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## Administrative Power and Religious Liberty at the Supreme Court

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# ADMINISTRATIVE POWER AND RELIGIOUS LIBERTY AT THE SUPREME COURT

*Mark L. Rienzi*<sup>†</sup>

## ABSTRACT

The Supreme Court has recently seen an increase in the number of religious exercise cases in which the conflict was caused by an act of administrative power, rather than an act of legislative power. There are probably several reasons for this increase, including the growth, size, and flexibility of the administrative state, political convenience, and the fact that administrators tend to be specialists who may be unaware of or undervalue competing interests like religious liberty.

While the sheer size, reach, flexibility, and specialization of the administrative state means we will likely continue to see more religious exercise conflicts caused by administrative power—and while there remains a danger of excessive judicial deference to agencies in these cases—in the long run this development can be positive for religious liberty. That is because the same attributes that make the administrative state likely to come into more conflicts with religious exercise (namely size, reach, flexibility, and specialization) also virtually guarantee that administrators will almost always have additional, less burdensome ways of achieving policy goals without burdening religious exercise.

The net result will be more religious exercise cases and, at least in the short run, more courtroom losses for the administrative state. In the longer run, either agencies will learn from these losses and use their size and flexibility to pursue win-win solutions in which they achieve their policy goals while working around religious differences, or they will continue to lose cases and build up a stronger body of Free Exercise and RFRA precedents. There are recent indications that both the

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Department of Justice and individual agencies are learning this lesson, which suggests that both religious groups and agencies will be better off going forward.

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## INTRODUCTION

Four years after it was decided, *Burwell v. Hobby Lobby Stores, Inc.*<sup>1</sup> remains a controversial decision. Critics say this is because the Court took the “unprecedented” step of recognizing that profit-making businesses can engage in religious exercise, thus working a “significant change in religious liberty doctrine.”<sup>2</sup> But that claim was always tenuous, given the Court’s age-old embrace of constitutional rights for corporate entities, and its repeated protections for First Amendment rights when people or organizations are trying to make money.<sup>3</sup> Indeed, when *Hobby Lobby* was decided, only two Justices accepted the claim

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1. 134 S. Ct. 2751 (2014).
  2. See, e.g., Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 195–98 (2015) (criticizing the “[u]nprecedented [s]uccess of [c]orporate [c]onscience [c]laims” and deeming *Hobby Lobby* a “significant change in religious liberty doctrine”).
  3. See, e.g., *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 687 (1978) (“[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”); see also Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 109–15 (2013) (setting forth historical, precedential, and logical arguments in favor of permitting religious exercise by profit-making entities).

that corporations cannot engage in religious exercise.<sup>4</sup> And four years later, there is still no evidence that this supposedly dramatic departure from prior law has increased the number or type of religious exercise claims, or resulted in secular corporations feigning religion to avoid otherwise valid obligations.<sup>5</sup> Neither the cases before *Hobby Lobby* nor the developments since *Hobby Lobby* support the critics' claims about the "unprecedented" and "dangerous" consequences of the case.

Lost in the uproar over corporate rights, however, is an important way in which *Hobby Lobby* actually is part of a dramatic shift in the type of religious liberty cases heard by the Supreme Court. That dramatic shift has to do not with the question of which corporate form religious families use to run their affairs, but rather with how the *government* conducts *its* affairs. For unlike the vast majority of religious exercise cases the Supreme Court has considered over the past century and a half, *Hobby Lobby* involved a government exercise of administrative power, rather than legislative power. It was not the democratically elected Congress that decided to require employers to provide health insurance coverage for abortion-inducing drugs and devices, but an administrative office (the Health Resources and Services Administration) within an executive agency (the federal Department of Health and Human Services).<sup>6</sup>

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4. Only Justices Sotomayor and Ginsburg agreed with this argument. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities."). Justices Kagan and Breyer declined to join that portion of the dissent. *Id.* at 2787.
  5. See Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 356 (2017) ("Contrary to predictions that *Hobby Lobby* would open the floodgates of religious liberty litigation, these cases remain scarce, making up only 0.6% of the federal docket. And contrary to predictions that religious people would be able to wield *Hobby Lobby* as a trump card, successful cases are even scarcer."); Stephanie H. Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1599 (2017) ("We also provide a new survey of all federal RFRA decisions since *Hobby Lobby*, which analyzes how the Supreme Court's decision in *Hobby Lobby* impacted win rates of reported religious exercise cases. The data does not demonstrate a dramatic increase in the win rate of religious exercise litigants under RFRA.").
  6. *Hobby Lobby*, 134 S. Ct. at 2762 ("Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision.").

