THE RELIGIOUS LIBERTY JURISPRUDENCE OF JUSTICE ANTONIN SCALIA

*Ronald J. Colombo**

As might be expected, the religious liberty jurisprudence of the late Justice Antonin Scalia is as unique as the man himself. It defies any simplified characterization, and reflects an approach that is both practical and principled. This Article will endeavor to explain Justice Scalia's approach to religious liberty, and, in closing, briefly prognosticate about the future of religious liberty in the United States in the wake of Justice Scalia's passing.

As a threshold matter, it is important to define the term that is the subject of this Article: religious liberty. By religious liberty, I refer, primarily, to the rights protected by the Free Exercise Clause of the First Amendment to the United States Constitution.[1] As such, this Article's focus will not be on the Establishment Clause of the First Amendment, although some discussion of the Establishment Clause will be necessarily unavoidable.

Taken together, the Constitution's two religion clauses read as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] This terse text has befuddled the courts, giving rise to a jurisprudence on matters of religion that has been difficult to synthesize or predict.

Part of the difficulty stems from what appears to be a certain tension between the two clauses. For on the one hand, the Establishment Clause has commonly been interpreted as somewhat hostile towards religious expression or activity—at least when the government, or some other state actor, is implicated. On the other hand, the Free Exercise Clause has commonly been interpreted as solicitous of religion, to the

---

* Professor of Law and Associate Dean for Distance Education, Maurice A. Deane School of Law, Hofstra University. This Article is based upon remarks I delivered at the Nassau County Bar Association, Mineola, N.Y., on May 24, 2017. I thank the Bar Association, and Professor Anthony Sabino, in particular, for the invitation.

1. U.S. CONST. amend. I.
2. *Id.*

point of preferring religious conscience and conduct, in certain contexts, over non-religious conscience and conduct.

Admittedly, another part of the difficulty stems from the fact that, as Justice Scalia once wrote, the interpretation of the Constitution has come to "rest upon the changeable philosophical predilections of the Justices," rather than the "deep foundations in the historic practices of [the American] people."[3] Thus, not only are the Constitution's religion clauses somewhat opaque, but they have also been subject to interpretation over the decades by a changing cast of Supreme Court Justices, many of whom, some have suggested, have interpreted these, and other, provisions of the Constitution as they would have liked them to have been written—as opposed to how they actually were written.[4] Put differently, when one subscribes to the concept of a "living Constitution"—a concept that Justice Scalia abhorred[5]—constitutional interpretation is less tightly tethered to the constitutional text itself, and is such subject to a greater degree of drifting from one school of thought to another.[6]

But this is, in part, a digression. The key takeaway here is that the proper interpretation of the First Amendment's religion clauses has remained subject to substantial debate for generations.

With regard to the Free Exercise Clause, Justice Scalia attempted to bring greater clarity to the Court's approach in his decision in *Employment Division v. Smith*.[7] In so doing, he ushered in the modern era of free exercise jurisprudence.

Prior to *Employment Division v. Smith*, it was not exactly clear how far the protections of the Free Exercise Clause reached. There was consensus that the Free Exercise Clause prohibited the government from coercing or enjoining religious belief. There was also consensus that the Free Exercise Clause prohibited the government from targeting a

---

3. Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

4. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY BY ANTONIN SCALIA 3, 38-41 (Amy Gutmann ed., 1997).

5. Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 33 (2007).

6. *Cf.* McCreary Cty., Ky. v. ACLU of Ky., 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting) ("What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate.").

7. 494 U.S. 872 (1990).

particular religion, or religion generally, for negative, discriminatory treatment. But after that, the consensus broke down.

According to one school of commentators, the Free Exercise Clause protects nothing other than that which has just been described.[8] Belief was sacrosanct, and with regard to conduct, the only prohibition was on governmental attempts to circumscribe religious activity *qua* religious activity.[9]

According to a group of historians and scholars, however, the framers of the First Amendment specifically chose the words "free exercise of religion," in lieu of narrower expressions such as religious belief, or worship, to enshrine robust constitutional protections for religiously motivated activity that go well beyond matters of belief or worship per se.[10] As per Professor Michael McConnell, so long as a particular religious practice or religiously inspired conduct did not threaten public "peace and safety,"[11] it must be allowed, and governmental encroachment thereupon must yield.[12]

The divide between the two perspectives is most vividly illustrated when it comes to neutral laws of general applicability; in other words, laws that do not target religion specifically, and are generally applicable to everyone.

