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Recent Applications of the Supreme Court's Hands-Off Approach to Religious Doctrine: From Hosanna-Tabor and Holt to Hobby Lobby and Zubik

Samuel J. Levine
Touro Law Center, slevine@tourolaw.edu

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In each of the past four terms, the United States Supreme Court has decided a case with important implications for the interpretation and application of the Religion Clauses of the United States Constitution:[1] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,[2] *Burwell v. Hobby Lobby, Inc.*,[3] *Holt v. Hobbs*,[4] and, most recently, *Zubik v. Burwell*.[5] Although the Court's decisions in these cases addressed—and seemed to resolve—a number of questions central to Free Exercise and Establishment Clause jurisprudence, including recognition of the "ministerial exception" and religious rights of a corporate entity, the decisions left a number of questions unanswered, such as the contours of free exercise rights for prisoners and the definition of a religious minister. More dramatically—though anticlimactically—in *Zubik*, rather than ruling in favor of one of the parties, the Court issued an unusual per curiam opinion instructing the parties to work to find a way to resolve the matter.

This chapter suggests that the Supreme Court's inability to answer some of these questions, or even to resolve the controversy in *Zubik*, is rooted in the Court's continuing, and arguably expanding, hands-off approach to religious doctrine. The hands-off approach, developed in a series of landmark cases, precludes judges from engaging in a close evaluation of the religious nature of Free Exercise and Establishment Clause claims in deference to adherents' characterizations of the substance and significance of a religious practice or belief.[6] Although the Court has offered both constitutional and practical justifications for this deference, the hands-off approach has been subject to considerable criticism among legal scholars.[7] Indeed, notwithstanding some sound

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[1] See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[2] 132 S. Ct. 694 (2012).

[3] 134 S. Ct. 2751 (2014).

[4] 135 S. Ct. 853 (2015).

[5] 136 S. Ct. 1557 (2016).

[6] See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988); United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd., 450 U.S. 707, 714 (1981); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969); United States v. Ballard, 322 U.S. 78, 87 (1944). See also Nat'l Spiritual Assembly of the Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc., 628 F.3d 837, 846 n.2 (7th Cir. 2010); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006); Symposium: The Supreme Court's Hands-Off Approach to Religious Doctrine, 84 Notre Dame L. Rev. 793 (2009).

[7] See, e.g., Jared A. Goldstein, Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs, 54 Cath. U. L. Rev. 497 (2005); Richard W. Garnett, A Hands-Off Approach to Religious Doctrine: What Are We Talking About?, 84 Notre Dame L. Rev. 837 (2009); Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 Colum. L.

policy considerations underlying the Court's attempts to prevent judges from evaluating the substance of religious doctrine,[8] the hands-off approach may bring about additional problems of its own.

First, conceptually, in its articulation of the hands-off approach, the Court has failed to clarify a number of descriptive and normative issues. Second, as applied, a hands-off approach that requires unquestioned deference to religious claims may impose unworkable burdens on the government, courts, and society as a whole.[9] Conversely, courts may respond by placing substantial limitations on the range of claims that qualify for religious protection.[10] Perhaps most basically, adjudicating cases under the Religion Clauses, the Religious Freedom Restoration Act (RFRA),[11] state RFRAs,[12] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)[13] requires consideration of religious claims and, at times, may necessitate careful judicial examination of the substance and nature of religious doctrine. This chapter argues that the challenge of reconciling the dual goals of adjudicating cases involving religion and maintaining appropriate deference to the beliefs of religious adherents manifests itself in the somewhat unsatisfying and often contentious nature of the religious freedom decisions handed down by Supreme Court over the last four terms.

I. The Supreme Court's Hands-Off Approach to Religious Doctrine: A Brief Overview[14]

Under current Supreme Court jurisprudence, religious freedom claims may be considered under the Free Exercise Clause, RFRA, state RFRAs, and RLUIPA—all of which, by definition,

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Rev. 1843 (1998); Samuel J. Levine, A Critique of Hobby Lobby and the Supreme Court's Hands-Off Approach to Religion, 91 Notre Dame L. Rev. Online (2015) [hereinafter Levine, A Critique of Hobby Lobby]; Samuel J. Levine, Hosanna-Tabor and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court's Hands-Off Approach to Religious Doctrine, 106 Nw. U. L. Rev. Colloquy 120 (2011); Samuel J. Levine, Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief, 25 Fordham Urb. L.J. 85 (1997) [hereinafter Levine, Rethinking the Supreme Court's Hands-Off Approach]; Samuel J. Levine, The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction, 84 Notre Dame L. Rev. 793 (2009); Christopher C. Lund, Rethinking the "Religious Question" Doctrine, 41 Pepp. L. Rev. 1013 (2014); William P. Marshall, Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law, 44 Texas Tech L. Rev. 239 (2011); Priscilla J. Smith, Who Decides Conscience? RFRA's Catch-22, 22 J.L. & Pol'y 727 (2014).