*Hobby Lobby* is not alone. Although most of the Supreme Court's religious exercise cases since 1878 have involved religious burdens imposed by some type of legislative decision, some do involve burdens imposed by unelected administrative agencies. In the first century of the Court's religious exercise case law, these administrative cases were the outliers, and it was mostly majoritarian legislative policies that generated conflicts with religious liberty. The Court's religious exercise jurisprudence was thus developed, for the most part, in cases that prompted the Court to think about the proper relationship between legislative majorities and religious individuals or groups.

More recently, however, the Court's religious exercise docket shows a significant increase in conflicts arising from administrative acts. For example, in 2012 the Court decided *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>7</sup> which dealt with EEOC's refusal to recognize a "ministerial exception" in discrimination cases.<sup>8</sup> After deciding *Hobby Lobby* in 2014, the Court decided *Holt v. Hobbs*<sup>9</sup> in 2015, concerning administrative decisions by prison officials to bar a Muslim prisoner from wearing a religious beard.<sup>10</sup> In 2016, the Court addressed the contraceptive mandate again in yet another administrative case, *Zubik v. Burwell*.<sup>11</sup> In 2017's *Trinity Lutheran Church of Columbia v. Comer*,<sup>12</sup> the Court considered whether a Missouri state agency had engaged in illegal discrimination by excluding a religious school from equal participation in a program to fund playground resurfacing.<sup>13</sup> In 2018, the Court decided *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*,<sup>14</sup> concerning whether a Colorado agency had

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7. 565 U.S. 171 (2012).

8. *Id.* at 189 ("The EEOC and Perich thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves. We find this position untenable. . . . We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

9. 135 S. Ct. 853 (2015).

10. *Id.* at 862 ("The Department's grooming policy requires petitioner to shave his beard and thus to 'engage in conduct that seriously violates [his] religious beliefs.'") (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

11. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) ("Federal regulations require petitioners to cover certain contraceptives as part of their health plans . . .").

12. 137 S. Ct. 2012 (2017).

13. *Id.* at 2021 ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.").

14. 138 S. Ct. 1719 (2018).

improperly discriminated against a religious baker who refused to provide a custom cake for a same-sex wedding.<sup>15</sup>

In every one of these cases, the Court ruled in favor of the religious party. And in every one of these cases, the burden on religious exercise had been imposed and the conflict created by an administrative agency, rather than a legislature.

Administrative agencies, just like legislatures, are part of the government and therefore subject to the same Free Exercise Clause and the same religious liberty statutes as legislatures. For example, when the federal government imposes a substantial burden on a person's religion, that burden is only permissible where the government has used the "least restrictive means" of advancing a "compelling government interest."<sup>16</sup> That analysis applies regardless of whether the burden was imposed by the legislature or an administrative agency because the Religious Freedom Restoration Act (RFRA) applies to all parts of the federal government.<sup>17</sup>

Nevertheless, it is reasonable to wonder how and why religious liberty conflicts generated by administrative actions might differ from conflicts generated by legislative actions. Is one kind more likely to occur than the other? Do judges treat actions by legislatures differently from actions by administrators? Is one kind of conflict easier to resolve than the other? Is the recent shift toward administrative cases at the Supreme Court a positive or negative development for religious liberty doctrine?

With these questions in mind, this Article explores the apparent recent increase in religious exercise cases arising from administrative action. Part II examines the Supreme Court's historical and recent dockets to demonstrate that there has been a shift from predominantly legislative issues in the Court's early decisions to much more frequent administrative involvement in the Court's recent cases. Part III explores some possible reasons for this change, including the sheer growth of the administrative state, the fact that administrative agencies tend to be populated by specialists who may not know or may not care about competing religious interests, and the fact that administrative agencies are sometimes convenient ways for governments to achieve goals without going through the legislative process. This Article concludes by providing an analysis of the likely impact of this shift in

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15. *Id.* at 1729 ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

16. Religious Freedom Restoration Act (RFRA) § 3, 42 U.S.C. § 2000bb-1(b)(2) (2012).

17. *Id.* § 5 ("[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.").

the Supreme Court's docket toward religious liberty cases related to administrative actions.

