Upholding restrictions on abolitionist literature benefitted slave interests; upholding restraints on political speech benefitted the national security state. These facts can in response elicit the following line of argument: if the Court could allow less strict (or even no enforcement) of the First Amendment in a way that advanced ignoble purposes, can't we allow it all the more to give less enforcement of the First Amendment in service of truly noble purposes? We can call this the *tu quoque* objection to rigorous free speech protection. Indeed, in their recent detailed polemic against contemporary freedom of speech doctrine, University of Alabama law professors Richard Delgado and Jean Stefanic develop this exact contention [9]. "The First Amendment co-existed quite comfortably with slavery for nearly 100 years and was never thought to cover abolitionist speech or speech deemed adverse to American interests," Delgado remonstrates [10]. Indeed, as Catherine Stimpson relates in a sympathetic re-articulation of Delgado's and Stefanic's point: "among the master's tools for shoring up his home and bank has been a manipulation of the First Amendment [11]." So, in turn, why should the First Amendment be applied with *elan* today when

much nobler purposes can be served through restricting its application? The emergence of arguments such as these can only augur poorly for religious liberty when the latter is subjected to the same forces arrayed against free speech today.

Blackstone and a Persisting Rationale for Restricting Freedom of Speech: the Breadth of the Protected Category

Beyond this concern, we should further assess the problem of subsuming religion under expressive speech by examining in greater depth why the legal tradition as recorded in Blackstone's *Commentaries* so favored legislative limitations on free speech. That the tradition of judicial deference was just a mechanism to protect vested interests is likely overly cynical. Were there other justifications? Moreover, do any of these justifications still hold relevance for legal developments today?

As to the question of the logic of the legal movement Blackstone identifies, it is important to make a distinction between competing governmental roles. In the *Commentaries,* Blackstone makes clear, especially in Chapter 1 titled "Of the Absolute Rights of Individuals," that he believes in the centrality of freedom to English citizenship. He holds, for example, that England "gives liberty, rightly understood, that is, protection, to a Jew, Turk, or a heathen, as well as to those who profess the true religion of Christ [12]."

However, Blackstone also believes that it is only for parliament to effectuate this liberty, not for the judiciary [13]. Why? Because there is no way, in his mind, for the courts meaningfully to police such a broad range of activities as "speech." Judicial supervision of legislative enactments on so vague a concept would transcend any proper bounds restricting judicial activity. It would in turn empower what the historian of English law Grant Gilmore says was at the core of the concern animating the legal tradition Blackstone describes, namely, the concern of empowering judges with the authority of "making law, with a sort of joyous frenzy"—a condition in which every judge feels entitled to define speech as his fancy might see fit—a state Blackstone saw as scarcely less than anarchy [14].

However, one way to respond to this argument for judicial deference is to contend that the category of religion is no less broad than that of speech. And since the Court has long developed a jurisprudence about the concept of religion without (it can be argued) descending into frenzied, anarchic judicial legislation, no special problem would attach to designating religion as speech.

However, this view is not quite right. For compared to an assertion of a religious liberty right, the assertion of a right to free speech is actually analogous to an assertion of a right under the Ninth Amendment. To be sure, religion is vague. But of course, so are other aspects of our written constitution. And as Mark Miles points out, a problem can't emerge surrounding a constitutional provision simply because the text "includes language that is subject to more than one reasonable interpretation." However, speech is in fact so broad that it becomes analogous to those rights announced but unspecified in the Ninth Amendment. This is so because as Miles further points out, the main problem endemic to the Ninth Amendment is the "interpretive barrier" posed not by its simple vagueness, but by a deeper "lack of an apparent 'theme' to guide interpretation." Indeed, as Niles remarks, there appears to be no evident theme at all for how to construe so vast a provision as found in the Ninth Amendment [15]. As to the broad category of expressive speech, we can very well say much the same thing. But in turn, we should note that the interpretative barrier caused by the Ninth Amendment's vagueness has resulted in nearly wholesale judicial "neglect." As Chase Sanders affirms, "there seems to be but one simple reason underlying the Ninth Amendment's neglect: it appears incapable of practical interpretation. No one has yet discovered a mechanism for empowering courts to identify the 'other [rights] retained by the people' that does not dramatically swell the judiciary's head on the three-headed hydra of American government [16]." There appears to be no way to adjudge such vast an array of potential rights that does not descend into that judicially crafted anarchy that so troubled Blackstone. However, under the constitutional text (as Justice Black reminds us, the Constitution says "no law…[17]"), as well as current Supreme Court doctrine, speech too has become so broad as to place it in a position effectively analogous to this very interpretive barrier besetting the Ninth Amendment. As noted, speech is now so sweeping that we are asked to maintain that free speech covers non-political speech acts, including public commercial live erotic simulated sex shows and prurient stripping [4,18]. "Speech" knows almost no limits.

