

Justice Scalia, the 2016 Presidential Election, and the Future of Church-State Relations

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INTRODUCTION

Justice Antonin Scalia was a commanding figure on the Supreme Court, whether one agreed or disagreed with him. He favored bright-line rules and, except for the freedom of speech cases, in which he tended to vote with the more liberal justices,¹ he was a reliable vote for the conservative side in the culture wars: from abortion, law and order, and LGBTQ rights to the separation of church and state.

His passing and his replacement will dramatically affect the Court's role in the religious culture wars and most markedly in the relationship between church and state that is mediated by the Establishment Clause.² Assuming that the Republican-controlled US Senate will not confirm President Barack Obama's nomination of Judge Merrick Garland, the forty-fifth president will determine the course of church-state relations with the next Supreme Court appointment. In my view, aside from foreign policy and the battle against religiously fueled terrorism, this is the most momentous issue that the next president will face.

During Scalia's tenure, the Establishment Clause and the principle of separation between church and state were steadily reduced in scope and effect, and his was a critically important vote to that end. It's not that he was a swing vote like Justices Sandra Day O'Connor and Anthony Kennedy, but rather that he was a deeply reliable vote to deflate the Establishment Clause. In closely decided case after closely decided case, he voted with a

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¹ See, for example, *Texas v Johnson*, 491 US 397, 398, 406 (1989) (holding that burning an American flag during a protest rally was expressive conduct protected by the First Amendment).

² See US Const Amend I.

majority or plurality of the Court to neuter and diminish the Establishment Clause. He did not write terribly often in this field. His role and views in this arena were part of a larger social movement to be sure. Starting with the Moral Majority appearing in 1979 and flourishing until the end of the 1980s,³ continuing with the rise of the evangelical Christians as a political force on the right, and followed by the 2009 Manhattan Declaration,⁴ in which Catholic bishops joined forces with some evangelical leaders to pursue a shared conservative agenda, there have been increasing calls for treating the Establishment Clause as redundant of the Free Exercise Clause.⁵

This unfortunate development erases some of the worst history involving religion in the United States. The “separation of church and state” was a concept derived by the Baptists who lived under a tyrannical established church in Massachusetts.⁶ While it is true that many escaped England and other parts of Europe to find religious liberty in colonial America, they did not arrive here with the concept of separating church and state.⁷ By and large, they came here to set up a society with a theocracy in which their faith dominated.⁸ That was the governing model they knew. The sheer size of the country made it possible to have multiple theocracies operating simultaneously, especially when there was no overarching federal, national government.⁹ But some, like the Baptists and the Quakers, felt the sting of oppression just as they had in Europe.¹⁰ The Baptists introduced a novel way of dealing with church and state by conceptualizing a division of power that prevented the state from coercing their beliefs and worship and from taxing them for not following the beliefs and worship practices of an established church.¹¹ The very concept of dividing

³ See Doug Banwart, *Jerry Falwell, the Rise of the Moral Majority, and the 1980 Election*, 5 W Ill Historical Rev 133, 133–35 (2013).

⁴ *Manhattan Declaration: A Call of Christian Conscience* (Nov 20, 2009), archived at <http://perma.cc/N3S4-KR3C>.

⁵ See, for example, Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm & Mary Bill Rts J 73, 90 (2005).

⁶ See Marci A. Hamilton and Rachel Steamer, *The Religious Origins of Disestablishment Principles*, 81 Notre Dame L Rev 1755, 1773–76 (2006).

⁷ Bernard Bailyn, *The Ideological Origins of the American Revolution* 247 (Belknap 1992).

⁸ *Id.*

⁹ See Hamilton and Steamer, 81 Notre Dame L Rev at 1765–67 (cited in note 6) (describing the diversity of religious establishments in the colonies and the states).

¹⁰ *Id.* at 1770.

¹¹ *Id.* at 1773–75.

power between church and state was radical, but it was in response to the oppression the Baptists (and the Quakers) experienced in Massachusetts and elsewhere.¹²

Since the Moral Majority appeared on the political scene, so-called social conservatives have attempted to make “separation” a dirty word and to turn the Establishment Clause into a prop for the Free Exercise Clause, rather than an independent principle. The goal of some in this movement is to make the United States a “Christian nation” that is based on explicitly Christian principles.¹³ The modern antiseperation theory of the Establishment Clause has been that the only purpose of the Establishment Clause is to further religious exercise.¹⁴ In other words, the Establishment Clause is always supposed to serve the ends of believers—a potential limitation solely on government—and never supposed to punish believers for overstepping boundaries. The “separation” of church and state is an epithet antithetical to their agenda of retaking the United States as a “Christian nation,” even though it was never monoreligious.¹⁵ When combined with the push for hyperprotection of religious conduct through the overreaching Religious Freedom Restoration Acts starting in the early 1990s, which also have been the darling of the evangelical right,¹⁶ we came close to opening the doors to a new United States of individual theocracies with citizens painfully aware of differences in faith—or worse, a single politically powerful dominant faith determining public policy that is in turn imposed on those with different beliefs.

