CONSTITUTIONAL CONTRACTION: RELIGION AND THE ROBERTS COURT

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This Article argues that the most salient feature to emerge in the first decade of the Roberts Court's law and religion jurisprudence is the contraction of the constitutional law of religious freedom. It illustrates that contraction in three ways.

First, contraction of judicial review. Only once has the Roberts Court exercised the power of judicial review to strike down federal, state, or local legislation, policies, or practices on the ground that they violate the Free Exercise or Establishment Clauses. In this constitutional context the Court has been nearly uniformly deferential to government laws and policies. That distinguishes it from its two predecessors—the Rehnquist and Burger Courts—both of which exercised judicial review more regularly.

Second, contraction in the range of voting patterns. The votes of the Justices in law and religion cases overwhelmingly are either unanimous or split five to four, with relatively few separate dissents or concurrences expressing distinctive approaches, and with the split correlating with partisan political or ideological divisions. The "liberal" and "conservative" wings vote in bloc, and frequently reason in bloc as well. This again contrasts with the voting patterns of prior Courts in religious freedom cases.

Third, contraction in coverage. As a substantive matter, the Court is narrowing the religion clauses. Every member of the Court seems now to accept that Employment Division v. Smith *properly interpreted the Free Exercise Clause. Matters are more complicated for the Establishment Clause, where there is far greater division among the Justices. Nevertheless, the Article claims that the Court is moving in a variety of ways toward a narrow interpretation of the Establishment Clause as well.*

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Whether the Roberts Court's contraction of the religion clauses, and its general preference for narrow readings of both, are positive developments will depend on one's views about fundamental questions of constitutional interpretation. Yet there is a conceptual unity to the Court's approach—logical and complementary, even if not inevitable; just as the Rehnquist Court narrowed the scope of constitutional protection for free exercise, so, too, is the Roberts Court narrowing the scope of constitutional prohibition under the Establishment Clause. In this corner of constitutional law, the Court is gradually withdrawing from the scene.

INTRODUCTION

Though John G. Roberts has been Chief Justice of the United States Supreme Court for only just more than nine years—less than the median tenure of eleven years for a Chief Justice[1]—the time is ripe for an initial assessment of the Court's contributions to the law of religious freedom under his stewardship. Since the fall of 2005,[2] the Supreme Court has issued decisions or substantive orders in four cases directly[3] involving the religion clauses of the Constitution,[4] two cases primarily about the Speech Clause and indirectly involving the religion clauses,[5] three cases involving the Religious Freedom Restoration Act,[6] and one case involving the Religious Land Use and Institutionalized Persons Act (RLUIPA).[7] It has also declined to hear several cases about establishment and free exercise (occasionally accompanied by illuminating dissents from, or "statements" about, denial of certiorari), and these, too, suggest something about its general approach to this corner of the First

1. Keith E. Whittington, *The Least Activist Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2226 n.45 (2014) ("Roberts's tenure is comparable, for example, to that of Salmon Chase or William Howard Taft.").

2. The Senate confirmed Roberts's nomination to the Supreme Court on September 29, 2005.

3. The religion clauses are implicated in different ways in these cases. For example, some involve standing to bring an Establishment Clause claim only, while others concern the substance of the Establishment Clause. Nevertheless, a case that "directly" involves the religion clauses is centrally about the meaning of those clauses, while a case that "indirectly" concerns the clauses does not address their meaning.

4. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007). An additional case, *Salazar v. Buono*, 559 U.S. 700 (2010), involved the Establishment Clause but was decided on other grounds, though several concurring and dissenting opinions raised the Establishment Clause issues.

5. Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

6. Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

7. Holt v. Hobbs, 135 S. Ct. 853 (2015); *cf.* Sossamon v. Texas, 131 S. Ct. 1651 (2011) (involving RLUIPA only indirectly).

Amendment.[8] So there are more than a few cases and a smattering of other data to peruse, reflect upon, and study. While there is inevitably something artificial about carving up the Court's jurisprudence by the tenure of a Chief Justice,[9] several interesting institutional and substantive patterns have already begun to emerge.

This Article argues that the most salient feature of the Roberts Court's first decade of jurisprudence on the religion clauses is its contraction of the constitutional law of religious freedom. It illustrates that contraction in three ways.

First, contraction of *judicial review*. Only once has the Roberts Court exercised the power of judicial review to strike down federal, state, and local legislation, policies, or practices on the ground that they violate the Free Exercise or Establishment Clauses.[10] In this constitutional context the Court has been nearly uniformly deferential to government laws and policies.[11] That distinguishes it from its two predecessors—the Rehnquist and Burger Courts—both of which exercised judicial review of federal, state, and local legislation and administrative practices more regularly. The Roberts Court's constitutional deference also largely contrasts with its statutory law and religion jurisprudence, where it has been more likely to rule against the government. Part I of the Article considers several possible explanations for this judicial-review asceticism.[12]

Second, contraction in the *range of voting patterns* in law and religion cases, or at least in the desire of the Justices to express their views in individual opinions. The votes of the Justices in law and religion cases reflect a recurring and yet rather unusual pattern: overwhelmingly the cases are either unanimous or split five to four, with comparatively few separate dissents expressing distinctive approaches, and with the split correlating with (if not due to) partisan political or ideological divisions. If the "liberal" wing of the Court

8. For further discussion, see *infra* Part I.

9. There are many other ways to analyze developments in the Court's jurisprudence with reference to its internal dynamics. But the tenure of Chief Justices—indeed, the very fact that Supreme Court epochs are often conceived as somehow corresponding to the Chief Justice (the Warren Court, the Burger Court, and so on)—is one common and useful way of doing so.

10. I define judicial review in the conventional way: as the Court's exercise of its constitutional power to strike down federal, state, or local laws, policies, or practices.

11. Even in those cases where the Court has limited the reach of federal law, its approach has been deferential. For further discussion, see *infra* Part I.

12. This Article focuses solely on these doctrinal developments; it is, in this sense, Supreme Court-centric, and its underlying assumption is that the doctrinal changes studied here aid in understanding the trajectory of the Court's jurisprudence. Nevertheless, and without injury to that project, any complete explanation for the types of constitutional contraction explored here would also need to account for political and cultural factors (the composition of the Court, the ebb and flow of the culture wars, and many others) beyond the scope of this Article. For one persuasive "political" study of this kind, see generally John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

joins its "conservative" counterpart, it almost always does so in a bloc rather than piecemeal. The contrasts with the voting patterns of prior Courts in religious freedom cases and the possible reasons for this bivalent distributional voting pattern are explored in Part II of this Article.

Third, contraction in the *coverage* of the religion clauses. As a substantive matter, the Court is narrowing the religion clauses. It has done little to indicate that it will depart from its free exercise holding in *Employment Division v. Smith*.[13] Indeed, with one possible exception,[14] every member of the Court seems now to accept that *Smith* properly interpreted the Free Exercise Clause. Matters are more complicated for the Establishment Clause, where there is far greater division among the Justices about fundamental questions of interpretation and scope. Nevertheless, using a simple but effective four-part interpretive scheme—narrow free exercise, broad free exercise, narrow establishment, and broad establishment—the Article argues in Part III that the Court is moving steadily toward narrow interpretations of both clauses.