Take, for example, laws against the use of controlled substances, such as peyote. These laws are not targeted against any particular religion, and apply to all Americans equally. Consider, however, how these laws affect those members of the Native American Church that use peyote sacramentally—ingesting it as part of ritualized worship.[13] A law against peyote's use would certainly interfere with the free exercise of such persons' religion. Should the First Amendment offer any relief from such a law to those whose religious worship is infringed thereupon? In other words, should the First Amendment require, in such instances, an exemption from compliance with that law on the part of certain religious adherents, given how the law infringes upon their free exercise of religion?

---

8. René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 738-40 (2011).

9. *Id.*

10. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461 (1990).

11. *Id.* at 1466.

12. For a more extensive discussion of this debate see Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 27-47 (2013).

13. *See* Autumn Gray, Note, *Effects of the American Indian Religious Freedom Act Amendments on Criminal Law: Will Peyotism Eat Away at the Controlled Substances Act?*, 22 AM. J. CRIM. L. 769, 772-73 (1995).

This was the exact question that came before the Supreme Court in *Employment Division v. Smith*.[14] In an opinion that garnered a five-justice majority, Justice Scalia wrote that the First Amendment does not afford any protection from government action such as this.[15] Were it otherwise, Justice Scalia feared that each citizen would become "a law unto himself."[16]

To account for precedent in which relief was granted to religious adherents in arguably analogous situations, Justice Scalia introduced the notion of "hybrid" free exercise claims, where "the Free Exercise Clause [was implicated] in conjunction with other constitutional protections."[17] Only in these situations, Justice Scalia asserted, can a religious claimant be judicially exempted from the demands of a neutral law of general applicability.[18]

Were our discussion of *Smith* to stop here, America's reputation as a sanctuary of religious liberty might fairly be called into question.[19] Admittedly, both in the eighteenth century and our own twenty-first century, simple freedom from unjust persecution on account of one's religion is itself a laudable accomplishment and not to be taken for granted.[20] But America's embrace of this "First Freedom" was typically viewed as more robust than that.[21] Toward that end, it is important to note that Justice Scalia acknowledged, in *Smith*, the important role of "legislative accommodations" in American history.[22] Legislative accommodations afford the political process an opportunity to provide further protections of religious conduct and activity than that which the Constitution strictly compels.[23] The sacramental use of peyote,

14. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

15. *Id.* at 878-79.

16. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

17. *Id.* at 881.

18. *Id.*

19. *Cf.* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374 (1996) ("The Court's entire record on religious liberty has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors.").

20. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 976-79 (2013); Doug Bandow, *Religious Persecution and Hostility on the Rise: The First Freedom Is Under Global Siege*, FORBES (Mar. 17, 2015, 7:00 AM), https://www.forbes.com/sites/dougbandow/2015/03/17/religious-persecution-and-hostility-on-the-rise-the-first-freedom-is-under-global-siege/#3b3f11f64f00 ("[F]our of five people around the world lack the freedom to worship and live faithfully.").

21. *See* Witte, *supra* note 19, at 388-405.

22. *See Smith*, 494 U.S. at 890.