This movement was abetted by the conservative Supreme Court justices who introduced a similar line of reasoning. Scalia

¹² Id.

¹³ Kevin M. Kruse, *A Christian Nation? Since When?* (NY Times, Mar 14, 2015), online at <http://www.nytimes.com/2015/03/15/opinion/sunday/a-christian-nation-since-when.html> (visited June 9, 2016) (Perma archive unavailable) (citing a 2015 poll that showed a majority of Republicans favored officially making the United States a Christian nation).

¹⁴ See, for example, *Elk Grove Unified School District v Newdow*, 542 US 1, 46–54 (2004) (Thomas concurring) (raising a historical argument that the clause is a federalism provision intended to prevent the federal government from interfering with state religious establishments); Natelson, 14 Wm & Mary Bill Rts J at 90 (cited in note 5) (“If the Establishment Clause exists to serve the Free Exercise Clause, then in the event of conflict, the former must yield.”).

¹⁵ Bailyn, *Ideological Origins of the American Revolution* at 247–49 (cited in note 7); Hamilton and Steamer, 81 Notre Dame L Rev at 1755 (cited in note 6).

¹⁶ For the federal statute, see the Religious Freedom Restoration Act of 1993, Pub L No 103-141, 107 Stat 1488, codified at 42 USC § 2000bb et seq. See also Marci A. Hamilton, *Development of State RFRA Statutes* (RFRA Perils), archived at <http://perma.cc/N5UJ-U9EG>.

was famous for decrying separation principles and doctrine, for example, in his dissent to *Lee v Weisman*.¹⁷ Justice Clarence Thomas is known for his argument that state and local governments are not bound by the Establishment Clause, as in his concurrence in *Town of Greece, New York v Galloway*.¹⁸ And Justice Samuel Alito has issued two extreme readings of the religious freedom statutes that border on a prescription of religious control of public policy in *Burwell v Hobby Lobby Stores, Inc*¹⁹ and *Holt v Hobbs*.²⁰ There was hardly an expenditure for the benefit of religious entities that struck Chief Justice William Rehnquist and Kennedy, Scalia, and Thomas as a bad idea, as seen in their plurality in *Mitchell v Helms*.²¹ Alito also initiated his residence at the Court with a plurality opinion that would drastically limit the ability of citizens to sue their governments for violating the Establishment Clause, with Scalia and Thomas chiming in that there should be no taxpayer standing under the Establishment Clause at all in *Hein v Freedom from Religion Foundation*.²² Finally, the modern conservative justices (Chief Justice John Roberts and Kennedy, Scalia, Thomas, and Alito) joined forces to open the door to prayers to start town meetings in *Galloway*.²³ The attempt to write the Establishment Clause out of the First Amendment, however, was incomplete when Scalia passed away.

The key points here are that so many of the recent Establishment Clause cases have been 5–4 decisions and that Scalia was among the plurality or the majority. With the retirement of O'Connor and the appointment of Alito, all of a sudden there were five solid votes to restrict or to do away with Establishment Clause principles whenever they limited religious entities' options. Instead this new majority could interpret the Establishment Clause as redundant with the Free Exercise Clause, solely intended to protect religious entities, as opposed to operating as a separation-of-powers principle for both government and religious entities.²⁴ Scalia repeatedly voted for the proposition that only strong "coercion" could violate the Establishment Clause,

¹⁷ 505 US 577, 633–37 (1992) (Scalia dissenting).

¹⁸ 134 S Ct 1811, 1835–38 (2014) (Thomas concurring).

¹⁹ 134 S Ct 2751 (2014).

²⁰ 135 S Ct 853 (2015).

²¹ 530 US 793 (2000).

²² 551 US 587, 637 (2007).

²³ *Galloway*, 134 S Ct at 1815.

²⁴ Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 Conn L Rev 807, 824–28 (1999). See also Marci A. Hamilton, *A Reply*, 31 Conn L Rev 1001, 1002–08 (1999).

and derided the concept introduced by O'Connor that the government violates the Establishment Clause when it "endorses" a religious viewpoint.²⁵ There was every reason to believe that Roberts, Scalia, Kennedy, Thomas, and Alito would bury O'Connor's "endorsement" test (because what could possibly be wrong with the government endorsing Christianity?) and reduce the Establishment Clause to a "coercion" principle that would permit religious entities broad power and latitude to operate in conjunction with government.