The results of this analysis may be surprising. On one hand, the rise of the administrative state and the single-minded approach that specialists often bring to policy-making seem likely to continue to generate conflicts with religious liberty. The administrative state is large and far-reaching, and it wields many different kinds of powers through many different programs, all of which makes continued friction with religious liberty interests likely.

However, the same aspects of the administrative state that make conflict likely also may make it easy to resolve. An administrative state that is large, far-reaching, and powerful may create a lot of conflict; but that same size, reach, power, and flexibility suggests that the government will almost always have less restrictive means available to achieve its goals without forcing people or institutions to violate their religion. In this respect, the administrative state may be seen as both a curse and a blessing to religious liberty at the Supreme Court: it will generate increased conflict, but the religious parties will usually win the case because the government will have other ways to achieve its goals.

The net result should please people of good faith on all sides, as these administrative conflicts mean the government will usually be forced to pursue win-win solutions that simultaneously achieve its policy goals while leaving religious objectors free to stand aside.

## I. LEGISLATIVE OR ADMINISTRATIVE? A ROUGH CLASSIFICATION OF THE SUPREME COURT'S RELIGIOUS EXERCISE CASES

One class of religious exercise cases arises when the government imposes a burden of some kind on the ability of an individual or a group to engage in a religious exercise. Such burdens can be imposed by either legislative government action or administrative government action, or sometimes by both.<sup>18</sup>

### A. *Classifications*

In order to get a sense of the trend toward religious exercise cases caused by administrative action, I attempt to categorize the Supreme Court's major religious exercise cases from 1878 to the present. I have attempted to classify them into cases in which the conflict with religious liberty was created by a legislature and cases in which the conflict was

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18. For purposes of this paper, I am focusing solely on religious exercise cases, as distinguished from Establishment Clause cases. To be sure, Establishment Clause issues can also arise from either legislative or administrative actions. At present, however, I am looking to understand those situations in which the government has created a conflict with someone's freedom to engage in religious exercise.



created by administrative action. In some situations, the burden was imposed by a combination of legislative and administrative actions.

To be sure, these classifications are to some extent subjective, as it is often possible to see both legislative action and administrative action somewhere in the picture (given that legislatures typically enact laws to at least empower an agency, and the executive branch is typically charged with enforcing statutes). As much as possible, I have attempted to assign responsibility for the conflict with the body that seems most directly involved in creating the conflict, and whose decision the Supreme Court is most directly addressing.

1. *Reynolds v. United States* (1878)—**Legislative**

*Reynolds v. United States*<sup>19</sup> is generally recognized as the starting point for the Supreme Court's religious exercise jurisprudence.<sup>20</sup> There are probably two reasons that the Supreme Court did not hear a religious exercise case in the first eighty-nine years of its existence. First, prior to the Fourteenth Amendment, the First Amendment's Free Exercise Clause did not apply to states.<sup>21</sup> As a result, Free Exercise claims were simply not available against the governments closest to the people and most likely to come into conflict with religious exercise. Indeed, the Supreme Court would not announce that the Free Exercise Clause was incorporated against the states for several more decades.<sup>22</sup>

Second, the federal government was much smaller and much less involved in the day-to-day lives of citizens than it is today. There were simply far fewer opportunities for the federal government to clash with religious exercise earlier in our history than there are today.<sup>23</sup>

One area in which such conflicts were possible, even in the nineteenth century, was the federal government's ability to enact laws to govern federal territories under Article IV. While Congressional

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19. 98 U.S. 145 (1879).

20. Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 384 (2006) (discussing Free Exercise Clause jurisprudence in the nineteenth century).

21. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Bill of Rights was intended to limit the government of the United States, and not the states individually).

22. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

23. See Lombardi, *supra* note 20, at 395–96 (noting that before 1878 free exercise cases were primarily decided by state courts).

action as to the States was limited by the enumeration of powers in Article I, Section 8, Congress has broader authority to “make all needful Rules and Regulations respecting the Territory” of the United States.<sup>24</sup>

In *Reynolds*, a Mormon man was found guilty of the crime of bigamy, as defined by the Revised Statutes enacted by Congress to govern the Utah Territory.<sup>25</sup> The Court found that Reynolds’ religious beliefs did not entitle him to an exemption from the statute.<sup>26</sup> Given that Reynolds was unable to comply with the requirements of a statute enacted by Congress,<sup>27</sup> *Reynolds* should be classified as a legislative burden case.