23. *Id.*

Justice Scalia observed, is indeed accommodated in the drug laws of many states.[24]

The dissent in *Smith*, authored by Justice Blackmun, was vigorous. He argued in favor of the more robust interpretation of the Free Exercise Clause, pursuant to which even a neutral law of general applicability could be abrogated were it to substantially impair an individual's free exercise of religion.[25] More specifically, the dissent argued that in such contexts, the law would only pass constitutional muster—as applied to the objecting, religious adherent—if it were "justified by a compelling [government] interest that cannot be served by less restrictive means."[26]

The *Smith* decision was widely panned by a broad spectrum of commentators, prompting Congress to pass, by a wide bipartisan margin, the Religious Freedom Restoration Act of 1993 ("RFRA").[27] The RFRA is popularly read as an attempt to reverse *Smith*, but should more accurately be read as accepting *Smith*'s invitation to promulgate "legislative accommodations" to provide religious liberty protection beyond that demanded by the Constitution.[28] For the RFRA is, in essence, a global legislative accommodation of religion, pursuant to which any government action, even one of "general applicability," that "substantially burden[s] a person's exercise of religion" must yield as applied to the complaining party unless the government bears the burden of proving that its action "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[29]

The RFRA was subsequently challenged in the courts, and upheld in *City of Boerne v. Flores*,[30] as constitutional as applied to the federal government, but unconstitutional as applied to state governments.[31] Significantly, in *City of Boerne*, Justice Breyer, who remains on the Court today, signed on to a dissent authored by Justice O'Connor, which argued that *Smith* was wrongly decided.[32] Thus, as the Court stands in 2017, one sitting Justice—Kennedy—signed on to the *Smith* decision,

---

24. *Id.*

25. *Id.* at 907 (Blackmun, J., dissenting).

26. *Id.*

27. 42 U.S.C. § 2000bb (2012); Joshua Dorner, *Religious Liberty for Some or Religious Liberty for All?*, CTR. FOR AM. PROGRESS 2 (Dec. 12, 2013), https://cdn.americanprogress.org/wp-content/uploads/2013/12/ReligiousLiberty.pdf.

28. Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 96 (1996).

29. 42 U.S.C. § 2000bb-1(a)–(b).

30. 521 U.S. 507 (1997).

31. *See id.* at 534-36.

32. *Id.* at 544-45 (O'Connor, J., dissenting).

and another sitting Justice—Breyer—has questioned that decision's correctness. None of the other seven Justices—Alito, Roberts, Thomas, Ginsburg, Sotomayor, Kagan, and Gorsuch—have explicitly opined on the matter.

A matter of considerable interest is how Justice Scalia fares compared to his fellow Justices with regard to their treatment of legislative accommodations, including the RFRA. For whereas Justice Scalia interpreted the Free Exercise Clause narrowly, he has not hesitated to uphold and enforce legislative accommodations. Viewed grossly, this appears to be somewhat paradoxical: in *Smith*, Justice Scalia ruled against the religious claimant;[33] in subsequent religious liberty cases, Justice Scalia ruled—or, in the case of a dissent, made it clear that he would have ruled—in favor of the religious claimants.[34]

Some of Justice Scalia's liberal counterparts exhibited a similar paradox, but in reverse. Consider Justices Breyer and Blackmun, each of whom was referenced earlier. Whereas each of these Justices opposed the *Smith* decision—and as such would have favored a more robust protection of religious liberty under the Constitution per se—each also more frequently opposed legislative efforts to accommodate religion. Justice Breyer opposed the applicability of RFRA in *Burwell v. Hobby Lobby Stores*,[35] and Justice Blackmun opposed New York's attempt to accommodate the unique educational needs of a particular Hasidic community in *Kiryas Joel v. Grumet*.[36] In each case, Justice Scalia, conversely, sided with the religious claimant.[37]

Another interesting observation can be gleaned from the cases *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*[38] and *Locke v. Davey*[39]—decided in 2010 and 2004, respectively. In each of these cases, claimants argued that they had been selectively discriminated against on grounds that were religious in nature.[40] In *Locke*, the plaintiff complained about a scholarship program that was open to all except those who would use the

---

33. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

34. *See* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 423, 439 (2006); Cutter v. Wilkinson, 544 U.S. 709, 713-14 (2005); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grument, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting). The exception to this trend was in *City of Boerne* where Scalia agreed with the majority that RFRA violated the Fourteenth Amendment as applied to the states. *See City of Boerne*, 521 U.S. at 536.

35. 134 S. Ct. at 2806 (Breyer, J., dissenting).