Yet, Scalia passed away before the Roberts Court could further restrict the Establishment Clause by eliminating the concept of "separation." Instead, with his passing, Establishment Clause principles and values now weigh in the balance. If Scalia is replaced with a like-minded religious conservative, it is highly likely that the Establishment Clause could become effectively nonjusticiable. If he is replaced with a more liberal justice who respects the need for separation of church and state, the moment when the Court could have done away with the separation of church and state altogether will have passed.

There are three arenas (and many others beyond the capacity of this short piece to address) in which a Republican replacement for Scalia could cement the drive to set aside separation principles while a Democratic nominee could bring Establishment Clause principles back from the brink. I will focus on three bellwether cases decided since 2000 to explain what is at stake.

I. FUNDING, PRAYER, AND STANDING

A. Funding

In *Mitchell*, the Court addressed whether a federal program providing computers to schools could also provide computers to private, religious schools.²⁶ Americans United for Separation of Church and State argued that the state may give textbooks on secular subjects to religious schools without violating the Establishment Clause, because those textbooks cannot be diverted to religious purposes.²⁷ But the computers were so easily diverted to

²⁵ See, for example, *Lamb's Chapel v Center Moriches Union Free School District*, 508 US 384, 400–401 (1993) (Scalia concurring) ("What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment . . . forbids endorsement of religion in general.").

²⁶ *Mitchell*, 530 US at 801–04 (plurality) (Thomas).

²⁷ Brief of Amici Curiae American Civil Liberties Union, American Federation of Teachers, American Jewish Committee, American Jewish Congress, Americans United for

religious ends that religious entities should not have been permitted to receive them.²⁸

Justice Scalia joined the plurality that reasoned that, so long as the government's purpose is neutral at the time of the delivery of the educational product, the donation cannot be tarred with an Establishment Clause violation, because all subsequent uses are determined by private actors, not the government.²⁹ In other words, the Establishment Clause stops at the schoolhouse door.

In a concurrence, Justice O'Connor wrote, for herself and Justice Stephen Breyer, that this should be a fact-based inquiry, and that, given the paucity of evidence that any of the computers had been diverted to religious ends, the Establishment Clause had not yet been violated.³⁰ She disagreed with the plurality's reasoning that there is a magical moment after which the courts must ignore the diversion of government funding to sectarian purposes.³¹

The three in dissent were persuaded that the significant potential for diversion to religious purposes was sufficient to find an Establishment Clause violation.³²

If Scalia's vote were removed, the plurality would be knocked down to three votes for a strong theory of "coercion"; there were two votes to wait and see whether there would be diversion, and three votes for a strong Establishment Clause presumption of divertibility. A Republican replacement is likely to keep the strong version of "coercion" a live theory at the Court, while a Democratic replacement is more likely to turn the tide toward a willingness to find Establishment Clause violations in circumstances in which the government's funding can be commandeered by the religious entity to private, religious ends.

B. Government-Sponsored Prayer

In *Galloway*, the Court split 5–4 on whether the town's practice of opening town meetings with a prayer since 1999 was constitutional.³³ Justice Kennedy wrote the opinion for the majority, which held that the town's system was inclusive enough to avoid

Separation of Church and State, Anti-Defamation League, Hadassah, Jewish Council for Public Affairs, and People for the American Way Foundation in Support of Respondents, *Mitchell v Helms*, Docket No 98-1648, *23–24 (US filed Oct 1, 1999) (available on Westlaw at 1999 WL 787898).

²⁸ See *id.* at *17–23.

²⁹ *Mitchell*, 530 US at 809–814 (plurality) (Thomas).

³⁰ *Id.* at 864–65 (O'Connor concurring).

³¹ *Id.* at 840–42 (O'Connor concurring).

³² *Id.* at 903–10 (Souter dissenting).

³³ 134 S Ct at 1813–15.

being either subtly or overtly coercive.³⁴ Scalia joined Justice Thomas to reject “subtle” coercion as the appropriate test, and instead set the mark at whether there is a “coercive state establishment[]” like those in place at the time of the Framing.³⁵ The four in dissent would have held the practice unconstitutional because the record was weak on inclusion of all faiths.³⁶

If one removed Scalia’s vote, Thomas would stand alone with an extreme interpretation that reduced the Establishment Clause to a nonforce. Chief Justice Roberts, Justice Alito, and Kennedy took a conservative but less extreme position, and four members of the Court took the position that the Establishment Clause has teeth. If Scalia’s vote were to be swapped out for another appointee like himself or even one somewhat more moderate on these issues, like Kennedy, the result would stand: cities can institute prayer to open town meetings. If Scalia were to be replaced by an appointee who takes the position that the Establishment Clause should have teeth, the result would be reversed and cities would be deterred from instituting religious observances prior to town meetings.

