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TAKING STOCK OF THE RELIGION CLAUSES

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INTRODUCTION

After a few decades of relative quiet, the Supreme Court has in recent years focused once again on the religion clauses and related statutes. Beginning with its unanimous opinion recognizing the ministerial exception in *Hosanna-Tabor v. EEOC* (2012), the Court has issued a series of high-profile decisions: *Town of Greece v. Galloway* (2014), *Burwell v. Hobby Lobby* (2014), *Holt v. Hobbs* (2015), *Trinity Lutheran v. Comer* (2017), *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), *Trump v. Hawaii* (2018), and just last term, *American Legion v. American Humanist Association* (2019).¹ This term (after the articles for this symposium had been written), the Court decided three cases involving religion: one striking down a no-aid provision relating to the use of tax credits for religious schools,² one clarifying the scope of the ministerial exception,³ and one holding that the federal government lawfully exempted

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1. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

2. *See Espinoza v. Mont. Dep't of Revenue*, No. 18-1195, 2020 WL 3518364 (U.S. June 30, 2020).

3. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267, 2020 WL 3808420 (U.S. July 8, 2020).

religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.⁴

A number of recent cases formally resolved under free speech doctrine also touch on important dimensions of religious freedom and religious expression: *Pleasant Grove City v. Summum* (2009), *Christian Legal Society v. Martinez* (2010), *McCullen v. Coakley* (2014), and *Reed v. Town of Gilbert* (2015).⁵ And, in its next term, the Court will hear a case at the intersection of religious freedom and gay rights that could reshape its approach to free exercise claims over the past thirty years.⁶

Changes in our understanding of law and religion also extend beyond legal doctrine.⁷ The past few years have seen significant demographic and political shifts. For the first time in American history, nonbelievers and religiously unaffiliated citizens comprise a significant demographic of the country's population,⁸ which has emerged alongside a declining Protestant influence on white middle-class culture.⁹ The role of American Muslims has taken on increased visibility.¹⁰ Voters are sorting themselves relationally, informationally, and even geographically.¹¹ And growing divides over the

4. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, 2020 WL 3808424 (U.S. July 8, 2020). This is the culmination of litigation that previously reached the Supreme Court a few years ago. See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (vacating and remanding consolidated cases due to supplemental briefing indicating that contraceptive coverage could be provided through insurance companies without notice to the religious employers).

5. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

6. See *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d. Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123). The second question presented asks whether the Court should revisit the free exercise framework set out in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* concluded that claims brought under the Free Exercise Clause warranted no heightened constitutional scrutiny when they challenged neutral and generally applicable laws and regulations. *Id.* at 885.

7. For an important assessment of how changes in law and religion jurisprudence may be more culturally than legally driven, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014). Horwitz suggests that "[t]he important arguments in moments of deep social and legal contestation—including the *Hobby Lobby* moment—are not arguments about what the law is; they are assertions about what our values should be. They are a battle for the descriptive high ground: for mastery over the terms of utterability." *Id.* at 188–89 (emphasis omitted).

8. See, e.g., Jack Jenkins, 'Nones' Now As Big as Evangelicals, *Catholics in the US*, RELIGION NEWS SERV. (Mar. 21, 2019), <https://religionnews.com/2019/03/21/nones-now-as-big-as-evangelicals-catholics-in-the-us/> [<https://perma.cc/X5Q5-58B8>] ("nones" now represent about 23.1 percent of the U.S. population).

9. See, e.g., JOSEPH BOTTUM, AN ANXIOUS AGE: THE POST-PROTESTANT ETHIC AND THE SPIRIT OF AMERICA (2014).

10. See, e.g., EBOO PATEL, OUT OF MANY FAITHS: RELIGIOUS DIVERSITY AND THE AMERICAN PROMISE (2018); ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM (2019).

11. See, e.g., BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (Mariner Books 2009) (2008); Richard Florida, *America's 'Big Sort' Is Only Getting Bigger*, CITYLAB (Oct. 25, 2016), <https://www.citylab.com/equity/2016/10/the-big-sort-revisited/504830/> [<https://perma.cc/6ELF-2TLG>]; Harry Enten, *Ending Gerrymandering Won't Fix What Ails America*, FIVETHIRTYEIGHT (Jan. 26, 2018), <https://fivethirtyeight.com/features/ending->

election of Donald Trump to the White House have heightened tensions within and between various religious demographics.¹² These and other changes reveal less consensus and greater tension within the American experiment of pluralism.¹³

The doctrinal and cultural changes of the past few years suggest the time is right to assess the landscape of free exercise and establishment law: where it is and where it might be headed. To that end, Washington University in St. Louis assembled some of the nation's leading law and religion scholars to reflect on these and other developments.¹⁴