[8] See, e.g., Garnett, supra note 7.

[9] See, e.g., Goldstein, supra note 7; Greenawalt, supra note 7; Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7; Marshall, supra note 7.

[10] See Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7. This dynamic seems to have led directly to the Supreme Court's landmark decision in the 1990 case, Employment Division v. Smith, which sharply curtailed the reach of Free Exercise protections. See Greenawalt, supra note 7, at 1906; Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7, at 88; Marshall, supra note 7, at 255 n.124

[11] 42 U.S.C. § 2000bb-1.

[12] See National Conference of State Legislatures, State Religious Freedom Restoration Acts (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/SUV5-3KRG].

[13] 42 U.S.C. § 2000cc-1.

[14] This discussion draws upon an analysis in Levine, A Critique of Hobby Lobby, supra note 7.

pertain only to claims that are premised upon religious practice or belief. Accordingly, as a threshold matter, a court must determine whether a claim is sincerely based in religious practice or belief before applying constitutional or statutory religious protections.[15]

Once a court has accepted the sincerity of a religious claim, the Court's hands-off approach to religious doctrine precludes several other forms of inquiry, which would touch upon an evaluation of the metaphysical truth underlying the claim. As a basic element of the hands-off approach—indeed, as a basic premise of religious freedom in the United States—the American legal system does not recognize or reject the metaphysical truth or validity of a particular religion or religious belief.[16] As a corollary, courts must grant legal protection to sincere religious claims regardless of the perception, among the court or other observers, that the claim is grounded in an unlikely or even bizarre form of religious practice.[17]

Building on these basic premises, the Court has expanded the scope of the hands-off approach to likewise preclude inquiry into the accuracy or consistency of a religious claim when two or more individuals profess adherence to the same religion but assert different views of that religion's beliefs or practices. As the Court has repeatedly emphasized in the context of cases involving disputes over church property, personnel issues, and other areas of religious practice, judges have no role in adjudicating intrafaith differences of belief.[18]

It should be noted that, despite the conceptual distinction between sincerity and accuracy of a religious claim, judges in practice may tend to question the sincerity of a religious belief that appears mistaken, insubstantial, or irrational, particularly when that belief is challenged by other self-declared co-religionists. Nevertheless, once a court has found that a religious adherent is sincere in asserting a claim as religious in nature, it must afford Free Exercise, RFRA, or RLUIPA protections, regardless of whether the belief is shared—or repudiated—by others professing adherence to the same religion.

Finally, both RFRA and RLUIPA include provisions that prohibit the government from imposing a substantial burden on the exercise of religion unless it demonstrates that "the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[19] Notably, although the Court has held that the hands-off approach precludes judicial evaluation of

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[15] See, e.g., Holt v. Hobbs, 135 S. Ct. 853, 862 (2015). An additional area of complexity in religious freedom cases, beyond the scope of this chapter, relates to the legal definition of religion. Notably, the Supreme Court has never mapped out the precise elements necessary for a system of belief to qualify as a religion under constitutional and statutory provisions. See, e.g., Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753 (1984); John O. Hayward, Religious Pretenders in the Courts: Unmasking the Imposters, 20 Trinity L. Rev. 24 (2014); Courtney Miller, "Spiritual but Not Religious": Rethinking the Legal Definition of Religion, 102 Va. L. Rev. 833 (2016); Eduardo Peñalver, Note, The Concept of Religion, 107 Yale L.J. 791 (1997); Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978). But see Christopher L. Eisgruber & Lawrence G. Sager, Does It Matter What Religion Is?, 84 Notre Dame L. Rev. 807 (2009).

[16] See, e.g., Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

[17] See, e.g., United States v. Ballard, 322 U.S. 78, 86–87 (1944).