36. 512 U.S. at 711-12 (Blackmun, J., concurring).

37. *Hobby Lobby*, 134 S. Ct. at 2759; *Kiryas Joel*, 512 U.S. at 752 (Scalia, J., dissenting).

38. 561 U.S. 661 (2010).

39. 540 U.S. 712 (2004).

40. *Christian Legal Soc'y*, 561 U.S. at 675; *Locke*, 540 U.S. at 717-18.

funds to pursue a degree in divinity.[41] In *Christian Legal Society*, the plaintiffs challenged a state university's decision to adopt an "all-comers" policy with respect to student organizations, suspiciously on the heels of—and arguably in response to—a religious student group's promulgation of a rule limiting membership to co-religionists.[42] Both sets of plaintiffs asserted, among other things, that their free exercise rights, as set forth under the First Amendment, had been infringed upon.[43]

In light of the 1990 *Smith* decision, the plaintiffs in *Christian Legal Society* and *Locke* could not readily seek relief from the applicable law, as it appeared to be a neutral law of general applicability.[44] Rather, in order to prevail, the plaintiffs needed to demonstrate that the government action in question was not neutral at all: that it operated, by design, to the detriment of religious adherents.[45] In each of these cases, Justice Scalia was with the dissenters who would have found a First Amendment violation.[46] He saw exactly the kind of unequal, unfair mistreatment that the Free Exercise Clause, even in its anemic, post-*Smith* form, does actually protect against. His more liberal counterparts, however—including the aforementioned Justices Stevens and Breyer—did not find any such defect on the record before them.[47] So once again we are confronted with the apparently anomalous approaches toward religious liberty of Justice Scalia on the one hand and Justices Stevens and Breyer on the other: Justice Scalia, who interpreted the Free Exercise Clause narrowly in *Smith*, was more willing to find the Clause violated in subsequent cases than his colleagues Justices Stevens and Breyer, who argued for a broader interpretation of the Free Exercise Clause yet were less willing to find it violated in cases subsequent to *Smith*.

Although it is not easy to reconcile the decisions taken by Justices Stevens and Breyer in the religious liberty cases referenced above (and, moreover, beyond the scope of this Article), a principled explanation can be proffered with regard to Justice Scalia's overall approach.

Before attempting any such reconciliation, however, a qualifier is in order. It should be acknowledged that every case coming before the

---

41. *Locke*, 540 U.S. at 715-18.

42. *Christian Legal Soc'y*, 561 U.S. at 668, 675.

43. *Id.* at 668; *Locke*, 540 U.S. at 718.

44. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

45. *See Christian Legal Soc'y*, 561 U.S. at 675; *Locke*, 540 U.S. at 720.

46. *Christian Legal Soc'y*, 561 U.S. at 706 (Alito, J., dissenting) (joining Justice Alito in dissent were Chief Justice John Roberts, Justice Scalia, and Justice Thomas); *Locke*, 540 U.S. at 726 (Scalia, J., dissenting).

47. *See Christian Legal Soc'y*, 561 U.S. at 696-97; *Locke*, 540 U.S. at 725.

Court is unique and implicates a number of interwoven issues. And for that reason, the paradoxes suggested above may well be overstated, if not completely illusory. For example, in *Hobby Lobby*, Justice Breyer's primary objection to the majority opinion was how it extended RFRA's protections to for-profit enterprises.[48] Similar confounding factors might well be present in each of the cases discussed previously. And the sample size is, admittedly, small. But the general impression of paradox with respect to religious liberty cases indeed remains.

With regard to Justice Scalia's apparently paradoxical thinking on the subject, a clear logic can be discerned as follows.