## 2. *Pierce v. Society of Sisters* (1925)—Legislative

In *Pierce v. Society of Sisters*,<sup>28</sup> the Court considered an Oregon statute that required all students to attend public schools.<sup>29</sup> The Society of the Sisters of the Holy Names of Jesus & Mary operated a Catholic school and challenged the statute.<sup>30</sup> In a decision that seems characteristic of its era, the Supreme Court relied on the Fourteenth Amendment rather than the First Amendment to find that the statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>31</sup> The burden in *Pierce* was imposed by a legislature.<sup>32</sup>

## 3. *Murdock v. Pennsylvania* (1943)—Legislative

*Murdock v. Pennsylvania*<sup>33</sup> concerned a municipal ordinance enacted by the City of Jeannette, Pennsylvania that required anyone engaging in solicitation or door-to-door sales to apply and pay for a license from the government.<sup>34</sup> Petitioners were a group of Jehovah’s Witnesses convicted for violating the statute because they went door-to-door distributing religious literature and offering religious books and pamphlets for sale.<sup>35</sup> The Court found that the government could not

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24. U.S. CONST. art. IV, § 3, cl. 2.

25. *Reynolds v. United States*, 98 U.S. 145, 146, 161, 168 (1878).

26. *Id.* at 161–62, 164–67.

27. *Id.* at 168.

28. 268 U.S. 510 (1925).

29. *Id.* at 530.

30. *Id.* at 531–32.

31. *Id.* at 534–35.

32. *Id.* at 529–30.

33. 319 U.S. 105 (1943).

34. *Id.* at 106.

35. *Id.* at 106–07.

regulate petitioners' evangelization activities in the same way it regulates commercial enterprises.<sup>36</sup> The burden in *Murdock* was imposed by a legislature.<sup>37</sup>

4. The Pledge Cases (*Gobitis* and *Barnette*) (1940, 1943)—  
**Administrative** (though curiously discussed by the Court as legislative)

The first two of the Court's cases to deal with burdens imposed by something like an administrative agency were the forced Pledge of Allegiance cases, *Minersville School District, Board of Education v. Gobitis* (1940)<sup>38</sup> and *West Virginia Board of Education v. Barnette* (1943).<sup>39</sup> In each case, the school authorities imposed a requirement that every student be forced to recite the Pledge of Allegiance or face punishment. In *Gobitis*, the requirement appears to have been imposed solely by the local school district.<sup>40</sup> In *Barnette*, the requirement was imposed jointly by a state statute (instructing the Board of Education to implement requirements to promote patriotism right after the *Gobitis* decision) and action by the state Board of Education (reciting key language from *Gobitis* and imposing the same Pledge requirement).<sup>41</sup>

Curiously, although both cases involved what we would think of today as specialized, administrative power, the Court in both cases discussed the requirements as if they had been directly imposed by the legislature. In *Gobitis*, for example, the Court emphasized that the right to free exercise cannot trump "legislation of general scope" and that "[j]udicial nullification of legislation" is to be avoided.<sup>42</sup> The Court found that promoting national unity is "an interest inferior to none" and that the Court would overstep its bounds if it tried to "deny the legislature the right to select appropriate means for its attainment."<sup>43</sup>

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36. *Id.* at 111 ("But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills.").

37. *Id.* at 112.

38. 310 U.S. 586 (1940).

39. 319 U.S. 624 (1943).

40. *Gobitis*, 310 U.S. at 591.

41. *Barnette*, 319 U.S. at 625–29.

42. *Gobitis*, 310 U.S. at 594–95.

43. *Id.* at 595.