Religion, on the contrary, at least as conventionally described by the federal judiciary, does possess some common interpretative core. Indeed, no court has ever equated religion with the bare articulation of an idea: religion, in American law, has boundaries. So although religion is notoriously slippery, a review of several of the prominent approaches to defining religion by the federal courts shows that there exists a central working concept of religion, conferring it a more limited status than expressive speech as such.

Although a detailed elaboration of the various definitions proposed by federal courts to define religion would have to be pursued elsewhere, religion does share some discernible common features in federal case law. Drawing in part on Ben Clemens work, "Defining Religion in the First Amendment [19]," we can itemize at least four variations of the meaning of religion in federal law.

First, there is the storied originalist view of religion. Originalists argue that religion does indeed have a delimited concrete meaning which separates the claims of religion from other claims about the world, about values, and about man's place in the universe. The early Supreme Court pronouncements on the meaning of religion generally defined religion narrowly

in terms of a Creator. For example, in the 1890 case of *Davis v. Beason* the Supreme Court stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will [20]," a view reiterated by Justice Hughes in the 1931 case of *United States v. MacIntosh*, where he holds that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation [21]."

In fact, this attachment to the plain original meaning of religion is provided by one of the lions of the legal left, Justice Hugo Black. In his epoch-making decision in *Everson v. Board of Education of Ewing Township* [22], Black repairs to the estimable James Madison, and specifically to his 1785 *Memorial and Remonstrance against Religious Assessments*, and sees it as describing the controlling original meaning of the Constitution's establishment clause. And precisely in this seminal writing Madison gives us a clearly delimited meaning to the concept of religion: religion is, Madison writes, "the duty which we owe to our Creator [23]." In what we might consider as the binding definition of Hugo Black (given the precedential value that has attached to *Everson*), religion concerns duties to one's creator, for which punishment for non-performance might arise by acts of the creator's justice.

Second, a somewhat different definition has also been developed which emphasizes transcendence and the presence of an extra-temporal element in the content of the belief, a view however which stops short of requiring a belief in a creator per se. In his article, "Defining 'Religion' in the First Amendment," J.H. Choper offers a definition of religion that focuses on whether the allegedly religious belief involves "a belief in a phenomenon of 'extratemporal' consequence," in the sense that the religious adherent holds that "the effects of action taken pursuant or contrary to his beliefs extend in some meaningful way to him beyond his lifetime [24]."

Third, there has emerged what we might call the comprehensive view, a position developed by Judge Adams of the Third Circuit Court in the 1979 case of *Malnak v. Yogi*. Judge Adams there proposes to identify religion by analyzing the role of the belief system in the life of adherents by looking at how these beliefs provide an overarching system that "addresses fundamental and ultimate questions having to do with deep and imponderable matters." Such fundamental questions include "the meaning of life and death, man's role in the Universe, [and] the proper moral code of right and wrong." This, too often will entail a belief in matters of extra-temporal consequence. In addition, Adams holds that for beliefs to count as religious they should be seen as regularly (but not absolutely) having external manifestations which can be identified by analogy with focal cases of religion (such as Roman Catholicism). He calls these features "formal, external, or surface signs" which are present in the focal cases of religion and are regularly present in a discernible analogical form in all members of the class 'religion.' Among the external signs whose presence should regularly be used to determine whether a belief or practice is religious are "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions [25]."

Fourth, we can survey the so-called functional view of religion. This perspective places less emphasis on the institutionalization of belief than is found in Adams's definition, and it also minimizes the metaphysical aspects found in several of the definitions surveyed above. This view received its clearest definition in the conscientious objector cases, especially in the holding in *United States v. Seeger* [26]. This view supplies a definition based on a detailed assessment of the "role or function that recognized religions have in the life of the adherents," including "deep and sincere belief [27]," and then seeks to develop tight analogies from these central cases to peripheral instances.

Again, I have not sought to provide a thorough examination of the category 'religion' under the constitutional doctrine. However, I do seek to point out that in each of the cases above, the court is not willing to erase the distinction between religion and expressive speech: on each of these views, expressive speech remains broader—considerably broader—than religion. Therefore, since breadth is taken to be the problem to be minimized, and expressive speech is broader than religion, designating religion as a subunit of speech casts religion in a more precarious position than it presently occupies. We could, therefore, indeed, face the Blackstonian logic outlined above. History *can* repeat itself.