In *Smith*, claimants demanded the creation of a *judicial* exemption from a law of general applicability. In the subsequent cases referenced above, claimants instead sought to enforce the terms of *legislative* accommodations from a law of general applicability. This difference is a critical one in Justice Scalia's thinking, as he viewed the judge's role in the American republic as one limited to the interpretation and enforcement of the laws. The making of laws, on the other hand, involves important value judgments properly left to the political process in Justice Scalia's opinion.[49] To quote one commentator: "[Justice Scalia] believes lawmakers—i.e., Congress—should be guided by moral values . . . but that the law has 'no room' for *judges* to inject their personal moral sentiments."[50] As such, Justice Scalia was reticent to read free exercise exemptions into the Constitution, and wished to eschew the temptation to constitutionalize his own policy preferences by favoring one religion's practices over another's, or disfavoring one particular law of general applicability vis-à-vis another. The far safer path, to Justice Scalia, was to interpret the Free Exercise Clause narrowly, in such a manner as to prevent him, or other Justices, from reading into the constitutional religious liberty protections that go beyond those supported by the text, regardless of how laudable those protections might be.

Justice Scalia was, however, quite comfortable deferring the question of religious exemptions to the general public, when decided by the appropriate organs of government as "legislative accommodations."[51] One reason for Justice Scalia's comfort in this

48. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2806 (2014) (Breyer, J., dissenting).

49. The promulgation of an exception to a law could certainly be considered a form of lawmaking.

50. Antony Barone Kolenc, *"Mr. Scalia's Neighborhood": A Home for Minority Religions?*, 81 ST. JOHN'S L. REV. 819, 828 (2007).

51. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 889 (1990).

regard, in contrast to that of some of his more liberal colleagues, would appear to be his understanding of the Establishment Clause.

As with the Free Exercise Clause, scholars and commentators have divided upon the true purpose and effect of the Establishment Clause. To some, the Establishment Clause erects a sturdy wall of separation between church and state, and vigilantly guards against any undue collaboration between the two.[52] To others, the Establishment Clause merely prohibits the government from "establishing" an official church of its own—such as the Church of England.[53] Justice Scalia's interpretation of the Establishment Clause put him closer to this second school of thought.[54] As such, he did not find problematic efforts on the part of government to collaborate with, endorse, or otherwise be supportive of religion on a non-sectarian, generic basis.[55] As such, whereas some of his more liberal colleagues scrutinized legislative accommodations as possible violations of the Establishment Clause, Justice Scalia was not overly concerned with this.[56] As Justice Scalia wrote in his dissenting opinion in *Kiryas Joel*: "When a legislature acts to accommodate religion, particularly a minority sect, 'it follows the best of our traditions.'"[57] He added that the Court's majority, in striking down a legislative accommodation in that case, "turn[s] the Establishment Clause into a repealer of our Nation's tradition of religious toleration."[58]

In sum, therefore, Justice Scalia's approach to religious liberty was nuanced but principled. Perhaps ever fearful of reading his own policy preferences into the Constitution, he interpreted the Free Exercise Clause narrowly, as permitting legislative accommodations of religion, but not requiring judicial exemptions from neutral laws of general applicability. He also interpreted the Establishment Clause narrowly, eschewing a construction, which, so often in practice, makes the Clause somewhat hostile toward religion. As such, he was quicker than some of his more liberal colleagues to uphold generous legislative accommodations of

---

52. William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 11-12 (1984).

53. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49-50 (2004) (Thomas, J., concurring).

54. *See* McCreary Cty., Ky. v. ACLU of Ky., 545 U.S. 844, 893-94 (2005) (Scalia, J., dissenting).

55. *See id.* at 894.

56. *Compare* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grument, 512 U.S. 687, 690 (1994), *with McCreary Cty*., 545 U.S. at 889, 891-92 (Scalia, J., dissenting).

57. *Kiryas Joel*, 512 U.S. at 744 (Scalia, J., dissenting) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

58. *Id.* at 752.

religion, seeing them as proper expressions of the popular will via the legislative process, and posing no conflict with the Establishment Clause. This approach is indeed internally consistent, eminently reasonable, and completely justifiable given the text and history of the First Amendment. It is, most of all, uniquely "Scalian."