The Court emphasized that “[t]he case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag-salute” and the Court refused “[t]o stigmatize legislative judgment” by invalidating that requirement.<sup>44</sup>

In *Barnette*, the West Virginia legislature amended its education statutes in the wake of *Gobitis*.<sup>45</sup> But the legislature did not itself directly require students to recite the Pledge of Allegiance.<sup>46</sup> Instead, it instructed the state Board of Education to establish the means for “teaching, fostering, and perpetuating the ideals, principles and spirit of Americanism.”<sup>47</sup> Not surprisingly, the Board of Education promptly adopted a resolution reciting the key findings from *Gobitis* and requiring students to recite the Pledge.<sup>48</sup>

But despite this involvement of the Board of Education, the Court continued to view the case as essentially legislative. Thus, for example, in explaining the *Gobitis* decision, the *Barnette* Court talked of how the earlier decision had attempted to respect the legislature as a co-equal guardian of liberty, and how disputes about “the wise use of legislative authority” should be left to the political process rather than judges.<sup>49</sup> And in *Barnette*’s most famous passages rejecting the rule from *Gobitis*, the *Barnette* Court emphasized the purpose of the Bill of Rights as protecting political minorities from the majoritarian legislative power.<sup>50</sup> In particular, the *Barnette* Court rejected *Gobitis*’s deference to “legislative authorit[ies]” and emphasized that the entire point of the Bill of Rights is to “withdraw certain subjects from the vicissitudes of political controversy” and to “place them beyond the reach of majorities and officials.”<sup>51</sup>

##### 5. *Prince v. Massachusetts* (1944)—**Legislative**

*Prince v. Massachusetts*<sup>52</sup> concerned a Massachusetts state child labor statute.<sup>53</sup> A Jehovah’s Witness woman was convicted for having brought her nine-year-old niece out to sell religious tracts on the

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44. *Id.* at 597.

45. *Barnette*, 319 U.S. at 625.

46. *Id.* at 626.

47. *Id.* at 626 n.1.

48. *Id.* at 625.

49. *Id.* at 638 (quoting *Gobitis*, 310 U.S. at 597–98, 600).

50. *Id.*

51. *Id.*

52. 321 U.S. 158 (1944).

53. *Id.* at 159.

street.<sup>54</sup> The Supreme Court affirmed the conviction, finding that the state was permitted to ban children under certain ages from selling magazines on public streets, even if the magazines had religious content.<sup>55</sup> The burden in *Prince* was imposed by a legislature.

6. *Braunfeld v. Brown* (1961)—**Legislative**

*Braunfeld v. Brown*<sup>56</sup> concerned the constitutionality of a Pennsylvania criminal statute prohibiting the sale of certain goods on Sundays.<sup>57</sup> Jewish store-owners, who observed a Saturday Sabbath rather than a Sunday Sabbath, sued to enjoin the statute, so that they would be free to sell goods on Sunday.<sup>58</sup> The Court rejected their claim, finding that the Sunday closing law did not interfere with the ability of the storeowners to observe their Saturday Sabbath.<sup>59</sup> The burden in *Braunfeld* was imposed by a legislature.

7. *Sherbert v. Verner* (1963)—**Administrative**

*Sherbert v. Verner*<sup>60</sup> concerned a woman whose religious faith (Sherbert was a Seventh-Day Adventist) precluded her from accepting Saturday employment.<sup>61</sup> The South Carolina Employment Security Commission, however, found that her religious reason for not accepting a job did not amount to “good cause” and therefore denied her request for unemployment compensation.<sup>62</sup>

As with *Gobitis* and *Barnette*, *Sherbert* involves something of a mixture between legislative and administrative power. After all, the Employment Security Commission did not set up the unemployment compensation scheme on its own—rather, the state legislature had done that.<sup>63</sup> Nevertheless, the key policy decision that created the conflict with religious liberty—the decision that a religious reason for not accepting “suitable work when offered” did not constitute good cause—was an administrative decision made by the Commission.<sup>64</sup> Accordingly,

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54. *Id.* at 159–60.

55. *Id.* at 168–70.

56. 366 U.S. 599 (1961).

57. *Id.* at 600.

58. *Id.* at 601.

59. *Id.* at 605.

60. 374 U.S. 398 (1963).

61. *Id.* at 399.

62. *Id.* at 401.

63. *Id.* at 400–01.

64. *Id.* at 401.

the conflict in *Sherbert* is best understood as one created by administrative power.<sup>65</sup>

8. Draft Cases (*Seeger*, *Welsh*, and *Gillette*, 1965–1971)—**Legislative**

From 1965–1971, the Court decided a trio of cases concerning the military draft Congress had instituted during the Vietnam war. In each case, the Court interpreted the federal statute concerning conscientious objection. In *United States v. Seeger*<sup>66</sup> and *Welsh v. United States*,<sup>67</sup> the Court interpreted § 6(j) to extend not just to traditional religious beliefs but also to a “sincere and meaningful” belief that “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”<sup>68</sup> In response to both Free Exercise and Establishment Clause claims, the Court in *Gillette v. United States*<sup>69</sup> upheld the statute’s distinction between conscientious objectors who object to participation in all wars, and those who object only to participation in certain wars.<sup>70</sup> In all of these cases, the Court was analyzing a burden placed on religion by the legislature in instituting a draft and interpreting a religious exemption created by the legislature.