The Compounding Problem of America's 'Free Speech Imaginary': Modern Free Speech Doctrine as a Paladin for Marginalized Communities, but Religion's Dominant Place in the Public Mindset; and Free Speech as a Guarantor of Public Indecency and Potential Protector of Hate

The record, therefore, seems to disclose that any attempt to cover so broad a topic as speech can in fact lead to no judicial supervision at all. However, why should we fear, with any sense of urgency, that this Blackstonian logic might actually obtain were religion defined as a species of the nebulous right of "speech?" Hasn't the Court's defense of speech in the last 50 years proven that just this broad concept can receive effective judicial protection? Indeed, why not think that—given the courts' solicitude for speech rights, especially in the post-World War II period—that this submergence would actually *aid* the defense of religious liberty?

The third problem I wish to suggest, however, militates against this optimistic view. Free speech in the United States, it seems, is increasingly refracted through a particular imaginary, that is, a dominant mode by which the right is

conceptualized in the public mindset. This free speech imaginary has, I believe, the following distinct characteristics: free speech is popularly understood as a protection for the socially marginal voice, while simultaneously religion (and especially Christianity) is understood to occupy a preeminent position throughout American life (no matter what the empirical reality in any particular region of the country might disclose). Further, free speech has been associated for a considerable period of time with sexual explicitness, while recently sexually graphic material has experienced a wave of censure due in part to the emergence of the #MeToo movement. Third, increasingly, free speech is being viewed as a pretext for hate speech. Each of these factors entails that religion would be exposed to increasing headwinds if it were associated specifically with an increasingly beleaguered right to freedom of speech.

As to the association of speech with marginalized communities, it is important to note that speech only came to be strongly protected in the eyes of the federal courts—after almost 150 years of "neglect [5]"—because of an upsurge in the courts' solicitude for the outsider. As Professor Sunstein has pointed out, all the major First Amendment cases in the 1940s, 1950s, and 1960s were brought by political dissidents [28]. By 1957, in the case of *Yates v. United States*, the Supreme Court ruled in favor of free speech rights for the politically marginal by overturning convictions under the Smith Act of fourteen "lower echelon" Communist party members [29]. Similar rulings occurred in *Aptheker v. Secretary of State* [30], *Noto v. United States* [31], and *United States v. Robel* [32]. These holdings reflected the growing influence of the view that "a democratic government could survive only if its prevailing 'truth' [is] continually questioned by dissident views."

In fact, this solicitude for the marginalized became the very foundation from which sprang the so-called "free speech revolution of the 1960s [7]." As Morton Horowitz, the late Professor of Legal History at Harvard Law School argued, "The Warren Court was the first Court in American history that empathized with the outsider….it was the first Court in American history that really identified with those who are down and out—the people who received the raw deal, those who are the outsiders, the marginal, the stigmatized [33]." In Horowitz's estimation, upending Blackstonian deference by affirming speech rights entered into the law only through a passion to protect the outsiders in society. Free speech protections by the Court carries with it, in consequence, this preferential option for the socially marginalized—a legacy that still occupies the popular mind today.

The cluster of popular associations augurs poorly for religious freedom—especially for the Christian faith—for Christianity in the United States is rarely if ever seen as the social outsider. No matter how much the Christian religion may have declined in this country, it still occupies in so much of the popular imagination (be it as a perceived fact to be lauded or regretted) [34] a position of long-standing social preeminence. Take, for example, the writings of the progressive professor and social change activist Guy Nave. He desires "eradicating the religious dominance of the church," since, to his mind, "implicit within early beliefs regarding Jesus' death and resurrection was the notion of challenging [all] political and religious dominance." Yet Professor Nave states, with regret: "Christianity has been and continues to be the dominant form of religious practice and expression in America [34]." Similar views about Christianity's preeminent position in the culture are shared by many secularists. As such, it can be hard for many to conceptualize robust, judicially-protected speech rights for the "dominant" Christians.