FREEDOM OF ASSOCIATION: CAMPUS RELIGIOUS GROUPS

Michael McConnell's keynote essay explores religious freedom for campus religious groups and the significance of the right of association.¹⁵ Beginning with a historical review of the right of association and its antecedent, the right of assembly, McConnell argues that these protections have always allowed religious groups to limit membership to those who share the same values and beliefs. McConnell suggests that prior to the Court's 2010 decision in *Christian Legal Society v. Martinez*, the government could enforce anti-discrimination laws only in the commercial sphere and in organizations whose membership restrictions were unrelated to their message or beliefs. But in *Christian Legal Society*, McConnell contends, the Court subsumed the freedom of association into free speech and held that the freedom of association only protected groups from government compulsion—not from the denial of benefits. McConnell asserts that this shift excludes the freedom of association from protections

gerrymandering-wont-fix-what-ails-america/ [https://perma.cc/UK5U-4GX3]. But see Greg Martin & Steven Webster, *The Real Culprit Behind Geographic Polarization*, ATLANTIC (Nov. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/why-are-americans-so-geographically-polarized/575881/> [https://perma.cc/C38U-6Z62] (arguing that “[t]here is no intentional ‘big sort’”).

12. See, e.g., JOHN FEA, BELIEVE ME: THE EVANGELICAL ROAD TO DONALD TRUMP (2018); THOMAS S. KIDD, WHO IS AN EVANGELICAL?: THE HISTORY OF A MOVEMENT IN CRISIS (2019); Mark Galli, *Trump Should Be Removed from Office*, CHRISTIANITY TODAY (Dec. 19, 2019), <https://www.christianitytoday.com/ct/2019/december-web-only/trump-should-be-removed-from-office.html> [https://perma.cc/SL88-Y82Y].

13. See generally JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

14. The conference was cosponsored and facilitated by the Washington University School of Law, the John C. Danforth Center on Religion and Politics, and the *Washington University Law Review* (I hold a joint appointment between the first two entities). Special thanks for their work on the conference and this symposium to Rachel Mance at the law school; Sandy Jones, Sheri Peña, and Debra Kennard at the Danforth Center; and Ryan Lundquist, Kristina Gliklad, and Emma Stewart at the *Law Review*. The conference also benefited from excellent moderating by Elizabeth Katz, Chad Flanders, Anna Bialek, and Daniel Epps.

15. Michael W. McConnell, *Freedom of Association: Campus Religious Groups*, 97 WASH. U. L. REV. 1641 (2020). McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School.

afforded by the unconstitutional conditions doctrine. McConnell concludes by suggesting that the Court's reasoning should trouble any and all who value civil liberties—especially if it “signals a general retreat” from protection of associational freedoms.¹⁶

FIRST AMENDMENT TRADITIONALISM

Marc DeGirolami's contribution explores the role of traditionalism in religion clause jurisprudence.¹⁷ DeGirolami situates his argument with an overview of the “traditions” of First Amendment law: the use of practices characterized by both long age and endurance to serve as “presumptive constituents of textual meaning.”¹⁸ DeGirolami considers traditionalism's interpretive role—offering past practices to understand unclear words—and its democratic role—resisting the abstractions of elites. As he compares traditionalism with various strains of originalism, DeGirolami contends that traditionalism offers something more than the “expected applications” that originalism offers jurists: enduring practices that give meaning to the text. And because traditionalism describes—and employs—real, enduring practices, DeGirolami suggests that it is the most real characterization of the “official story” of First Amendment law.¹⁹ DeGirolami concludes that—despite academic protestations to the contrary—the Court uses traditionalism, not originalism, in deciding cases.

RECONSIDERING *THORNTON V. CALDOR*

Christopher Lund revisits the Court's 1985 decision in *Estate of Thornton v. Caldor*²⁰ and questions its internal logic and contemporary relevance.²¹ Lund opens with a review of the *Caldor* facts: a devout Presbyterian sued his employer for violating a Connecticut statute that gave employees the right not to work on their chosen Sabbath. Lund emphasizes the brevity and shallowness of the Court's opinion: a single page of legal analysis that fails to consider free exercise—only offering an “almost-visceral sense that the . . . statute advance[d] religion.”²² Analogizing to

16. *Id.* at 1652.

17. Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020). DeGirolami is the Cary Fields Professor of Law and Co-Director, Center for Law and Religion at St. John's University School of Law.

18. *Id.* at 1659.

19. *Id.* at 1682.

20. 472 U.S. 703 (1985).

21. Christopher C. Lund, *Reconsidering Thornton v. Caldor*, 97 WASH. U. L. REV. 1687 (2020). Lund is a Professor of Law at Wayne State University Law School.