[18] See, e.g., Holt v. Hobbs, 135 S. Ct. 853, 863 (2015); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–51 (1969); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976); Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

[19] 42 U.S.C. § 2000bb; 42 U.S.C. § 2000cc.

the centrality of a practice or belief within a religious system, questions remain as to whether this deference extends to categorizing a religious burden as substantial.[20]

Indeed, although the compelling state interest/least restrictive means evaluation can be challenging, the Supreme Court has engaged in this form of strict scrutiny for many decades, in the context of RFRA,[21] RLUIPA,[22] and the Free Exercise Clause.[23] In contrast, however, there have been few, if any, Supreme Court cases interpreting and applying the contours of the form of "substantial burden" that triggers the compelling state interest/least restrictive means test.

The resolution of this question may have a critical, if not dispositive, effect on the outcome of a case. If the Supreme Court's hands-off approach precludes judicial inquiry into the nature and degree of the burden that a law imposes on religion, the claimant's assertion of substantial burden will trigger the compelling state interest/least restrictive means test. Conversely, if courts have the authority to evaluate—and potentially reject—the claimant's assertion of substantial burden, the government may prevail without having to satisfy the relatively high compelling state interest/least restrictive means standard.

II. Applying the Hands-Off Approach

A. Hosanna-Tabor *and* Holt

In the 2012 case, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,[24] in a unanimous opinion authored by Chief Justice Roberts, the Supreme Court formally recognized the ministerial exception, holding that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[25] A crucial section of the opinion relied heavily on landmark church property decisions in which the Supreme Court first established the hands-off approach, requiring judicial deference to the theological determinations of ecclesiastical tribunals.[26] The Court found that "[o]ur decisions in [church property disputes] confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."[27] Similarly, it concluded, "[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."[28]

Notwithstanding the Court's unanimity in *Hosanna-Tabor*, the decision left a number of questions unanswered.[29] Indeed, the Court arguably achieved unanimity precisely because it restricted the scope of its analysis, avoiding some of the more complex issues that may arise in

[20] See, e.g., Ira C. Lupu, Hobby Lobby and the Dubious Enterprise of Religious Exemptions, 38 Harv. J.L. & Gender 35, 80–82 (2015).
[21] See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).
[22] See, e.g., Cutter v. Wilkinson, 544 U.S. 709 (2005).
[23] See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).
[24] 132 S. Ct. 694 (2012).
[25] Id. at 702.
[26] See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). See also Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7; Greenawalt, supra note 7.
[27] Hosanna-Tabor, 132 S. Ct. at 704.
[28] Id. at 710.
[29] See, e.g., Christopher C. Lund, Free Exercise Reconceived: The Logic and Limits of *Hosanna-Tabor*, 108 Nw. U. L. Rev. 1183 (2014); Michael W. McConnell, Reflections on *Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821 (2012).

further application of the ministerial exception. In turn, the Court's avoidance of these issues may stem, in part, from a desire to avoid a full consideration of the difficulties posed by a broad application of the hands-off approach.

For example, the majority did not provide a legal standard to determine whether a given employee of a religious organization would be categorized as a minister. Justice Thomas, however, authored a concurring opinion advocating a nearly categorical hands-off approach: "[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."[30] A more extensive concurrence, authored by Justice Alito and joined by Justice Kagan, suggested that "[i]f a religious group believes that the ability of . . . an employee to perform [various] key [religious] functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position."[31]

Despite the difference in degree, both concurring opinions advocate a considerable measure of deference to religious adherents. The majority's refusal to adopt either of these positions—or even to define "minister"—may reflect an underlying concern that a broadly applied hands-off approach would prove unworkable, insulating religious organizations from employment discrimination claims and various other disputes with employees.[32] The Court may be unable to arrive at a consensus with respect to the contours of the hands-off approach more generally, given its potentially wide-ranging ramifications.

In the 2015 case, *Holt v. Hobbs*,[33] in another unanimous decision, this time authored by Justice Alito, the Court applied a combination of RFRA and RLUIPA to consider the religious freedom claims of an inmate in state prison. It first resolved the threshold question by accepting the sincerity of the plaintiff's religious belief: "Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief."[34] Somewhat curiously, the Court then seemed to find it necessary—or at least useful—to cite the amicus brief for "Islamic Law Scholars" in support of the proposition that "Petitioner's belief is by no means idiosyncratic."[35] Notably, however, under a basic tenet of the hands-off approach, courts are precluded from considering the extent to which a religious practice or belief is consistent with a mainstream religious tradition. In fact, as the Court immediately added, "even if [the petitioner's claim] were [idiosyncratic], the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'"[36]

The Court's willingness to characterize the prisoner's belief on the basis of a substantive theological study may demonstrate the abiding confusion over the distinction between the sincerity and the truth of a religious claim. More broadly, its analysis may demonstrate an abiding confusion—or discomfort—latent in the continued application of the hands-off approach to any religious claim, regardless of how far removed from a mainstream religious tradition. In