Moreover, there has also occurred a close association of free speech claims with a different kind of marginalized speech: not the numerically marginal, but, rather, what has historically been seen as the morally marginal: sexually tawdry and explicit speech. As Garry notes, "perhaps the most significant change in free speech law since the early 1970s" has been the inclusion into a protected status of "vulgar or sexually explicit speech [7]." In fact, as Garry further points out, "the vast majority of current free speech disputes involve entertainment speech that is accused of being graphically violent or sexually explicit [7]." As referenced above, speech, in fact, is the very category the Court uses to define an extraordinarily broad range of protected actions, including, as noted, public commercial live erotic simulated sex shows and stripping and the right to so-called dial-a-porn services. In the 1989 case of *Sable Communications, Inc. v. FCC*, the Supreme Court overruled a congressional law banning pre-recorded pornographic telephonic messages [7,35]. Garry argues that this, in turn, has led to an "overprotection" of this "non-vital" form of speech [7]. Whatever one's views on sexually explicit material, it remains true that it has received a considerable degree of juridical protection under the First Amendment, resulting in its close association with free speech in the popular mindset. Indeed, Garry makes this point by noting that debates about sexually explicit speech inevitably "spill over" into the debates about other forms of speech; the two are so closely connected that it is hard to debate speech without the associations with sexual tawdriness coloring the debate [7].

However, as many have recognized, we now exist in a social reality that can best be termed the post-#MeToo period. A defining feature of the #MeToo movement has been to identify the interlocking patterns that allow powerful individuals (mostly men) to feel entitled to engage in degrading behavior toward women. And front and center in this movement has been the anti-pornography campaign. The nation's leading anti-pornography organization, the National Center on Sexual Exploitation (NCOSE), has called for major changes by media outlets in light of the #MeToo movement. Although NCOSE does not call for censorship in most cases, the logic of its campaign is predicated on a denunciation of sexually explicit material that can supply arguments for the especially zealous to move beyond condemnation toward legal restraint. Indeed, in a recent

Open Letter, the executive director of NCOSE states, "We are calling on HBO to cancel *The Deuce* in light of the current climate of sexual harassment, abuse, and degradation of women in #MeToo [36]." *The Deuce* is a tawdry but not obscene show about the history of the illicit sex industry in New York City in the 1970s. Containing as it does sexually explicit images, it has been the object of sustained criticism by #MeToo advocates, since many argue that sexually explicit images "reinforce the patriarchal view that women's bodies are mere instruments to further male sexual pleasure"—the driving pulse behind the offending behavior at which the #MeToo Movement seeks to strike back [36].

Perhaps ironically (given a large number of religious conservatives involved in the growing anti-pornography movement) our current social climate augurs poorly for religious liberty. For as religion becomes associated with the general idea of "free speech," it *pro tanto* becomes exposed to the passions driving the restraint on speech emanating from quarters partly occupied by social conservatives themselves.

Lastly, the free speech imaginary have I believed comes increasingly to be marked by a willingness to associate freedom of speech with a pretextual fig leaf covering hate speech. Here we can refer back to the work of law professors Delgado and Stefanic. They call for a major reorientation of the law to redefine speech rights so that certain groups who are deemed to espouse hate are unprotected by First Amendment guarantees. Catherine Stimpson echoes this point by asserting that freedom of speech has simply become "too tainted to serve as an instrument of change" and thus "we cannot dismantle the master's house with the master's tools [11]." A move beyond freedom of speech conventionally understood is now seen as necessary.

Equally notable have been calls emanating from college campuses to de-platform speakers accused of hate and to enshrine restrictions on speech, even in public colleges and universities, a trend documented by many including by the activist First Amendment attorney Greg Lukianoff. These campus-fueled trends have, Lukianoff asserts, further colored the popular understanding of freedom of speech. This is so simply because "what happens on campus doesn't stay on campus," as "higher education, more than ever, shapes our general culture [37]." To the extent that this association of religious liberty with the broader category of speech informs the popular mindset, religious freedom can only encounter additional obstacles in the future. In turn, the obstacles to speech could inhibit the protection of religious liberty guarantees—guarantees once seen as central to the American political project.

Conclusion

In all, deference to legislative restrictions on those forms of speech which are not attached in the popular imagination to communities seen as marginal might be expected soon to become the norm, not the exception; judicial neglect, the rule, judicial solicitude for the freedom at issue, the unlikely variance. Indeed, it was just this sort of thing that happened to the religious liberty rights of Kelvin Cochran—they received no judicial protection whatsoever, save the Blackstonian rebuke against the state's prior restraint. Although this short reflection can offer no definitive conclusions, just this very thing might continue to occur across the country—should the drive to submerge religion under the enormously broad category of expressive 'speech' continue unchecked, and we continue to associate speech rights with our dominant free speech imaginary.

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