22. *Id.* at 1695.

Lochner v. New York,²³ Lund argues that the Court in both cases sought to protect “natural” market power from state interference: statutes protecting the *physical* health of employees in *Lochner* and statutes protecting the *religious* health of employees in *Caldor*. Lund observes that *Caldor* was the first time the Court found a religious exemption statute unconstitutional, and it did so with no attention to free exercise. Although Lund concludes that much in *Caldor* is “undoubtedly right,” the opinion’s lack of analysis means that “there are also reasons to treat the case warily and with caution.”²⁴

UNTANGLING ENTANGLEMENT

Stephanie Barclay’s contribution is one of two articles that examine the effect of *American Legion v. American Humanist Society* on the Court’s standing doctrine.²⁵ Barclay considers whether the longstanding test in *Lemon v. Kurtzman*²⁶ remains viable after *American Legion*. She notes that six justices in *American Legion* expressed their desire to reject the *Lemon* test, either in whole or in part. Although she agrees that the first two prongs of the test can be justifiably discarded as ahistorical judicial inventions, she insists that the third prong—excessive entanglement—requires greater attention. Barclay contends that the Court’s pre-*Lemon* entanglement jurisprudence should survive in the two contexts in which it has historically been applied: protecting religious groups from government interference in their internal affairs and preventing the government from giving certain religious groups preferential treatment. Although the Court has also applied excessive entanglement tests elsewhere, Barclay argues that this use lacks the historical justifications supporting use in government interference and preferential treatment cases. Barclay concludes that the Court can resolve apparent tensions between the Establishment and Free Exercise Clauses and promote religious pluralism by restricting its entanglement analysis to only historical applications—thus permitting even-handed government partnerships with religious groups to remain.

CROSSING DOCTRINES: CONFLATING STANDING AND THE MERITS UNDER THE ESTABLISHMENT CLAUSE

Ashutosh Bhagwat’s contribution also examines the effect of *American Legion v. American Humanist Society* on the Court’s standing doctrine.²⁷

23. 198 U.S. 45 (1905).

24. Lund, *supra* note 21, at 1700.

25. Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020). Barclay is Associate Professor of Law at Brigham Young University Law School.

26. 403 U.S. 602 (1971).

27. Ashutosh Bhagwat, *Crossing Doctrines: Conflating Standing and the Merits Under the*

Bhagwat first assesses Justice Gorsuch's concurrence which argues that "offended observer" standing should be abandoned because it derives from *Lemon v. Kurtzman* and a majority of the Court has now abandoned *Lemon*. While agreeing both that "offended observer" standing ought to be discarded and that its existence is unique to Establishment Clause jurisprudence, Bhagwat disagrees that *Lemon* is the source of this theory of standing. Instead, he notes that the endorsement prong of the *Lemon* test—from which "offended observer" standing is supposedly derived—first appeared in a 1984 concurrence and was not adopted by a majority until 1989, by which point lower courts had already recognized a version of such standing. Bhagwat further suggests that an Establishment Clause violation alone does not give rise to a judicially cognizable injury: mere offense or feelings of exclusion must be paired with a more traditional legal claim, with the Establishment Clause providing substantive law to adjudicate that claim. Although eliminating offended observer standing would complicate standing in religious display cases, Bhagwat contends that plaintiffs in cases involving schools or legislative prayer would likely retain standing because of those environments' coercive natures. Bhagwat concludes that his arguments would likewise question Equal Protection standing, where injury is merely the inability to compete equally, not tangible consequences.

WHAT IS A "SUBSTANTIAL BURDEN" ON RELIGION UNDER RFRA AND THE FIRST AMENDMENT?

Gabrielle Girgis looks at the meaning of "substantial burden" under free exercise analysis.²⁸ Girgis assesses what constitutes a "substantial burden" in claims under the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Free Exercise Clause. She surveys three current tests—one used in lower courts and two proposed by legal scholars—for identifying substantial burdens and, after noting their strengths and weaknesses, expands to create

Establishment Clause, 97 WASH. U. L. REV. 1729 (2020). Bhagwat is the Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality and Martin Luther King Jr. Professor at University of California, Davis School of Law. Bhagwat's article addresses an issue argued on different sides of the *American Legion* appeal by two of the other symposium contributors. See Michael W. McConnell, Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of Petitioners, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717), 2018 WL 6819439 (arguing that respondents lacked standing because offended-observer standing is an anomaly and standing under the Establishment Clause requires a concrete, personal injury), and Christopher C. Lund, Brief of Law Professors as Amici Curiae in Support of Respondents, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717), 2019 WL 582080 (suggesting that the arguments against standing were unpersuasive, would work a sea change in Establishment Clause claims, and conflated the merits with standing).

28. Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755 (2020). Girgis is a graduate student in the Department of Politics at Princeton University.

a new framework for courts to use. Her framework identifies two categories of religious exercise that can be substantially burdened: religious obligations and the exercise of “religious autonomy.” Girgis then describes four types of cognizable burdens, of which the first three require the claimant to choose between two or more undesirable options: to forego religious exercise, to exercise and forego public benefit, to exercise and suffer a legal penalty, or to be prevented from exercising at all. Girgis argues that only laws that affect the two categories of religious exercise and that create one or more of the four kinds of cognizable burdens can be said to create a *substantial* burden. Defending against potential Establishment Clause concerns, Girgis argues that her framework’s breadth will prevent courts from discriminating between religions and will require courts to defer to the claimant on “whether [the] practice is truly an obligation or a form of substantial religious autonomy”—thus preventing courts from endorsing certain doctrinal interpretations.²⁹ Girgis concludes by applying her framework to RFRA claims and *Smith*, showing that it would find a substantial burden in cases like *Hobby Lobby* but not in cases where there is only a conscience-based and not a religion-based objection.

‘THE PECULIAR GENIUS OF PRIVATE-LAW SYSTEMS’: MAKING ROOM FOR
RELIGIOUS COMMERCE

Michael Helfand argues that the use of private law agreements to buoy so-called religious commerce is slowly being eroded by public law.³⁰ By relying on “neutral principles of law” in lieu of theological language in contracts, Helfand asserts, religious institutions, individuals, and corporations have long been able to avoid the public law “religious question” doctrine. Helfand contends that this norm has allowed religious commercial transactions like the kosher food industry, church and synagogue land trusts and grants, and religious arbitration agreements to flourish. Helfand expresses concern that this norm is being attacked by modern scholars who argue that religious arbitration agreements violate the Federal Arbitration Act’s neutrality principles and that granting binding legal decision-making authority to religious arbitrators violates the Establishment Clause. Helfand concludes that although public law serves an important fringe function—preventing courts from making exclusively religious determinations or expressing a sectarian preference—public law

29. *Id.* at 1781.

30. Michael A. Helfand, *The Peculiar Genius of Private-Law Systems’: Making Room for Religious Commerce*, 97 WASH. U. L. REV. 1787 (2020). Helfand is the Associate Dean for Faculty and Research and a Professor of Law at Pepperdine University’s Caruso School of Law.

incursions into private law norms undermine an important economic microsystem: religious commerce.

RECONSIDERING HOSTILE TAKEOVER OF RELIGIOUS ORGANIZATIONS

Jessie Hill concludes the symposium by returning our attention to a key focus of McConnell's essay: *Christian Legal Society v. Martinez*.³¹ Hill explores the issue of disagreement within religious institutions and the "hostile takeover" threat posited in Justice Alito's dissent. After reviewing various hostile takeover cases, Hill determines that the heart of the issue is whether it is appropriate for a group to prevent changes in its values or mission by excluding outsiders who both want to join and then to alter the group through the group's normal procedural means. Hill notes that in the associational context, hostile takeovers are often organizational changes made through legitimate means, therefore making it difficult to discern why such changes should be found inappropriate by the courts. Thus, rather than creating a new hostile takeover jurisprudence, Hill argues that the independence of religious organizations is best preserved by relying on well-established religion clause doctrine that prevents secular interference in faith-based matters.

Justice Alito's opinion in *American Legion* observed that when it comes to the Court's Establishment Clause doctrine, "[w]hile the concept of a formally established church is straightforward, pinning down the meaning of a 'law respecting an establishment of religion' has proved to be a vexing problem."³² The same could be said of free exercise doctrine. Even with the relatively straightforward standard in *Smith*, courts and scholars have struggled to articulate the scope and meaning of free exercise and even of "religion" itself.³³ The increasing religious heterogeneity in American society suggests that these challenges will continue. Indeed, they are in some ways interminable—some doctrinal issues unavoidably raise simultaneous concerns of free exercise and establishment, and some theoretical tensions are inevitably zero-sum. Nevertheless, the scholarly

31. B. Jessie Hill, *Reconsidering Hostile Takeover of Religious Organizations*, 97 WASH. U. L. REV. 1833 (2020). Hill is the Judge Ben C. Green Professor of Law and Associate Dean for Research and Faculty Development at Case Western Reserve University School of Law.

32. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (Alito, J., plurality opinion).

33. See, e.g., George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Jonathan P. Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 WASH. U. L. REV. 191 (2016).

task remains to clarify and sharpen emerging doctrine, elucidate tensions, and minimize ambiguities. The contributors to this volume join that ongoing work at this important moment in religion clause doctrine.