The next appointment thus could change the landscape of church-state relations in the public square, with a Republican embedding a presumption against Establishment Clause violations while, conversely, a Democrat likely would revive the concept of a meaningful separation between church and state.

C. Taxpayer Standing

While Scalia persistently joined positions that make it harder to win Establishment Clause claims, he also favored making it impossible to bring such claims in the first place. Scalia was a critic of *Flast v Cohen*,³⁷ which granted taxpayers standing to institute Establishment Clause claims against a government.³⁸

In *Freedom from Religion Foundation*, the Court had an opportunity to overrule *Flast*, and Scalia and Thomas were strongly in favor.³⁹ That would have shut down a great many Establishment Clause challenges to government funding. But Alito, in his

³⁴ Id at 1824–28.

³⁵ Id at 1837–38 (Thomas concurring).

³⁶ Id at 1851–52 (Kagan dissenting).

³⁷ 392 US 83 (1968).

³⁸ Id at 88.

³⁹ 551 US at 637 (Scalia dissenting) (“*Flast’s* lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. . . . It is time—it is past time—to call an end.”).

first Religion Clause opinion, found a middle ground that did not fully reverse *Flast* but rather reduced its scope, thereby limiting the instances in which taxpayers can challenge government spending that benefits religious entities. On Alito's reasoning, the taxpayers in that case lacked standing because the funds originated from the executive branch rather than Congress.⁴⁰ In effect, the Court halted lawsuits against the federal government for its increasing willingness to fund religious social missions, and opened the door to more church-state collaboration on funding simply by making the funds discretionary in the executive branch rather than plainly identified in Congress.

Again, without Scalia, Thomas's position appears more extreme by comparison, but the prospect of eliminating taxpayer standing altogether becomes less of a threat. A Republican appointment to fill his seat might well set the Court back on track to overruling *Flast*, but a Democratic appointment is likely to secure a stronger position for those who would sue the government for spending that favors or privileges religious entities.

II. THE FREE EXERCISE CLAUSE AND JUSTICE SCALIA

Justice Scalia was the author of the Supreme Court's majority decision in *Employment Division, Department of Human Resources of Oregon v Smith*,⁴¹ which reaffirmed the Supreme Court's dominant approach to free exercise cases, holding that neutral and generally applicable laws are subject to rationality review (the easiest level of review for the government), but that laws targeting religion are subject to the Court's most serious level of scrutiny.⁴² This approach was confirmed by the Court in *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*.⁴³ As with so much of Scalia's authorship, the *Smith* opinion sought to be definitive and set out bright-line principles. The definitive announcement of the governing standard—even if the same standard was used in the “vast majority” of cases—took religious entities by surprise.⁴⁴

⁴⁰ Id at 605–09.

⁴¹ 494 US 872 (1990).

⁴² See id at 877–78 (contrasting laws that single out specific religious practices with generally applicable laws having incidental effects on the exercise of religion). See also generally Marci A. Hamilton, *Employment Division v Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 *Cardozo L Rev* 1671 (2011).

⁴³ 508 US 520, 524 (1993).

⁴⁴ *Smith*, 494 US at 885.

This is not the place to go into the details, but I have documented at length in my previous writings that the *Smith* decision did not alter the primary decisionmaking structure in free exercise cases.⁴⁵ To the contrary, it was consistent with the “vast majority” of the Court’s doctrine, to quote the *Smith* opinion.⁴⁶ But the case did generate extreme opposition from religious quarters, because it definitively rejected the more generous standard that religious litigators and entities had been seeking to insert into free exercise doctrine since 1963 and *Sherbert v Verner*.⁴⁷ Scalia’s sharp and clear summary of past free exercise cases sent a strong—and to them, disturbing—message that their mission to tilt the free exercise scale heavily in their direction was doomed.