Of the three varieties of contraction, the last is the most speculative. Any complete explanation for the progressive contraction of the religion clauses is, at this point, premature. The Roberts Court has not yet decided enough religion clause cases to make a definitive statement about the trajectory of its jurisprudence. And, of course, significant changes in the composition of the Roberts Court may in turn reverse or otherwise modify any of these contracting tendencies. Nevertheless, without taking a hard position on the merits of constitutional contraction, this Article offers several explanations for the religion clauses' contraction in coverage. There is, in fact, a conceptual unity to the Court's approach, logical even if not inevitable: just as the Rehnquist Court narrowed the scope of free exercise in the *Smith* decision, the Roberts Court is gradually cutting away some of the doctrinal fat that has bloated the Establishment Clause over the past several decades.[15]

I. CONTRACTION OF JUDICIAL REVIEW

The Roberts Court's asceticism with respect to judicial review is in part a function of the cases that it has agreed and declined to hear, and in part of how it has disposed of the cases that it has heard: discretionary review makes it necessary to consider both categories of cases. Yet by either measure, the Roberts Court has eaten an extremely lean diet. It has agreed to hear fewer constitutional challenges implicating the religion clauses than its predecessors: counting generously, it has heard seven such cases, while over a comparable

13. 494 U.S. 872 (1990).

14. The possible exception is Justice Alito. For elaboration, see *infra* Part III.

15. *See* Marc O. DeGirolami, *Bloating the Establishment Clause*, CTR. FOR L. & RELIGION FORUM (May 16, 2012), http://clrforum.org/2012/05/16/bloating-the-establishment-clause (arguing that the Court's current Establishment Clause tests—and the endorsement test especially—are highly conducive to bloated readings of the coverage of the Establishment Clause).

period (1995-2005) the Rehnquist Court heard eleven cases bringing religion clause challenges[16] and the Burger Court (1976-1986) heard a whopping twenty-seven cases, most of them concerning the Establishment Clause.[17]

Even more striking is that the Roberts Court has only once exercised the power of judicial review to strike down federal or state laws, policies, or practices as violating the religion clauses. Indeed, in two of its four Establishment Clause cases it did not reach the merits because it found lack of standing to bring a claim.[18] Even in those cases that are primarily about the Speech Clause—where the Court has otherwise been far more willing to strike down laws and policies as unconstitutional[19]—and only indirectly about religious freedom, the Court has held its fire.[20] The single law and religion case where the Court exercised judicial review to invalidate a law is *Hosanna-Tabor*

16. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Locke v. Davey, 540 U.S. 712 (2004); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). Though some of these cases (*Watchtower*, *Good News Club*, *Rosenberger*, and *Pinette*) were decided on the basis of the Speech Clause, they also indirectly implicated issues of free exercise and establishment. Since this Article includes cases decided by the Roberts Court whose primary basis was the Speech Clause and that only indirectly implicated the religion clauses, it includes similarly situated cases for prior Supreme Courts as well.

17. Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983); Larkin v. Grendel's Den, 459 U.S. 116 (1982); Larson v. Valente, 456 U.S. 228 (1982); United States v. Lee, 455 U.S. 252 (1982); Widmar v. Vincent, 454 U.S. 263 (1981) (presenting, technically, a Speech Clause case but implicating the religion clauses); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Stone v. Graham, 449 U.S. 39 (1980); Harris v. McRae, 448 U.S. 297 (1980); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Jones v. Wolf, 443 U.S. 595 (1979); NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979); McDaniel v. Paty, 435 U.S. 618 (1978); New York v. Cathedral Acad., 434 U.S. 125 (1977); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1976); Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

18. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2010); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

19. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518 (2014); United States v. Alvarez, 132 S. Ct. 2537 (2012); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011); Snyder v. Phelps, 131 S. Ct. 1207 (2011); United States v. Stevens, 559 U.S. 460 (2010). On the expansion of the Speech Clause at the hands of the Roberts Court, to the detriment of precedent, see generally Randy J. Kozel, *Second Thoughts About the First Amendment* (Notre Dame Legal Studies Paper No. 1434, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476586.

20. Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

Evangelical Lutheran Church v. EEOC, involving the ministerial exception to the reach of anti-discrimination laws as applied to religious institutions.[21]

Judicial restraint has many meanings, but it is often conceived as a court's unwillingness to overturn state and federal legislation, policy, or practice as unconstitutional.[22] Some scholars and others have insisted that the Roberts Court is by this measure an "activist" court, or even "extraordinarily activist."[23] As respects the religion clauses, this Article disagrees: the Roberts Court has in fact been considerably more restrained in this sense than both the Rehnquist and Burger Courts when it comes to religion clause jurisprudence.[24] In the

21. Even *Hosanna-Tabor* reflects only a particular, narrow kind of judicial review, inasmuch as the Court held that the ministerial exception was an exception to the scope of anti-discrimination laws. It did not strike down those laws generally, but merely limited their reach. Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S. Ct. 694, 705-06 (2011) ("Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception."). It is the type of judicial review also exercised by the Burger Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that schools operated by churches are not subject to various state-imposed labor regulations. But it differs from the type of judicial review in which the Court strikes down a particular law or policy as categorically unconstitutional.

22. *See* Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633 (2014). Some argue that judicial restraint properly refers specifically to judicial reticence to overturn legislative acts (federal or state) alone. *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012). But I include government policies or practices both because there are relatively few cases about the religion clauses decided by the Court at all and because judicial review is in fact exercised to review legislative and executive action.

23. *See, e.g*., Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 863 (2010) ("The conservatism of October Term 2009 differs from that of October Term 1988. The latter emphasized great deference to the decisions of the elected branches of government, but the current conservatism shows little such deference, especially when deference conflicts with the conservative judicial ideology."); Gene Nichol, *Trumping Politics: The Roberts Court and "Judicial" Review*, 46 TULSA L. REV. 421, 422 n.8 (2011) ("This essay makes the intemperate claim that the Roberts Court majority has become an extraordinarily interventionist, activist, ideological, and even partisan force in our present structure of government."); 'Meet the Press' (NBC television broadcast April 11, 2011) (transcript available at http://www.msnbc.msn.com/id/36362669/ns/meet_the_press/t/meet-press-transcript-april) (recording the comment of Senator Leahy that the Roberts Court "is the most activist court in my lifetime"). While observing that the term "activist" is meaningless, Pamela Karlan nevertheless offers the view that "the Roberts Court has lost faith in the democratic process." Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 29 (2012). As this Article shows, however, this claim is problematic with respect to the Roberts Court's law and religion jurisprudence, where the Court's deference to democratic processes seems to be robust.

24. The claims here are therefore consistent with, but stronger than, the conclusions reached by Lee Epstein and Andrew Martin, who write that though the Roberts Court is not "especially" activist, neither is it especially restrained. *See* Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal,*

Rehnquist Court's final ten years, it struck down state or federal laws, policies, or practices as (directly or indirectly) violating the religion clauses in four cases.[25] It is also worth noting that in its final decade, the Rehnquist Court agreed to hear more cases seeking to invalidate government laws, policies, or practices than the Roberts Court, even when ultimately it did not rule against the government.[26] A comparable analysis of the Burger Court in its final decade shows it to have been a great deal more aggressive than its successors in its exercise of judicial review as to the religion clauses: in 1985 alone, it struck down four state laws as violating the Establishment Clause; altogether it struck down laws, policies, or practices as unconstitutional under the religion clauses in fourteen cases.[27]

Justice Rehnquist once objected to the "heavy First Amendment artillery that the Court fires at" "sensible and unobjectionable" legislation,[28] and the Roberts Court seems to have taken his criticism to heart. There are likely several explanations for the Court's preference for keeping its judicial review powder dry, but three stand out as especially plausible.

State, and Local Laws, 61 EMORY L.J. 737 (2012). In the religion clause context, the Roberts Court *is* especially restrained by this measure.

25. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Watchtower Bible and Tract Soc'y of N.Y. v. Village of Stratton, 536 U.S. 150 (2002) (holding village ordinance unconstitutional on the basis of the Speech and Free Exercise Clauses); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). The Rehnquist Court also held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the Religious Freedom Restoration Act was unconstitutional as applied to the states, but *Boerne* is not included in the Rehnquist Court's judicial review tally because the religion clauses themselves are truly peripheral to the Court's holding.

26. Cases in which the Rehnquist Court declined to invalidate a government statute, policy, or practice on religion clause grounds include *Locke v. Davey*, 540 U.S. 712 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); and *Agostini v. Felton*, 521 U.S. 203 (1997).

27. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Estate of Thornton v. Caldor, 472 U.S. 703 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Larkin v. Grendel's Den, 459 U.S. 116 (1982); Larson v. Valente, 456 U.S. 228 (1982); Widmar v. Vincent, 454 U.S. 263 (1981) (presenting a speech case with implications for free exercise); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Stone v. Graham, 449 U.S. 39 (1980); NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979); McDaniel v. Paty, 435 U.S. 618 (1978); New York. v. Cathedral Acad., 434 U.S. 125 (1977); Wolman v. Walter, 433 U.S. 229 (1977); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

In its last ten years, the Burger Court upheld government laws, policies, and practices against constitutional challenge on the basis of the religion clauses in Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983); United States v. Lee, 455 U.S. 252 (1982); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Harris v. McRae, 448 U.S. 297 (1980); Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980); Jones v. Wolf, 443 U.S. 595 (1979); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1976).

28. *Grendel's Den*, 459 U.S. at 130 (Rehnquist, J., dissenting).

First, the current Court's docket is much smaller than in years past: in the 2013 term the Roberts Court agreed to hear seventy-five cases,[29] where thirty years ago more than double that number would not have been uncommon.[30] Fewer cases overall may mean fewer cases seeking judicial review.[31] More importantly, there may not be anything unique about the religion clauses. As Keith Whittington has observed, the Roberts Court has in general been far more reluctant to exercise the power of judicial review to invalidate laws than any of its predecessors:

> Under Chief Justice Roberts, the Court has struck down statutes at an annual average rate of 3.8 cases, which is the fewest since before the Civil War (only the Gilded Age Courts are even close) . . . . The Roberts Court has struck down federal law in fewer cases, on average, than any modern Court, with the exception of the immediate post-New Deal Courts. The change is even more striking in cases involving the invalidation of state laws. The Roberts Court has struck down state laws in fewer cases per year than any Court since the Civil War, by a significant margin.[32]

Indeed, the substantial decline of judicial review involving the religion clauses from the Burger Court's last decade to the Rehnquist Court's last decade noted earlier (from fourteen to four) is also consistent with Whittington's claim that "ironically, the Rehnquist Court that was denounced as among the most activist might instead be the harbinger of a period of sustained judicial restraint not seen since before the Progressive Era."[33] The Roberts Court may simply be following the course set by the Rehnquist Court in this respect.

Nevertheless, while it is true that the Roberts Court's judicial-review asceticism as to the religion clauses may in part reflect its more general reluctance to strike down state and federal law, there are specific features of religion clause doctrine that further and more deeply explain the striking,

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29. Supreme Court of the United States, *2013 Term Opinions of the Court*, WWW.SUPREMECOURT.GOV (Aug. 24, 2014), http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=13.

30. *Compare 2013 Term Opinions of the Court*, SUP. CT. UNITED STATES (Aug. 24, 2014), http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=13 (indicating that, during the October term of 2013, the Supreme Court issued seventy-five slip opinions), *with* U.S. REPS. Vols. 543-45, 513-15, *and id*. vols. 469-73 (Aug. 24, 2014), *available at* http://heinonline.org/HOL/Index?collection=usreports&set_as_cursor=clear (indicating that during the October terms of 2004, 1994, and 1984 the Supreme Court issued 80, 93, and 165 slip opinions, respectively). On the Court's shrinking docket, see David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010).

31. In addition to a shrinking docket, it is possible that the number of certiorari petitions bringing religion clause challenges has decreased over time. Thanks to Mike Perino for raising this issue.

32. Whittington, *supra* note 1, at 2227.

33. *Id*. at 2230.

comparative rarity of Roberts Court judicial review in this particular context.[34] The most prominent of these is that the law of religious accommodation—one of the most vital issues of religious free exercise that at one time implicated the Free Exercise Clause directly—has by now largely become entirely statutory. The Roberts Court has decided or issued substantive orders in four cases involving either RFRA or RLUIPA.[35] In the same period it has decided only one case (perhaps) partially about the Free Exercise Clause, a case in any event that is arguably not about religious accommodation at all and that represents a carve-out from general free exercise principles.[36] The single case that brought both statutory and free exercise claims was resolved solely on the basis of the statutory claim without any decision as to free exercise.[37]

It is tempting to attribute the reason for this transition from the Free Exercise Clause to statutory law entirely to the holding of *Employment Division v. Smith*, which ostensibly precluded judicial review as to laws that are neutral and of general application.[38] To be sure, the rule announced in *Smith* has contracted the number of Free Exercise Clause challenges. And yet there are features of *Smith*—most notably the issue of the meaning of "general applicability" and the scope of what I have elsewhere described as the "individual-assessment exception" to *Smith*—that have suggested to several lower courts that accommodations are constitutionally required more often than

34. It should be noted that the percentage drop in overall cases decided among the Courts studied here is considerably lower than the percentage drop in religion clause cases decided, which is in turn lower than the percentage drop in religion clause cases as to which judicial review was exercised. In its final decade, the Burger Court averaged 164.8 total slip opinions per year, while the comparable numbers for the Rehnquist and Roberts Courts are 107.4 and 80.6 respectively. *See* Harold J. Spaeth, et al., *Version 2014 Release 01*, 2014 SUP. CT. DATABASE (Aug. 28, 2014), http://supremecourtdatabase.org. That represents a drop of approximately fifty-two percent from the Burger to the Roberts Court. By contrast, the comparison in the number of law and religion cases heard by the Burger Court over its last decade and the Roberts Court to date—twenty-seven and seven respectively—reflects a drop of about seventy-four percent. Finally, the comparison in the number of law and religion cases as to which the two Courts exercised judicial review—fourteen and one, respectively—reflects a drop of approximately ninety-three percent. These differences in percentage drop suggest that there may be more to the contraction in law and religion cases specifically than may be explained simply by the Court's generally shrinking docket.

35. *See supra* notes 6-7.

36. *Hosanna-Tabor* may be more properly characterized as concerning the doctrine of church autonomy and the limits of non-discrimination law, rather than accommodation from neutral, generally applicable law. For further discussion see Marc O. DeGirolami, *Free Exercise by Moonlight*, SAN DIEGO L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587216.

37. The claimants in *Conestoga Wood Specialties Corp. v. Burwell*, 724 F.3d 377 (2013)—which was consolidated with *Burwell v. Hobby Lobby Stores, Inc.*—brought free exercise claims as well as RFRA claims. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). The Court declined to rule on the free exercise claim. *Id.* at 2785 ("Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.").

38. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 878 (1990).

may appear under *Smith*.[39] To date, however, the Supreme Court has declined to hear any cases raising either a direct challenge to *Smith* or a challenge implicating *Smith*.[40]

Moreover, the Court has recently suggested that the statutory protections for religious free exercise under RFRA are *more capacious* than those afforded by the Court's pre-*Smith* free exercise jurisprudence.[41] As Justice Alito wrote in his opinion for the Court in *Hobby Lobby*: "By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. . . . Nothing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment."[42] If that dictum is followed and entrenched, it might become even more difficult than it is now to obtain review in a suit against state and local governments, as the scope of what is protected by the Free Exercise Clause may continue to diminish by contrast with what is available under RFRA.[43]

All of the foregoing concerns the Free Exercise Clause, but the Court's contraction of judicial review as to the Establishment Clause is even more conspicuous, since the great majority of religion clause cases in which the Rehnquist and Burger Courts exercised judicial review concerned establishment. Entirely new and expansive theories of the meaning of the Establishment Clause were advanced or entrenched by those Courts.[44] The Roberts Court has to date been much more restrained. In the only case directly testing the limits of the Establishment Clause, the Roberts Court reaffirmed a Burger Court precedent[45] in upholding the practice of legislative prayer against constitutional challenge on historical grounds that essentially ignored several of the sundry tests of its predecessors.[46] The Court's other Establishment Clause cases have either limited standing to bring an Establishment Clause challenge or (arguably) provided a constitutional ground for the ministerial exception.

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39. MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 160-65 (2013); *see also* Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2057 (2011); Richard A. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 884 (2001).

40. This notwithstanding considerable uncertainty in the lower courts about the precise coverage of *Smith*. *See* DEGIROLAMI, *supra* note 39 at 160-65.

41. Some have argued that RFRA may be a "super-statute" or that it has "quasi-constitutional" status. *See* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) (describing, but not endorsing, this view); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 254. The dicta in Justice Alito's opinion suggest that RFRA may have even more power than the Free Exercise Clause itself.

42. *Hobby Lobby Stores*, 134 S. Ct. at 2767, 2772.

43. This will depend in part on the existence and interpretation of state RFRAs or state constitutional protections.

44. *E.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Lemon v. Kurtzman, 403 U.S. 602 (1971).

45. Marsh v. Chambers, 463 U.S. 783 (1983).

46. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

The Roberts Court's denials of certiorari in Establishment Clause cases are instructive as well. The Court has declined to hear four cases in which a circuit court reviewed a state or local practice on Establishment Clause grounds.[47] In three of the four cases, the circuit court had struck down the state law or practice. Since it takes the votes of only four Justices to agree to hear a case, one possibility is that the liberal wing of the Court is consistently voting against accepting certiorari in these types of cases, thereby avoiding a contest that it is not unlikely to lose over the continued vitality of the *Lemon* test or the endorsement test as well as leaving in place circuit court decisions that struck down government laws and practices on the basis of more expansive interpretations of the Establishment Clause articulated by prior Supreme Courts.[48] A second possibility (not incompatible with the first) is that at least some members of the conservative wing of the Court are voting to deny certiorari because they can implement their views about the Establishment Clause simply by limiting standing to bring a claim at all. At any rate, the dissents from denial of certiorari and related "statements" by Justices Scalia, Thomas, and Alito, in combination with Justice Kennedy' opinion in *Town of Greece* ignoring the *Lemon* and endorsement tests altogether and instead discussing (in a portion of the opinion commanding only a plurality of the Court) the coercion test,[49] may suggest that the Roberts Court will not be striking down laws as violating the Establishment Clause any time soon. It has been steadily withdrawing from the constitutional stage.

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47. Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012) (holding that a high school graduation held in a church violated the Establishment Clause), *cert. denied*, 134 S. Ct. 2283 (2014). Justice Scalia dissented from denial of certiorari in *Elmbrook* and was joined by Justice Thomas. Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011) (holding that a large cross displayed in a war memorial located on public land violates the Establishment Clause), *cert. denied sub nom.* Mount Soledad Memorial Assoc. v. Trunk, 132 S. Ct. 2535 (2012). Justice Alito joined in the denial of certiorari in *Trunk* but authored a "statement" indicating that the reason was not agreement with the Ninth Circuit on the Establishment Clause merits. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (holding that memorial crosses on the side of a highway offended the endorsement test), *cert. denied sub nom.* Utah Highway Patrol Assoc. v. Am. Atheists, Inc., 132 S. Ct. 12 (2011). Justice Thomas authored a lengthy dissent from denial of certiorari in *Utah Highway Patrol*. Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1 (1st Cir. 2010) (rejecting Establishment Clause challenge to state law requiring public schools to authorize period for voluntary recitation of the Pledge of Allegiance), *cert. denied* 131 S. Ct. 2992 (2011).

48. Even in the First Circuit Pledge case, where the First Circuit upheld a statute setting aside public school time for voluntary recitation of the pledge, the court used the *Lemon* test and the endorsement test to reach that result. *Hanover Sch. Dist.*, 626 F.3d at 9-12.

49. *Town of Greece*, 134 S. Ct. at 1819-28; *see also* Lee v. Weisman, 505 U.S. 577 (1992).

II. CONTRACTION IN THE RANGE OF VOTING PATTERNS

A second and narrower phenomenon of constitutional contraction concerns a reduction in the range of voting patterns in law and religion cases. That might signal a concomitant contraction in the number of distinctive views among the Justices about the scope and meaning of the religion clauses, or it might simply indicate an increased reticence to express those views in individual written opinions, or it might suggest something about the increasing ideological polarization of the Court when it comes to law and religion issues. The votes of the Justices over the last decade in law and religion cases overwhelmingly reflect only two distributional patterns: unanimity or a 5-4 split that correlates with the standard ideological divisions. The Roberts Court has issued four unanimous law and religion decisions as to the result[50] and six decisions split 5-4.[51] As to the unanimous cases, *O Centro* contained no separate concurring opinions, *Hosanna-Tabor* contained concurrences by Justice Thomas and by Justice Alito (joined by Justice Kagan) offering slightly stronger theories of the ministerial exception than that adopted by the Court, *Holt v. Hobbs* likewise contained two curt concurrences by Justice Ginsburg (totaling two sentences) and Justice Sotomayor, and *Summum* contained very brief concurrences by Justice Stevens (joined by Justice Ginsburg), Justice Scalia (joined by Justice Thomas), Justice Breyer, and Justice Souter (who concurred only in the judgment of the Court). The 5-4 decisions almost all contain a dominant, lengthy dissenting opinion joined in full by every dissenting Justice.[52]

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50. Holt v. Hobbs, 135 S. Ct. 853 (2015); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

51. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *Town of Greece*, 134 S. Ct. 1811 (2014); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2010); Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Salazar v. Buono, 559 U.S. 700 (2010); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007). The Wheaton College substantive order involving a preliminary injunction broke down six to three, with Justice Breyer joining the conservative wing of the Court. The only other case indirectly involving law and religion decided by the Roberts Court is *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), which concerned states' sovereign immunity from actions for damages under RLUIPA. The distribution of votes was six to two.

52. The principal dissent in *Hobby Lobby* was authored by Justice Ginsburg, 134 S. Ct. at 2787 (Ginsburg, J., dissenting), and though Justice Breyer (joined by Justice Kagan) authored an additional, extremely short dissent on a narrow issue, *id*. at 2806 (Breyer, J., dissenting), they both joined Justice Ginsburg's dissent in full. The principal dissent in *Town of Greece* was authored by Justice Kagan. 134 S. Ct. at 1841 (Kagan, J., dissenting). Once again, Justice Breyer authored a separate, narrow, fact-specific dissent and once again he also joined the principal dissent in full. 134 S. Ct. at 1838 (Breyer, J., dissenting). The only dissent in *Winn* was authored by Justice Kagan (joined in full by all dissenting Justices). 131 S. Ct. at 1450 (Kagan, J., dissenting). The only dissent in *Hein* was authored by Justice Souter (joined in full by all dissenting Justices). 551 U.S. at 637 (Alio, J., dissenting). The only dissent in *Christian Legal Society* was authored by Justice Alito (joined in full by all dissenting Justices). 561 U.S.at 706. The somewhat exceptional case here is *Buono*, in which Justice Stevens authored a dissent (joined by Justices Ginsburg and Sotomayor), 559 U.S. at

Once again, the contrast with prior Courts is noticeable. The voting pattern in law and religion cases of the Rehnquist Court in its final decade was far more varied: of the Court's eleven cases, one—*Cutter v. Wilkinson*—was unanimous and four were split 5-4, but one decision split 8-1,[53] two split 7-2,[54] and three split 6-3.[55] The Burger Court's voting pattern over its last decade was even more diverse: four 9-0 decisions, four 8-1 decisions,[56] one 7-2 decision, five 6-3 decisions, and thirteen 5-4 decisions.