[30] Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring).
[31] Id. at 712 (Alito, J., concurring).
[32] For similar critiques of the ministerial exception, see, e.g., Frederick Mark Gedicks, Narrative Pluralism and Doctrinal Incoherence in *Hosanna-Tabor*, 64 Mercer L. Rev. 405 (2013); Leslie C. Griffin, The Sins of *Hosanna-Tabor*, 88 Ind. L.J. 981 (2013).
[33] 135 S. Ct. 853 (2015).
[34] Id. at 862.
[35] Id.
[36] Id. at 862–63 (citation omitted).

any event, the Court unanimously found that grooming policy substantially burdened the inmate's religious exercise and did not satisfy the compelling state interest/least restrictive means standard.[37]

As in *Hosanna-Tabor*, although the Justices reached unanimity, the majority opinion again seemed to leave unanswered a number of difficult questions, likewise implicated by the hands-off approach, involving the precise contours of the extent to which prison officials must defer to inmates' religious claims.[38] Justice Sotomayor filed a separate concurring opinion emphasizing her concern that deference to inmates' religious claims should not undermine the deference accorded to prison officials' security interests: "I do not understand the Court's opinion to preclude deferring to prison officials' reasoning when that deference is due—that is, when prison officials offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them."[39]

B. Hobby Lobby *and* Zubik

In stark contrast to the somewhat limited scope of the decisions in *Hosanna-Tabor* and *Holt*, the 2014 case *Burwell v. Hobby Lobby* provided an opportunity for the Supreme Court to apply the hands-off approach in a more expansive manner, with ramifications not only for issues of religious freedom but also for such contentious matters as abortion rights and the legal status of corporations. Not surprisingly, likewise in stark contrast to the unanimous holdings in *Hosanna-Tabor* and *Holt*, *Hobby Lobby* resulted in a sharply divided Court, appearing to reflect fundamental differences over the contours of the hands-off approach and the degree of deference it requires courts to accord to religious claims.[40]

In *Hobby Lobby*, the plaintiffs challenged the provisions of the Affordable Care Act ("ACA")[41] requiring employers to provide health insurance to employees that included access to certain forms of contraception.[42] Writing for the five-justice majority, Justice Alito provided a rather systematic—if somewhat formalistic—application of the elements of the hands-off approach. First, the opinion established that the plaintiffs had a "sincere religious belief that life begins at conception" and "object[ed] on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo."[43]

Second, consistent with the deference required by the hands-off approach, the majority accepted the plaintiffs' theological understanding of their religious beliefs: "providing the insurance coverage demanded by the . . . regulations lies on the forbidden

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[37] Id.

[38] See, e.g., Incumaa v. Stirling, 791 F.3d 517 (4th Cir. 2015); Sessing v. Beard, 2015 WL 3953501, at *1 (E.D. Ca. June 29, 2015).

[39] Hosanna-Tabor, 135 S. Ct. at 867 (Sotomayor, J., concurring). Similar concerns over broad applications of the hands-off approach in the prison context have been raised repeatedly since the adoption of RFRA. See Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7, at 98–99 n.59. See also Marci Hamilton, The Supreme Court's New Ruling on the Religious Land Use and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions, FINDLAW (June 2, 2005), http://writ.news.findlaw.com/hamilton/20050602.html [https://perma.cc/Q3Y4-G2QR].

[40] This section draws upon an analysis in Levine, A Critique of Hobby Lobby, supra note 7.

[41] See Patient Protection and Affordable Care Act of 2010, 124 Stat. 119; 42 U.S.C. § 300gg–13(a)(4).

[42] See Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751, 2777–79 (2014).

[43] Id. at 2774.

side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."[44] Indeed, the majority noted, the plaintiffs' claim "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[45] Thus, according to the majority, "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" would "in effect tell the plaintiffs that their beliefs are flawed."[46] Not surprisingly, therefore, affirming basic principles set forth as part of the Court's hands-off approach, the majority declared that "[f]or good reason, we have repeatedly refused to take such a step."[47]

The majority then applied the remaining prongs of RFRA, relying again on the hands-off approach to defer to the plaintiffs' depiction of a substantial burden on religious exercise.[48] Finally, the majority concluded that the provisions in the ACA did not constitute the least restrictive means of furthering a compelling governmental interest.[49]

Writing for the four dissenters, Justice Ginsburg agreed with the majority that the plaintiffs' "religious convictions regarding contraception are sincerely held."[50] In addition, the dissent adopted one of the basic elements of the hands-off approach to religious doctrine, citing Supreme Court precedent to establish that "courts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs."[51]

Nevertheless, despite initially deferring to the plaintiffs' characterization of their religious beliefs, the dissent argued that the law would not impose a substantial burden on religious practice, finding that the plaintiffs' claims, "however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake."[52] Therefore, the dissent reasoned, the plaintiffs' claim did not subject the ACA provisions to the compelling state interest/lease restrictive means test.