Religious litigators, lobbyists, and entities, as well as some leading law professors, declared war on the Supreme Court and turned to Congress for the unprecedented, generous protection they had been unable to persuade the Court to provide. They formed the Coalition for the Free Exercise of Religion, which in turn pushed the Religious Freedom Restoration Act⁴⁸ (RFRA) in Congress.⁴⁹ Despite the “restoration” in the title, when enacted, RFRA put into place a regime like no other before it. Suddenly, the government could not defend laws because they were neutral and generally applicable, but rather every law in the country could now be challenged by believers, who could force the government to satisfy a more demanding standard than the Court had ever employed in the free exercise cases.⁵⁰

There was a time when it was conceivable that a new justice replacing Scalia might move the Court back toward the religious entities’ preferred standard, which is now enshrined in RFRA. But the course of RFRA has shown it to be a generator of social conflict and cultural warfare and anathema to the free markets. It was first supported by conservative groups to overcome the spread of state fair housing laws that banned discrimination on the basis of marital status.⁵¹ That seed of discriminatory intent has fully bloomed in the current movement to use state-level

⁴⁵ See, for example, Hamilton, 32 Cardozo L Rev at 1671–74 (cited in note 42).

⁴⁶ *Smith*, 494 US at 885.

⁴⁷ 374 US 398 (1963).

⁴⁸ Pub L No 103-141, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq.

⁴⁹ For a detailed description of free exercise standards and the legislative history behind RFRA, see Marci A. Hamilton, *God vs. the Gavel: The Perils of Extreme Religious Liberty* 1–38, 239–78 (Cambridge 2015).

⁵⁰ See Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty after City of Boerne v Flores*, 1997 S Ct Rev 79, 101–05.

⁵¹ Hamilton, *God vs. the Gavel* at 232–36 (cited in note 49).

RFRA to permit discrimination against same-sex couples and the LGBTQ community generally, the rights of whom in turn have been stunted in numerous states because of the open push to use religious “liberty” to discriminate against others in the free market.⁵² In addition, the increasing understanding of courts, prosecutors, and the public of seriatim child sex abuse in religious institutions as well as worldwide extremist Islamic terrorism have made it virtually impossible to support any doctrine that places blind trust in religious institutions or individuals to be un-governed by law.⁵³ Therefore, the era for the Supreme Court to embrace the misguided standard of RFRA or even strict scrutiny across all laws has passed.

Thus, it is my view that Scalia’s passing is unlikely to affect the Court’s Free Exercise of Religion doctrine. Correlatively, it is too late to turn RFRA back into the sheep it appeared to be when it was first proposed to Congress. Its dangers are now fully apparent. With Scalia on the Court, RFRA was increasingly understood for what it is—an uncontrollable standard that invites not liberty, but rather imposition of faith on others who have different beliefs—and with his passing it is unlikely that the RFRA genie will be stuffed back into the bottle.

CONCLUSION

With Justice Scalia’s passing, the stakes are especially high in the Establishment Clause arena, but not as high in the Free Exercise context. It is rational to assume that the currently Republican-controlled Senate will persist in refusing to confirm President Obama’s selection of Judge Garland, and, therefore,

⁵² Marci A. Hamilton, *The 2016 RFRA Decline Is Due to the Difficulty of Selling Discrimination and Child Endangerment as Good Policy* (Justia, Feb 23, 2016), archived at <http://perma.cc/AXN9-7UUR>; Marci A. Hamilton, *Indiana Leads the Way with an Outrageous RFRA Proposal Again* (Justia, Jan 21, 2015), archived at <http://perma.cc/PC8E-ANW5>. For several infographics detailing which states have enacted similar RFRA statutes and which single out same-sex couples, see Marci A. Hamilton, *States That Permit Discrimination against Same-Sex Marriage Couples*, archived at <http://perma.cc/8LD7-BM5C> (RFRA Perils).

⁵³ This evidence-based, more-measured approach to religious institutions is evident in sex abuse cases across the United States and at the Supreme Court. Even when the Court held that the First Amendment creates a “ministerial exception,” it suggested that the exception may not immunize nonecclesiastical decisions regarding ministries. See *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694, 710 (2012) (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”).

that the next president will appoint someone to fill Scalia's chair. A Republican president who continues in the same vein as recent Republican presidents would likely appoint someone in line with Scalia's views on the Establishment Clause and further erode the separation of church and state, at the same time the candidate may favor an extreme reading of RFRA. While this in my view is a threat to liberty for all Americans, these extreme interpretations have been a harbinger for RFRA's deconstruction.⁵⁴ That means Scalia's anti-Establishment Clause views likely would be revived, and there would be further deterioration of the principle of separation of church and state. The impact on the First Amendment's Free Exercise Clause is less likely to be significant. Conversely, a Democratic president is likely to appoint someone who will revive the separation of church and state, creating a solid majority of five on these issues, and who has a healthy understanding of the need to govern and accommodate religion in a way that protects liberty and the vulnerable at the same time.

⁵⁴ Marci A. Hamilton, *Pending RFRA Bills* (RFRA Perils), archived at <http://perma.cc/8LD7-BM5C>.