What can one learn from the reduction in the range of voting patterns observable in the Roberts Court? Caution is in order given the paucity of law and religion cases decided by the Roberts Court (particularly by comparison with the extremely large number of religion clause cases heard by the Burger Court), as well as the difficulty of piecing together explanations for voting patterns in general. Any judgments will be speculative.

One marked difference among these three periods of time is the Court's desire (or capacity) for unanimity among the three Supreme Courts studied here. This past term alone, the Roberts Court has reached unanimity as to the result in roughly two-thirds of its cases, an astonishingly high percentage.[57] Three unanimous law and religion decisions in ten years is an extremely unusual tally. In the Rehnquist Court's final ten years, it achieved unanimity in only one case, *Cutter v. Wilkinson*.[58] Despite hearing nearly four times the number of law and religion cases heard by the Roberts Court, the Burger Court's final decade likewise saw only one unanimous decision in *United States v. Lee*.[59]

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735 (Stevens, J., dissenting), and Justice Breyer authored a separate, narrower dissent, without joining Justice Stevens's dissent, 559 U.S. at 760 (Breyer, J., dissenting).

53. Watchtower Bible & Tract Soc'y, 536 U.S. 150, 172 (2002) (Rehnquist, J., dissenting).

54. Locke v. Davey, 540 U.S. 712, 726 (2004) (Scalia & Thomas, JJ., dissenting); Capitol Square v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting (joined by Justice Ginsburg)).

55. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 130 (2001) (Stevens J., dissenting); *id.* at 134 (Souter, J., dissenting); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (Souter, J., dissenting); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).

56. Justice Rehnquist was the lone dissenter in three of the four 8-1 opinions. Larkin v. Grendel's Den, 459 U.S. 116, 128 (1982) (Rehnquist, J., dissenting); Estate of Thornton v. Caldor, 472 U.S. 703, 711 (1985) (Rehnquist, J., dissenting); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting). Justice White dissented alone in *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting).

57. *See* Jonathan H. Adler, *Despite Hard Cases, Supreme Court Displays Remarkable Degree of Unanimity*, VOLOKH CONSPIRACY (June 25, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/25/despite-hard-cases-supreme-court-displays-remarkable-degree-of-unanimity.

58. 544 U.S. 709 (2005).

59. 455 U.S. 252 (1982). The only other intervening unanimous law and religion decisions have been *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); and *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

Furthermore, each of the Roberts Court's unanimous law and religion decisions was decided on narrow and highly particularized grounds. *O Centro* was a context-specific application of RFRA; *Summum* was not even decided on religion clause grounds at all, but by recourse to a narrow application of the doctrine of government speech; the Court took great pains to emphasize the limited scope of its decision in *Hosanna-Tabor*; and the same narrowness of scope is evident in *Holt v. Hobbs*, whose outcome was due in no small part to the state's weak legal advocacy. Though it is true that some of the Roberts Court's unanimous law and religion decisions have contained concurrences, those, too, have generally been narrow. These concurrences have by and large not reflected totally different rationales for the result from the majority opinions, and their authors have, in the main, joined the Court's majority opinion.

Second, the difficulty of achieving unanimity in religion clause cases is exacerbated by their highly ideological quality. Michael Heise and Gregory Sisk concluded in one of their empirical studies of the federal judiciary that political factors are particularly powerful with respect to decisions about the Establishment Clause:

> Whether celebrated as a proper integration of political and moral reasoning into constitutional judging, shrugged off as mere realism about judges being motivated to promote their political attitudes, or deprecated as a troubling departure from the aspirational ideal of neutral and impartial judging, the powerful role of political factors in Establishment Clause decisions appears undeniable and substantial. In the context of federal court claims implicating questions of Church and State, it appears to be *ideology* much, if not all, of the way down.[60]

Heise and Sisk's findings with respect to political ideology's influence on free exercise and religious accommodation cases are far less stark, but they do find that other extra-legal ideological factors are relevant there as well.[61]

The politicized quality of law and religion controversies may well be reflected in the Roberts Court's ideological 5-4 voting patterns in the majority of its law and religion cases. Yet apart from ideological division itself, there is the separate issue of *ideological bloc* voting. When the liberal wing of the Roberts Court dissents, it tends to do so in a bloc in which all dissenters join the principal dissent;[62] likewise in the single law and religion-related case

60. Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"?: An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204 (2012).

61. Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374-75 (2013).

62. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *Town of Greece*, 134 S. Ct. 1811 (2014); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2010); Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Salazar v. Buono, 559 U.S. 700 (2010); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

where the conservative wing was in the minority.[63] The maverick (or at least unpredictable) jurisprudential viewpoint in law and religion cases has all but disappeared, a perspective that could be found in both liberal and conservative jurists of the past. The sort of jurisprudence reflected in the totality of Justice Brennan's opinions—a strict separationist approach to the Establishment Clause[64] in combination with expansive protection for free exercise,[65] including support for tax exemptions for churches[66]—is not to be found on the current Court. An example on the other side of the ideological spectrum might be Justice White, who authored the opinion for the Court in *Board of Education v. Allen*[67] and dissented in *Widmar v. Vincent*,[68] but also authored the majority opinions in *Frazee*[69] and *Amos*,[70] and dissented in *Grand Rapids v. Ball* and *Aguilar v. Felton*.[71] These Justices took positions in religion clause cases that made it more complicated to mark them down as either entirely pro- or anti-religion from an ideologically partisan point of view.[72] The increase in bloc voting in the Roberts Court may suggest that the reliability of partisan pigeonholing with respect to religion has increased.

Third, bloc voting makes it less likely that the Justices will stake out and defend grand theories of the religion clauses that are doctrinally idiosyncratic (or creative). Narrow opinions have a greater likelihood of attracting more

63. *Christian Legal Soc'y*, 561 U.S. 661.

64. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Edwards v. Aguillard, 482 U.S. 578 (1987); Aguilar v. Felton, 473 U.S. 402 (1985); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

65. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting); Sherbert v. Verner, 374 U.S. 398 (1963).

66. *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (Brennan, J., concurring); *see also* Michael W. McConnell, *Justice Brennan's Accommodating Approach Toward Religion*, 95 CAL. L. REV. 2187 (2007).

67. 392 U.S. 236 (1968) (striking down a law requiring school districts to purchase and loan textbooks to students enrolled in parochial schools on equal terms with those enrolled in public schools as violating the Establishment Clause).

68. 454 U.S. 263, 282 (1981) (White, J., dissenting) ("I have long argued that Establishment Clause limits on state action which incidentally aids religion are not as strict as the Court has held. The step from the permissible to the necessary, however, is a long one. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the States to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority.").

69. 489 U.S. 829 (1989) (holding that denial of unemployment benefits to worker who refused position because job would have required him to work on Sunday violated free exercise clause of First Amendment).

70. 483 U.S. 327 (1987) (upholding Title VII exemption to religious discrimination as to non-profit activities of religious organization against Establishment Clause challenge).

71. 473 U.S. 373, 400 (White, J., dissenting) ("I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools . . . . I am satisfied that what the States have sought to do in these cases is well within their authority and is not forbidden by the Establishment Clause.").

