Justice Antonin Scalia's Opinions on Religion: An Introduction

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This issue of the University of Hawai'i Law Review contains a wonderful collection of articles on the constitutional standards protecting religious freedoms, focusing on the views of Justice Antonin Scalia. Justice Scalia visited the University of Hawai'i in February 2000 and participated in a number of classes and programs through which he helped the rest of us understand the nature of his views on a wide range of issues. In order to give the visit a specific focus, our Law Review invited a group of distinguished law professors to analyze Justice Scalia's opinions in the area of religious freedoms and put these opinions in a larger context. The forum provided our academic community with an afternoon of intense intellectual stimulation, and this publication makes the event accessible to a larger audience.

The First Amendment's two clauses on religion – protecting the "free exercise" of religion and prohibiting the "establishment" of religion – are expansive and visionary, and have guided our nation for more than two centuries to protect the diversity of religious beliefs while maintaining a separation of church and state. But these two clauses can come into conflict, and the effort to protect the free exercise of one group's religious activities frequently risks the danger of endorsing a practice or even coercing others who reject such activities, and thus of "establishing" a religion. How to draw the line between the allowable accommodation of religious practices and the prohibited establishment of religion is one of the central problems facing U.S. courts today. Justice Scalia's opinion for the Court in *Employment Division, Oregon Department of Human Resources v. Smith*[1] pointed a new direction on this issue, and the implications of the opinion are still being sorted out by the U.S. Congress, courts, and commentators.

The *Smith* decision says that a generally applicable law is enforceable even if it interferes with the religious practices of a group, so long as the law was not adopted for the specific purpose of interfering with the group's religious activities.[2] Justice Scalia's opinion leaves a number of issues unresolved – such as whether the generally applicable law must be a criminal law, or whether civil laws have the same effect, and whether the rule applies in situations where other constitutionally-protected rights are also involved, such

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[1] 494 U.S. 872 (1990).

[2] An example of a law adopted specifically to burden a religious practice was found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

as the right to privacy or the rights of parents to provide for the education of their children. Congress' attempt to reverse the *Smith* holding in the 1993 Religious Freedom Restoration Act[3] was declared unconstitutional by the Court in the *City of Boerne* case,[4] but it remains unclear whether the *Boerne* decision applies to federal programs, or only to those of the states.

Other important unresolved issues include the basic question of what is a religion and what role courts should play in determining what is a bona fide religious belief or practice,[5] what standards should govern the question of when governmental action amounts to an "establishment" of religion, what duties governments have to "accommodate" religions by allowing public property to be used by religious groups, and what governments and courts should do to identify and discourage "opportunistic fraud" or "strategic adherence," whereby persons or organizations become religious in order to take advantage of the protections of the Free Exercise Clause.

The articles that follow attempt to sort out these issues, and others, and provide a framework for future analysis of religious disputes. Professor Erwin Chemerinsky focuses on Justice Scalia's religious decisions, and his approach toward constitutional and statutory interpretation, and addresses whether he is using neutral principles or a result-oriented approach. Professor William Kelley, a former law clerk of Justice Scalia's, examines and explains the Justice's views in a broader perspective. Dean Kathleen Sullivan provides an innovative and extremely useful matrix for categorizing and understanding judicial perspectives on religious issues. And Professor Aviam Soifer places the recent decisions in historical context and discusses their practical implications.

These thoughtful articles provide a rich cornucopia of ideas and a good read for anyone seeking insight into these important and complicated issues. We are grateful for the contributions of these distinguished academics, and hope

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[3] While he was visiting us in Hawai'i, I asked Justice Scalia how he would rule if Congress removed the exemption for religious groups from the prohibition in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1994), on sex-based discrimination in employment, thus making illegal the Roman Catholic Church's prohibition on women becoming priests. He said that as a judge he would enforce the generally-applicable law against the Church, but that as a citizen he would join in political efforts to restore the exemption and thus to allow the Church to continue its practices. He contended that the political process is usually adequate to protect and accommodate minority religious practices, pointing out that shortly after the *Smith* decision Oregon changed its law so that the religious use of peyote by the Native American Church was no longer illegal.

[4] City of Boerne v. Flores, 521 U.S. 507 (1997).

[5] *Cf.* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding the Mormon Church's exemption from Title VII of the 1964 Civil Rights Act, even for janitors working in a Church gymnasium) *with* Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993) (refusing to recognize such an exemption for the Kamehameha Schools, which were established by a will requiring all teachers to be Protestants).

that this issue of our Law Review will be of assistance in bringing clarity to a confused body of constitutional law.