The future of religious liberty in a post-Scalia world is difficult to predict with precision. The election of President Trump, and the appointment of Neil Gorsuch to the Supreme Court—a dependable defender of religious liberty during his tenure on the Tenth Circuit Court of Appeals[59]—suggests that for the foreseeable future at least, religious liberty protections in the United States are unlikely to wane. However, there is reason to believe that religious liberty might actually be significantly augmented in Justice Scalia's absence under present circumstances. And this is because Justice Scalia's *Smith* decision might not survive his passing.

Recall that only two Justices on the Court have firmly staked out a position with regard to *Smith*: Justice Kennedy, who signed on to the decision, and Justice Breyer, who denounced it.[60] There is, therefore, no obvious majority on the Court in favor of *Smith*. Recall also the successful rhetoric of the supporters of same-sex marriage, who argued that "fundamental" rights ought not to be left up to voters or legislatures to decide, but rather must be recognized via judicial fiat as a matter of constitutional interpretation.[61] Thanks to the *Smith* decision, religious liberty, America's "First Freedom," is indeed largely a matter subject to plebiscite. This may not sit well with most Justices; they may not share Justice Scalia's view that the Free Exercise Clause largely leaves the protection of religious liberty to the democratic process. In their review of the historical record and the Court's own jurisprudence on the matter, they may find that the Clause does indeed have real teeth. With a reversal of *Smith*, judicial exemptions could overtake legislative exemptions as the primary means by which religious conscience and practice is protected.

A reversal of *Smith* would have still more profound consequences. For unlike RFRA, a reinvigorated Free Exercise Clause would apply to

---

59. *See* Sean R. Janda, *Judge Gorsuch and Free Exercise*, 69 STAN. L. REV. ONLINE 118, 118-22 (2017).

60. As of this writing, Justice Kennedy is eighty-one years old and rumored to be contemplating retirement. *See Fearing Trump's Next Move, Liberals Urge Justice Kennedy to Stay*, NBC NEWS (June 3, 2017, 9:43 AM), https://www.nbcnews.com/feature/nbc-out/fearing-trump-s-next-move-liberals-urge-justice-kennedy-stay-n767731.

61. Brianne J. Gorod, *Why the Constitution Trumps Any State's Ban on Same-Sex Marriage*, NEW REPUBLIC (Apr. 23, 2015), https://newrepublic.com/article/121623/constitution-not-voters-should-have-final-say-gay-marriage.

state law and state governments, and not only federal law. The contraceptive mandate cases against the Affordable Care Act notwithstanding,[62] it is at the state level where most conflicts between law and religion occur, and where most free exercise litigation takes place.[63]

Justice Scalia embraced a religious liberty jurisprudence that generally rejected constitutionally mandated judicial exemptions, but simultaneously embraced legislative accommodations. Although in 1990, when *Smith* was decided, the clear consensus in America was that religious exercise was worthy of protection,[64] that consensus has largely dissipated by 2017.[65] As such, the legislatively-based religious liberty protections that Justice Scalia most likely assumed would persist when *Smith* was decided are now no longer certain to long endure. Consequently, whether the free exercise of religion will remain America's "First Freedom" well into the twenty-first century may well depend upon whether the cornerstone of Justice Scalia's religious liberty jurisprudence, his decision in *Smith*, is ultimately abandoned.

62. Young Conaway Stargatt, *Next Wave of ACA Lawsuits Challenges Contraceptive Mandate*, 17 NO. 12 DEL. EMP. L. LETTER 3 (2012).

63. *See Becket Case Database*, BECKET L., http://www.becketlaw.org/cases/?fwp_case_status=active (last visited Feb. 15, 2018).

64. *See* Thomas D. Dillard, Note, *The RFRA: Two Years Later and Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435, 442-45 (1996).

65. *See* Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1149 (2017). *Compare* Dillard, *supra* note 64, at 435 (stating the RFRA in 1993 was a "bipartisan effort endorsed by interest groups ranging from the American Civil Liberties Union to staunchly conservative religious groups in the Traditional Values Coalition"), *with* Travis Weber, *Will Nonprofit Religious Organizations Withstand the Sexual Revolution in Law?*, 29 REGENT U. L. REV. 259, 283 (2017) (noting the recent intense controversy generated by similar legislation proposed at the state level).