72. Justice Thomas's Establishment Clause jurisprudence is doctrinally idiosyncratic, but it is not unpredictable from a politically partisan perspective.

signatories, inasmuch as other Justices may be less concerned about the unintended reach of deeper, broader, maximalist opinions in future cases.[73] The opinions of the Roberts Court in this area show that the Justices are generally disinclined from writing in what Karl Llewellyn once described (and praised) as the "Grand Style."[74] Their preference for a more "Formal Style"[75] may have resulted in opinions that more of their colleagues are comfortable joining. A propensity to write tighter, narrower opinions may induce otherwise like-minded Justices to unite, but it might also persuade Justices who view deeper questions altogether differently to come together on more focused issues. Justices Alito and Kagan have very different perspectives on the relationship of church and state, and yet Justice Kagan joined Justice Alito's concurrence in *Hosanna-Tabor* in an opinion which elaborated a slightly more potent version of the ministerial exception than was advanced by the majority.[76]

A comparison of the principal dissenting opinions in the Court's two legislative prayer decisions, *Marsh v. Chambers* and *Town of Greece v. Galloway*—the former decided by the Burger Court, the latter by the Roberts Court—is also instructive in this respect. Justice Brennan's dissent in *Marsh* is a magniloquently sweeping separationist credo. "The Establishment Clause," he intoned,

> is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land. The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion "must be a private matter for the individual, the family, and the institutions of private choice."[77]

After this flourish, Justice Brennan proceeded to announce several principles within "[t]he imperatives of separation and neutrality" undergirding the Establishment Clause, including non-interference with "the essential autonomy

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73. On judicial minimalism and maximalism, see generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). The Roberts Court's general preference for judicial minimalism is remarked in Charles W. "Rocky" Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 69 (2011) ("[The Roberts Court's] decisions typically comport with the precepts of minimalism, avoiding constitutional issues when possible, respecting the holdings of prior decisions, resolving controversies in small steps, relying on incremental rules, and providing an opportunity for a dialogue on constitutional meaning.").

74. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 5 (1960). Features of the Grand Style include an emphasis on principle over doctrine and an ongoing "quest" in opinion-writing to find the "best law." *Id*. at 36.

75. *See id*. at 287-96 (listing as features of the Formal Style the controlling force of doctrine and the importance of fine doctrinal distinctions, rather than broad principles, in advancing the law).

76. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (highlighting the importance of "formal ordination and designation as a 'minister'").

77. Marsh v. Chambers, 463 U.S. 783, 802 (1983) (quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)).

of religious life" and that "[w]ith regard to matters that are essentially religious . . . there should be no political battles, and . . . no American should at any point feel alienated from his government."[78] Striking down legislative prayer as categorically unconstitutional, he concluded, would have "invigorated both the 'spirit of religion,' and the 'spirit of freedom.'"[79] His paean to separationism as the constitutional essence of religious freedom and religious individuality was certainly heartfelt, but it was also an idiosyncratically expansive reading of the Establishment Clause evoking some of the more extreme separationist blasts of the late Vinson and Warren Courts. It should therefore come as little surprise that Justice Brennan's *Marsh* dissent was joined only by Justice Marshall; Justice Stevens, who also dissented, did not join it.[80]

By contrast, Justice Kagan's dissent in the more recent legislative prayer case, *Town of Greece*, was much narrower. Her dissent accepted the continued legitimacy of the historical framework of *Marsh*.[81] It even went so far—unnecessarily far—as to express positive agreement with *Marsh*.[82] Though the dissent was framed as vindicating the idea of "religious equality," it did not stake out a deep political philosophy of the relationship of religion and government to be superimposed on the Establishment Clause. In fact, Justice Kagan disclaimed that what appeared to be a grand principle "translates here into a bright separationist line."[83] In actuality the dissent's principal disagreement with the Court was not over the fundamental consistency of legislative prayer with "religious equality" or some other deep vision of the Establishment Clause but over the reach of *Marsh*[84] and over factual particulars concerning whether the town had been sufficiently conscientious in encouraging ecumenical language and attempting to include non-Christian prayer-givers:

> If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would

78. *Id*. at 805-06.

79. *Id*. at 822.

80. A doctrinally idiosyncratic opinion need not be legally incorrect; it may be quite correct. The point here is merely that a doctrinally idiosyncratic opinion is often less likely to be joined by other Justices. Justice Thomas, for example, has several times advanced an originalist, non-incorporationist reading of the Establishment Clause. *See, e.g*., Town of Greece v. Galloway, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring). It may well be the right interpretation of the Establishment Clause, but to date, no other member of the Court has joined these specific parts of these opinions.

81. 134 S. Ct. at 1841-42 (Kagan, J., dissenting).

82. *Id*. at 1845 ("Relying on that 'unbroken' national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as 'a tolerable acknowledgment of beliefs widely held among the people of this country.'").

83. *Id*. at 1841.

84. *Id*. ("I agree with the majority that the issue here is 'whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.' Where I depart from the majority is in my reply to that question.").

> have valid grounds for complaint . . . . Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does . . . . So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide.[85]

As Justice Alito astutely observed, though some of the rhetoric of Justice Kagan's opinion swept more broadly, "the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed."[86] Yet the point here is not about the merits of the various opinions or about minimalist and maximalist opinions generally, but that notwithstanding some of the more florid language in Justice Kagan's dissent,[87] its ultimate basis was quite narrow. And just as the breadth of the Grand Style in Justice Brennan's *Marsh* dissent may have dissuaded other Justices to join it, the narrowness of the Formal Style in Justice Kagan's *Town of Greece* dissent may have drawn in the remainder of the liberal bloc, producing yet another five-to-four result.

III. CONTRACTION IN COVERAGE

The Roberts Court's first decade has also seen contraction in the substantive coverage of the religion clauses. Although this is the most speculative of the three varieties of contraction explored in this Article (in part because the Roberts Court has decided relatively few cases in this area to date),[88] there have already been some definitive doctrinal contractions and some contracting trends are underway.

It may be helpful before discussing these to offer a framework for evaluating what contraction or expansion as to the clauses' coverage entails. For simplicity, this Article refers to "broad" and "narrow" approaches to

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85. *Id*. at 1852.

86. *Id*. at 1831 (Alito, J., concurring).

87. *See, e.g*., *id*. at 1851, 1854 (Kagan, J., dissenting) ("In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion . . . . When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another."). For criticism, see Marc O. DeGirolami, *The Traditional Frame: Justice Kagan's Dissent and Justice Alito's Concurrence in Town of Greece*, CENTER FOR L. & RELIGION F. (Apr. 10, 2015), http://clrforum.org/2014/05/06/the-traditional-frame-justice-kagans-dissent-and-justice-alitos-concurrence-in-town-of-greece.

88. There may be some relationship between contraction in the exercise of judicial review, *see supra* Part I, and contraction in substantive coverage. A Court that never strikes a law down as unconstitutional may in the process be narrowing the coverage of certain civil rights. There may be fewer cases for judicial review because there is less for the religion clauses to do. But a refusal to strike down a law may have the effect of reaffirming existing precedent, and of retaining the existing substantive coverage. Contraction in the exercise of judicial review need not necessarily mean contraction in substantive coverage.

coverage.[89] A broad free exercise view reads the Free Exercise Clause expansively—in favor of generous constitutional rights to accommodation from neutral, generally applicable laws on the basis of religious scruple and generous rights of institutional autonomy and insulation from government intrusion. A narrow free exercise view reads the Free Exercise Clause only to require accommodations in unusual circumstances, as when a religion is being explicitly targeted for discriminatory treatment or when it would cost nothing to accommodate a religious objector, and few or no rights of religious institutional autonomy. A broad Establishment Clause view reads the clause to demand strict separation of church and state, or a progressively unyielding application of the *Lemon* test or the endorsement test. A narrow Establishment Clause view reads the clause as covering less—as prohibiting various kinds of coercive action by the state, for example, or as prohibiting certain historically clear-cut cases of establishment such as control over doctrine and personnel, compulsory church attendance, restrictions on political participation, and several others,[90] but little else of what the modern Supreme Court has said is prohibited by the clause.