Thus, the crucial point of contention among the Justices in *Hobby Lobby* turned directly on the dissent's willingness to evaluate—and reject—the plaintiffs' characterization of the degree to which the law would burden their exercise of religion. As Justice Ginsburg expressly noted, the dissent was premised on "[u]ndertaking the inquiry that the Court forgoes," leading to the "conclu[sion] that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."[53] In short, Justice Ginsburg dissented in large part because her understanding and application of the hands-off approach was more limited than that of the majority.

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[44] Id. at 2779.
[45] Id. at 2778.
[46] Id.
[47] Id.
[48] Id.
[49] Id. at 2779–85. See also id. at 2785–87 (Kennedy, J., concurring).
[50] Id. at 2798 (Ginsburg, J., dissenting).
[51] Id. (citing Thomas v. Review Bd., 450 U.S. 707, 715 (1981)) (alteration in original).
[52] Id. (citation omitted).
[53] Id. at 2799.

Justice Ginsburg's dissent further critiqued the majority's formalistic acceptance of the hands-off approach on the grounds that it raises practical and policy concerns. Near the end of her dissent, Justice Ginsburg presented a virtual parade of horribles, involving scenarios which, she argued, the majority's holding would render difficult for the government to administer and for courts to adjudicate.[54] As commentators have long noted, notwithstanding sound policy considerations in favor of precluding judicial inquiry into the accuracy of theological claims, deferring to religious adherents may prove overly burdensome for governments and courts attempting to accommodate sincerely held religious beliefs.[55]

Among the questions left unresolved by the Supreme Court's holding in *Hobby Lobby*—many of which involve elements of the hands-off approach—issues revolving around the application of the "substantial burden" test may stand out as the most contentious. Although the majority in *Hobby Lobby* held that, under the facts of the case, the government regulation placed a substantial burden on the plaintiff's exercise of religion—a point strongly contested by the dissent—the majority did not provide more general guidance for delineating the extent to which judges must defer to a religious claimant's characterization of substantial burden on religious practice.

Indeed, the lack of guidance in *Hobby Lobby* arguably engendered the division that has subsequently split appellate judges in cases involving religious non-profit employers' objections to filing forms or entering into contracts that would result in contraceptive coverage by an outside provider. The splits in and among circuits often turn on the application of the hands-off approach to religious doctrine, particularly in the context of the substantial burden standard.[56]

For example, in a 2015 case, in which the Seventh Circuit Court of Appeals split 2-1, the majority noted that "[t]he core of the disagreement between the plaintiffs and the government lies in how we apply the substantial burden test."[57] The majority initially applied aspects of the Supreme Court's hands-off approach, acknowledging that "it is not our province to decide religious questions."[58] Nevertheless, the majority insisted that "whether the government has imposed a substantial burden on . . . religious exercise is a legal determination. And we are not required to defer to the plaintiffs' beliefs about the operation of the law."[59] Instead, the majority found that "contraceptive coverage under the ACA results from federal law, not from any actions required by objectors under the accommodations" and, therefore, the regulations operated in a way that did not substantially burden the plaintiffs' exercise of religion.[60]

A dissenting judge took the majority to task for failing to adhere to the precedent set in *Hobby Lobby*. In Judge Manion's view, the "straightforward" application of *Hobby Lobby* leads to the conclusion that the provision at issue imposed a substantial burden on the plaintiff's

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[54] Id. at 2804–05.

[55] See, e.g., Goldstein, supra note 7; Greenawalt, supra note 7; Levine, Rethinking the Supreme Court's Hands-Off Approach, supra note 7; Marshall, supra note 7.

[56] Although in nearly all of these cases, the courts of appeals have accepted the government's interpretation of "substantial burden," see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 939–940 & n.11 (8th Cir. 2015) (citing cases), in one case the court deferred to the religious adherent's sincerely held view of the burden imposed on religion, see id. at 941, while several other appellate judges have adopted similar positions in concurring and dissenting opinions, id. at 941–42 (citing cases).

