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October 14, 2010: Why is Snyder v. Westboro Baptist Church a free speech case?

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Title: Why is Snyder v. Westboro Baptist Church a free speech case?

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10/14/2010—In all the discussion about the funeral protest case, no one has really mentioned how odd it is that this is a free speech case as opposed to a free exercise of religion case. Why is that? To the church, the picketing is absolutely a part of their ministry of God's word. To them it is religion, not speech. The simple answer to the question is that after Employment Division v. Smith in 1990, no free exercise claim can be made against a so-called generally applicable law. The government need never make an accommodation for religion. So, for example, a ban on alcohol as in Prohibition did not have to make an exception for wine for sacramental use. This was not the law before Smith. Before that change, a substantial interference with religious practice required the government to show an extraordinary justification, called a compelling state interest.So, a general ban on demonstrations at or near a funeral would survive a free exercise challenge because it is a general law. But this is not the case with regard to free speech. For that reason, the Westboro Church is relying on free speech rather than free exercise of religion. But why? Why is free exercise a second-class right? It is not because practice is conduct and speech is speech. The Court acknowledged in Smith that religious practice combined with some other kind of right might be relied on to overturn even a general law, like a mandatory school law.The reason may be a basic shift away from religion to the more secular right of conscience available to all citizens. That would be strange coming from an opinion by Justice Scalia, but maybe secularization has gone further than we thought.