The broad/narrow scheme is not meant to capture any single person's views with precision (there are always complications and nuances). It is instead a crude but useful typology of religion clause outlooks. So, for example, one could characterize Justice Scalia's religion clause jurisprudence as generally favoring narrow free exercise and narrow establishment rights relative to other Justices.[91] In the legal academy, scholars including Kent Greenawalt and Douglas Laycock have tended to support broad free exercise and broad establishment readings of the clauses,[92] while others including Marci Hamilton and Caroline Corbin have argued for a narrow free exercise and a broad establishment interpretation.[93] Still others including Philip Hamburger and

89. For a similar taxonomy with different aims, see Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1358-77 (2012). Nothing complimentary or pejorative is intended by the terms "narrow" or "broad." A narrow waistline may be preferable to a broad one, just as a broad horizon may be preferable to a narrow one. At any rate, the terms are used here for the descriptive purposes of making comparisons among a range of possible perspectives, not to indicate agreement or disagreement with those perspectives.

90. For further discussion of these clear-cut examples from the early history of the Establishment Clause, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131-76 (2004).

91. *See* Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 878 (1990).

92. *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2005); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2007); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

93. *See, e.g.*, MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); Caroline Corbin, *Above the Law? The Constitutionality of the Ministerial*

Richard Garnett tend to favor narrow readings of both clauses.[94] I myself have argued for a comparatively broad free exercise and narrow establishment regime based on historical considerations,[95] and similar classifications could be made for almost anyone who has discussed the coverage of the religion clauses.[96]

There are three ways in which the Roberts Court has contracted the substantive coverage of the religion clauses, thereby favoring narrow readings of both. First, no Justice on the current Court has shown any inclination to reverse the narrow interpretation of the Free Exercise Clause established by the *Smith* decision. If anything, the Court has ratified that interpretation in the only case that appears to extend the reach of the Free Exercise Clause—*Hosanna-Tabor*. It is certainly possible to read *Hosanna-Tabor* as a broad free exercise case, inasmuch as the Court for the first time explicitly found there to be a constitutionally mandated exception to the reach of the government's antidiscrimination laws. But it may be more accurate and far-sighted to see that holding as simply a carve-out from the more general rule of *Smith* with respect to religious accommodations, which was reaffirmed in *Hosanna-Tabor*. No Justice signaled any disagreement with the *Smith* rule in *Hosanna-Tabor*,[97] though Justice Alito, as a circuit judge, interpreted *Smith* warily, as still subjecting to strict scrutiny several governmental regulations that affected religion.[98] Yet in the absence of any contrary indication, in what could be seen as the sole case about the Free Exercise Clause, the Roberts Court implicitly confirmed its unanimous allegiance to a narrow approach to free exercise.

Second, perhaps the principal doctrinal contribution of the Roberts Court to establishment jurisprudence has been to contract taxpayer standing to bring an

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Exemption from Antidiscrimination Law, 75 FORDHAM L. REV. 1965 (2007); Caroline Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010).

94. *See, e.g.*, PHILIP A. HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1315 (2011); Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

95. *See* DEGIROLAMI, *supra* note 39, 147-206.

96. This includes Supreme Court Justices: I have already mentioned Justice Scalia, and other Justices can be roughly categorized within this framework.

97. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). *Church of the Lukumi Babalu Aye* was also unanimous as to the judgment, though several concurrences articulated fundamental disagreements with the *Smith* free exercise framework. *Id.* at 559 (Souter, J., concurring); *id.* at 577 (Blackmun, J., concurring). It is possible that the Court's opinion in *Lukumi* itself so weakened and limited the scope of *Smith* that nobody on the current Court is likely to object to *Smith* any longer. This reading of *Lukumi*, however, is not one that most courts share. Thanks to Paul Horwitz for pressing this point.

98. *See* Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

Establishment Clause challenge. It has twice narrowed the rule in *Flast v. Cohen*, a late Warren Court case in which the Court held that taxpayer standing to bring Establishment Clause challenges was uniquely warranted because of the putatively singular injuries to conscience prohibited by the Establishment Clause.[99] In *Hein v. Freedom From Religion Foundation*, however, the Roberts Court in a plurality opinion held that *Flast* was limited to congressional expenditures explicitly authorized by statute and did not extend to general appropriations made to the executive branch.[100] And in *Arizona Christian School Tuition Organization v. Winn*, the Roberts Court further circumscribed *Flast*, holding that Establishment Clause taxpayer standing is unavailable to challenge the granting of tax credits (as opposed to direct government expenditures).[101] The Court may not yet have overruled *Flast*, but it has drastically narrowed and confined its reach.[102] In combination with the legislative prayer decision, these standing decisions suggest that the Court is favoring narrow readings of the Establishment Clause[103]—as much or more a contraction at the justiciability stage as at the merits or remedies stages.[104]

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99. 392 U.S. 83 (1968).

100. Hein v. Freedom from Religion Found., 551 U.S. 587, 605 (2007).

101. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011). Justice Scalia (joined by Justice Thomas) wrote separately urging that *Flast* should be overruled. *Id*. at 1450 (Scalia, J., concurring).

102. For insightful discussion of the issue, see Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1889-95 (2014) (discussing *Flast* and its "patricidal progeny").

103. Some scholars might perceive *Hobby Lobby* as narrowing the scope of the Establishment Clause as well, inasmuch as the Court rejected the argument that an exemption under RFRA would violate the Establishment Clause. *See, e.g.*, Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing Off the Wall: What the New York Times and the Courts are Missing in the Birth Control Mandate Fight*, SLATE (Nov. 26 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html. I have argued that these scholars misread the doctrine and make erroneous claims about the types of exemptions prohibited by the Establishment Clause. *See* Marc O. DeGirolami *On the Claim that Exemptions from the Contraception Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE (Dec. 5, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html; DeGirolami, *supra* 36; *see also* Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby & Conestoga, et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354); Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, THE VOLOKH CONSPIRACY (Dec. 4, 2013), http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause. If they are right, however, then *Hobby Lobby* would represent another narrowing of the scope of the Establishment Clause.

104. *Cf*. Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984) (discussing the expansion of standing doctrine to contract the ability of "non-Hohfeldian" plaintiffs to bring "structural lawsuits").

Third, as discussed earlier, there is the notable absence of a single case striking down a law as violating the Establishment Clause in about a decade (excepting, depending on its basis, *Hosanna-Tabor*). One might argue that the substantive law of the Establishment Clause has thus remained in a kind of petrified state of confusion since 2005, the last time the Court struck down a local practice as violating the Establishment Clause with no single rationale gaining the assent of a majority of the Court.[105] Indeed, the very least that can be said is that the Court's older Establishment Clause tests—the *Lemon* test and the endorsement test—have neither been explicitly overruled nor explicitly ratified. Whatever indications there were that the Court might take its historical approach to legislative prayer and apply it to the Establishment Clause more generally have not borne fruit.[106]

But another way of looking at the dearth of Establishment Clause cases in the Roberts Court's first decade is precisely as a kind of contraction in coverage. That perspective depends upon perceiving the making of constitutional law as a distinctive type of common law process, in which a subsequent precedent on the same substantive topic not only explains or elucidates the reach of the prior case, but also reaffirms and re-entrenches the prior case as good law. The very process of revisiting and reaffirming prior cases—whether or not those earlier cases are extended to reach the facts of the current case—can itself strengthen the validity and vitality of those earlier cases.[107] This is not always the case: sometimes when a court raises a precedent, it rejects it, distinguishes it, narrows it, or even reformulates it. But if the precedent is reaffirmed (even if it is not extended), it is often regularized and re-validated.

