



The Religious Freedom Restoration Act

A complicated legacy for Justice Antonin Scalia

By Kim Colby

As irreplaceable as he was irrepressible, Justice Antonin Scalia's intellect and wit dominated oral arguments before the United States Supreme Court. His brilliance was exceptional, even on a bench composed of nine highly accomplished individuals. Since his death, it has been both satisfying and surprising to witness commentators' consensus in honor of his steadfast dedication to the Constitution's text.

But brilliance is not infallibility. Unfortunately, religious liberty fell victim to one of Justice Scalia's most grievous errors. In 1990, he authored the opinion in *Employment Division v. Smith*, dramatically narrowing the protection that the Constitution itself (at least as interpreted by the Supreme Court) provides to religious liberty. The current religious liberty battles that we have witnessed in Indiana, Georgia and other states, directly stem from the *Smith* opinion.

Before 1990 when *Smith* was decided, the Supreme Court's test for protecting the free exercise of religion allowed the government to burden a citizen's (or religious institution's)

religious exercise only if the government demonstrated that it had a compelling interest that justified overriding the individual's (or institution's) religious conscience. The *Smith* decision reversed this traditional presumption: the government no longer had to show a compelling reason for overriding religious convictions. If a law was neutral and generally applicable, a citizen must obey the law, even if obedience violated core religious convictions, and even if the government could easily accommodate the religious convictions if it wished to do so.

The *Smith* decision created a gaping hole in the Constitution's protection of religious liberty, although some remnants of constitutional protection survived. If the government acted out of hostility to religion, singled out religion for separate treatment or prohibited religious conduct while permitting analogous secular conduct, the law was unconstitutional. But if the law was neutral on its face toward religion and was generally applicable to all citizens, the religious citizen or institution must obey the law no matter how great the burden on religious exercise or how trivial the government's interest in enforcing the law.

Long a part of American legal tradition, constitutional exemptions for religious exercise are essential to preserving religious liberty. An example of a religious exemption is found in Article II, Section 1 of the Constitution itself, which allows the President to “swear (or affirm)” his oath of office. Without the ability to “affirm” rather than “swear,” some Christians would be disqualified from serving as president because they could not take the oath of office.

But how could Justice Scalia, who truly was a staunch proponent of religious liberty, write such a damaging decision? The best explanation lies in Justice Scalia’s belief that the Constitution gives legislatures, not judges, the authority to balance the relative merits of citizens’ religious claims against the government’s various interests. As a result, in *Smith*, he condemned constitutional exemptions, as “created” by judges, while simultaneously endorsing statutory exemptions, as created by Congress or state legislatures.

In direct response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act of 1993 (“RFRA”). A 68-member coalition of diverse religious and civil rights organizations, including the Christian Legal Society, encouraged Congress to restore substantive protection for religious liberty. Senator Kennedy and Senator Hatch led the bipartisan effort to enact RFRA, which passed the Senate 97-3 and the House by unanimous voice vote. President Clinton proudly signed RFRA into law.

RFRA once again placed the burden on the government to demonstrate that a law was sufficiently compelling to justify burdening a citizen’s or institution’s religious freedom. But four years later, in 1997, the Court ruled in *City of Boerne v. Flores* (with Justice Scalia joining the majority opinion) that RFRA applied only to federal law, not to state and local law. Consequently, since *Boerne*, 22 states have adopted their own “state RFRAs” to protect their citizens against state and local laws that burden religious exercise.

As heretical as it may sound, RFRA, not the First Amendment, provides the primary protection for Americans’ religious liberty as to federal laws and regulations. It is critical that religious liberty supporters internalize this fact. Sentimentality must give way to the cold hard fact that the First Amendment no longer adequately protects religious liberty.

When state legislatures consider legislation to protect religious liberty, religious liberty opponents’ argument that statutory protections are unnecessary because “the First Amendment already protects religious liberty” must be countered by two basic facts. First, after *Smith*, inadequate constitutional protection for religious liberty must be supplemented by statutory protections. Second, the federal RFRA protects religious liberty only as to federal law. Without state statutory protections for religious liberty, very little protection exists to guard religious liberty from burdensome state and local laws and regulations. The argument that new statutory protections for religious liberty are unnecessary because “religious liberty is already protected by the Constitution” is a siren song that

threatens to dash religious liberty against the rocks of a culture increasingly hostile to traditional religious beliefs.

To be fair to Justice Scalia, the *Smith* decision arguably was a well-disguised blessing. Without *Smith*, there would have been no RFRA. While paying lip service to strong constitutional protection for religious liberty, the pre-*Smith* Court usually diluted the constitutional protection in actual cases. In contrast, when implementing RFRA’s statutory protections, the Court has issued three remarkably robust religious liberty decisions. In 2006, in *Gonzales v. O Centro*, and again in 2014, in *Hobby Lobby v. Burwell*, the Court rejected the federal government’s attempt to claim a compelling interest in overriding citizens’ religious practices. In 2015, in *Holt v. Hobbs*, the Court applied the RFRA analysis in a case involving RFRA’s sister statute, the Religious Land Use and Institutionalized Persons Act, to rule unanimously in favor of a prisoner’s religious exercise.

Independent of RFRA, in 2012, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a unanimous Court rebuffed the government’s argument that the *Smith* decision meant that the First Amendment provided no special protection for a church’s decisions regarding hiring and firing its ministers. During oral argument, Justice Scalia scoffed at the government’s argument that the *Smith* decision meant that neutral and generally applicable nondiscrimination laws trumped a religious congregation’s First Amendment right to determine who should serve as its ministers.

Before Justice Scalia died, the Court agreed to review two religious liberty cases. The *Little Sisters v. Burwell* case was heard March 23, 2016, and will decide whether

RFRA protects religious nonprofits from being forced to allow the government to use their insurance plans to provide contraceptives to their employees despite the religious institutions’ religious beliefs. After oral argument, the Court ordered supplemental briefing in an apparent attempt to avoid a tie vote. A decision is expected in June.

This fall, the Court will hear arguments in *Trinity Lutheran Church v. Paulsen*. A church preschool was denied participation in a state program that gives grants to nonprofits wishing to purchase recycled tires for playground surfaces. While the federal constitution permits such grants, Missouri claims that its state constitution prohibits grants to a church preschool. While a 4-4 tie is conceivable, surely all eight justices should be able to agree that children deserve the safest playground possible, regardless of whether they attend a secular or religious preschool. Just imagine the fun Justice Scalia would have had during that oral argument. He will be sorely missed.

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