[57] Grace Schools v. Burwell, 801 F.3d 788, 803 (7th Cir. 2015).

[58] Id. at 804.

[59] Id.

[60] Id. at 805.

religious exercise.[61] If so, he argued, the majority's refusal to apply *Hobby Lobby* in this manner stemmed from "balk[ing] at the idea that we must accept a person's assertion that a law burdens their religion. The court fears that such a rule will allow a person to escape any number of regulations . . . unless the government can meet the strict scrutiny test laid down by RFRA."[62] Indeed, this concern was voiced by Justice Ginsburg and the other dissenters in *Hobby Lobby*, who likewise refused to defer to the plaintiffs' claim of substantial burden.

As such, according to Judge Manion's reasoning, the majority failed to adhere to the Supreme Court's hands-off approach to religious doctrine as developed in *Hobby Lobby*. In Judge Manion's words, "since the nonprofits said that they sincerely believe that the accommodation violates their religion *because* the accommodation makes them complicit in the provision of contraceptive services, the court has attacked their claim that the law makes them complicit."[63] In particular, he found, "acting as an expert theologian, the court holds that the accommodation's operation as understood by the court is not a substantial burden to the nonprofits' religious exercise."[64]

When these cases reached the Supreme Court in *Zubik v. Burwell*,[65] it might have been expected that, as in *Hobby Lobby*, the Court would remain divided, resulting again in expansive majority and dissenting opinions exploring religious objections to the ACA in considerable detail. Moreover, it might have been expected—or hoped—that the Court would take the opportunity to clarify the appropriate degree of deference that the hands-off approach requires in adjudicating a claim of substantial burden on religious exercise. Instead, the Court issued a unanimous per curiam opinion, instructing the parties to work to find a resolution to the case.[66]

There has been much speculation offering possible reasons for the unusual outcome in *Zubik*.[67] Some have suggested that because Justice Scalia passed away before the case was decided, the Court was left with a 4-4 split, and the Justices preferred a unanimous judgment to an evenly divided opinion. More specifically, perhaps the Court remains sharply divided over the contours of the application of the hands-off approach to the question of substantial burden.[68] Rather than issuing an inconclusive 4-4 decision that would have echoed the divisions among appellate court judges,[69] the Supreme Court opted for unanimity. Once again, that unanimity results not from reaching consensus on important issues, but rather from avoiding resolution of difficult issues raised by the hands-off approach.

Indeed, as in *Holt*, Justice Sotomayor joined the unanimous majority but found it necessary to write a separate concurring opinion, joined by Justice Ginsburg, emphasizing that the Court "expresses no view on 'the merits of the cases'" such as "'whether petitioners' religious exercise has been substantially burdened.'"[70] Accordingly, Justice Sotomayor cautioned, "[l]ower courts .

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[61] Id. at 809 (Manion, J., dissenting).
[62] Id.
[63] Id.
[64] Id.
[65] 136 S. Ct. 1557 (2016).
[66] Id.
[67] See, e.g., http://www.scotusblog.com/case-files/cases/zubik-v-burwell/ [https://perma.cc/98X6-U4UD]; https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/prof-michael-mcconnell-on-zubik-v-burwell-yesterdays-supreme-court-rfra-contraceptive-decision/ [https://perma.cc/72EU-CMT3].
[68] See, generally, University of Illinois Law Review Online Spring 2016 Symposium, https://illinoislawreview.org/online/2016/ [https://perma.cc/3U9N-U3XT].
[69] See supra note 58.
[70] Zubik, 136 S. Ct. at 1561 (Sotomayor, J., concurring).

. . should not construe" the opinion "as [a] signal[] of where this Court stands."[71] Yet, while it may not be possible to predict where the Court stands as a whole, Justice Sotomayor seems to have signaled her own abiding concerns over applying a broadly deferential hands-off approach to the substantial burden test.

Conclusion

Courts and scholars have offered sound justifications for the Supreme Court's hands-off approach to questions of religious doctrine grounded in constitutional principles of religious freedom as well as more general concerns over judicial competence and the role of judges. Nevertheless, as recent cases have illustrated, the hands-off approach raises concerns of its own, at times serving as a source of contention and confusion. The ongoing tensions and divisions among Justices and judges revolving around these issues may suggest a need for the Supreme Court to revisit and perhaps rethink the contours of the hands-off approach to achieve clarity for the future.

[71] Id.