Consider, for example, only a fragment of the Burger Court's unusually ample Establishment Clause jurisprudence in 1985: in two cases, it reaffirmed and developed limits on government financial support for religious institutions;[108] in a third, in only a few words it articulated an entirely new, confusing, and not particularly well-reasoned theory of Establishment Clause

105. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

106. My own view is that this is regrettable, inasmuch as the historical approach has significant advantages over other alternatives. *See generally* DEGIROLAMI, *supra* note 39, chs. 7, 10. But the outright denial of certiorari in the *Elmbrook School District* litigation (rather than an order granting certiorari, vacating the decision below, and remanding the case for further proceedings consistent with the Court's holding in *Town of Greece*) may suggest that the Court's older Establishment Clause tests are not dead yet. Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012) (holding that a high school graduation held in a church violated the Establishment Clause), *cert. denied*, 134 S. Ct. 2283 (2014).

107. Reaffirmation of precedent fortifies precedent's reliance function. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1855-57 (2013). But it can also signal the Court's recommitment to that precedent in each new iteration of reaffirmation.

108. Aguilar v. Felton, 473 U.S. 402 (1985); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

violations based on third-party harms;[109] and in a fourth, it extended its school prayer cases to proscribe moments of silence as well.[110] In each case, the Burger Court relied on, reclaimed, and revitalized the *Lemon* test, together with the tradition of expansive Establishment Clause doctrine that preceded it.[111] Each of these four cases further entrenched—and "familiar[ized]"[112]—the broad reading of the Establishment Clause. Or consider the legislative prayer cases: before *Town of Greece*, there had been no decision on the issue since 1983, and while *Marsh* was still good law, the simple fact of the passage of thirty years without any word from the Supreme Court made *Marsh's* continuing vitality less certain. Yet now, after its reaffirmation and re-entrenchment in *Town of Greece*, *Marsh* has new strength and force, even as its scope may be limited to legislative prayer.

The primary point is that over ten years the Roberts Court has not engaged in this process of precedential reaffirmation and re-entrenchment at all with respect to the Court's broad Establishment Clause tests. If precedent has a "half-life," and if the absence of precedential reaffirmation suggests something of judicial desuetude, then such reaffirmation will matter for the strength of the precedent. To the extent that the Roberts Court has explicitly moved Establishment Clause doctrine in any direction, it has contracted it in the doctrine of standing.

And what of *Burwell v. Hobby Lobby*? The ferocity of opposition to the Court's decision is so overpowering in some circles as perhaps to obscure that *Hobby Lobby* was not a constitutional case at all.[113] As already noted, in the Free Exercise Clause context, the Court has shown solicitude for statutes such as RFRA and RLUIPA, which are creatures of the political branches, far more than for constitutional doctrine, which is not. True, Justice Alito suggested that RFRA gives more free exercise protection than what was available before *Smith*. But *Hobby Lobby* can and should be read as a straightforward exercise in statutory interpretation, not as a crypto-expansion of constitutional rights under the Free Exercise Clause. Indeed, possibly for reasons of constitutional avoidance, the majority in *Hobby Lobby* expressly declined to address the free exercise claims that were raised. And the narrowness of the Court's 5-4 holding—limited as it is to the rights of closely held corporations to exercise religion under RFRA and to the conclusion that, in this case, the government did not satisfy strict scrutiny where it was already employing a less restrictive

109. Estate of Thornton v. Caldor, 472 U.S. 703.

110. Wallace v. Jaffree, 472 U.S. 38 (1985).

111. *Ball*, 473 U.S. at 380; *Aguilar*, 473 U.S. at 410; *Caldor*, 472 U.S. at 708; *Jaffree*, 472 U.S. at 55-56.

112. *Ball*, 473 U.S. at 380.

113. Arguments associating *Hobby Lobby*, 134 S. Ct. 2751 (2014), with *Citizens United v. FEC*, 558 U.S. 310 (2010), for example, make the regrettable category mistake of comparing statutory apples with constitutional oranges.

means in implementing its contraception mandate[114]—hardly indicates that *Hobby Lobby* represents a major expansion of religious free exercise at all, let alone constitutional free exercise. Nothing in *Hobby Lobby* contradicts the core thesis espoused here: that of contraction in constitutional coverage.

Whether the Roberts Court's contraction as to the coverage of the religion clauses, and its general preference for the narrow reading of the clauses, is a positive development will depend on one's views about fundamental questions of constitutional interpretation. Contraction in the coverage of both clauses may suggest that on the issue of religious expression, for example, one might expect to see more government expression and less individual expression. In politically partisan terms, religious conservatives should expect more establishment and fewer free exercise cases with which to agree, while secular liberals should expect the reverse. That jurisprudential outcome would hardly represent an uncomplicated good for those who support religious freedom.

Yet there is an underlying unity in the Roberts Court's approach, an attention to the hydraulics of the First Amendment. In 1990, the Rehnquist Court opted for a narrow reading of the Free Exercise Clause, resulting in an unbalanced doctrinal state of affairs: a narrow Free Exercise Clause and a broad Establishment Clause. But if the Free Exercise Clause is interpreted narrowly, then the argument for reading the Establishment Clause narrowly grows stronger. If constitutional protection for religion is narrowed, then so, too, should constitutional prohibition with respect to religion. The clauses are a unit: together, they express an integrated and complementary position about the relationship of religion and government. The view of the current Court seems to be that if it retreats from the constitutional stage of protection, it should also withdraw from the constitutional arena of prohibition.[115] The Roberts Court appears to be following just this course, gradually balancing the clauses and narrowing the more expansive and immoderate interpretations of the Establishment Clause that it inherited.

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114. The *Hobby Lobby* majority required Justice Kennedy's concurrence, which made a point of emphasizing that the government did have a compelling interest in its mandate and that the government was already using less restrictive means than what it offered Hobby Lobby. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2786 (Kennedy, J., concurring) ("As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases.").

115. Some may agree that the clauses should be read complementarily, but nevertheless disagree that they should both be read the same way. For example, some may resist the latter conclusion on the basis of a "broad principle of government non-endorsement" that applies across the Constitution. *See* Nelson Tebbe, *Government Non-Endorsement*, 98 MINN. L. REV. 650 (2013). Others may instead argue for complementary readings of the clauses that favor narrow establishment but broad free exercise protections. The claim here is merely that the Roberts Court's approach is internally coherent and logical, not that it is necessary.

CONCLUSION

This Article has argued that in the Roberts Court's first decade, its approach to the religion clauses is best described as contraction—as to judicial review, as to the range of voting patterns, and as to the substantive coverage of the clauses. A decade is not a long time at the Supreme Court and the vagaries of elections might well disturb or even reverse some or all of the trends discussed here. For the present, however, those who decry the Roberts Court's "activism" should welcome its strikingly restrained religion clause jurisprudence (though they probably will not). And those who bemoan the modern Supreme Court's aggressive jurisprudence of the religion clauses, inaugurated in 1947,[116] developed and expanded in the 1960s, and steadily entrenched in the 1970s and 1980s, should approve of a Supreme Court that is more reticent than its predecessors to wield that power.

116. Everson v. Bd. of Educ., 330 U.S. 1 (1947).