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65. The *Sherbert* precedent also controlled the outcome of several similar unemployment compensation cases to reach the Court from state court systems. See *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717 (1981) (“Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*.”); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987) (“We see no meaningful distinction among the situations of *Sherbert*, *Thomas*, and *Hobbie*.”); *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (holding that denying unemployment benefits to a Christian who would not work on Sundays violated the Free Exercise Clause). I have not treated these cases separately here, because they are largely just re-applications of *Sherbert*; given that these additional cases occurred after the first century, they would somewhat artificially exacerbate the rise in administrative cases during that period.

66. 380 U.S. 163 (1965).

67. 398 U.S. 333 (1970).

68. *Seeger*, 380 U.S. at 165–66; see also *Welsh*, 398 U.S. at 344 (“That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”).

69. 401 U.S. 437 (1971).

70. *Id.* at 461.

9. *Wisconsin v. Yoder* (1972)—**Legislative**

In *Wisconsin v. Yoder*,<sup>71</sup> the Court considered a challenge by Amish parents to a state statute that required school attendance until the age of 16.<sup>72</sup> The parents declined to send their children to school after the eighth grade and were fined five dollars for violations of Wisconsin's compulsory school attendance law.<sup>73</sup> The Court found that enforcement of the law violated the Free Exercise Clause.<sup>74</sup> The burden on religion in *Yoder* was imposed by a legislature.

10. *McDaniel v. Paty* (1978)—**Legislative**

In *McDaniel v. Paty*,<sup>75</sup> a combination of state constitutional and legislative enactments prevented a minister from serving as a delegate to Tennessee's state constitutional convention.<sup>76</sup> The Tennessee Constitution prohibited ministers from serving in elected office generally. When calling a constitutional convention, the state legislature incorporated this requirement into its statutory restrictions about who would be eligible to serve as a delegate to the convention.<sup>77</sup> The Court found that the Free Exercise Clause prohibits the government from conditioning someone's "right to seek and hold office as legislators or delegates" on forfeiting his religious exercise.<sup>78</sup> The burden on religion in *McDaniel* was imposed by a legislature.

11. *United States v. Lee* (1982)—**Legislative**

In *United States v. Lee*,<sup>79</sup> the Court considered whether an Amish employer should be required to comply with federal statutes requiring the payment of certain payroll taxes.<sup>80</sup> Lee, a member of the Old Order Amish church, argued that doing so would conflict with his religious beliefs in violation of the Free Exercise Clause.<sup>81</sup> Although the Court found a burden on Lee's religious beliefs, it found that the government should win because "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax

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71. 406 U.S. 205 (1972).

72. *Id.* at 207.

73. *Id.* at 207–08.

74. *Id.* at 214–16.

75. 435 U.S. 618 (1978).

76. *Id.* at 620–21.

77. *Id.* at 621.

78. *Id.* at 626, 629.

79. 455 U.S. 252 (1982).

80. *Id.* at 254.

81. *Id.* at 254–55.

payments were spent in a manner that violates their religious belief.<sup>82</sup> The burden on religion in *Lee* was imposed by a legislature.

12. *Bob Jones University v. United States* (1983)—**Mixed**

In *Bob Jones University v. United States*,<sup>83</sup> the Court interpreted the federal internal revenue code provisions related to tax-exempt status to exclude a college with a ban on inter-racial dating.<sup>84</sup> In one sense, the case seems primarily legislative, in that the Court was interpreting and applying restrictions enacted by Congress.<sup>85</sup> That said, it is clear that an agency—the Internal Revenue Service—also played an important role because the IRS had acted to deny tax-exempt status based on a prior federal court ruling interpreting the statute.<sup>86</sup> Accordingly, the case is best classified as mixed.

13. *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985)—**Mixed**

In *Tony & Susan Alamo Foundation v. Secretary of Labor*,<sup>87</sup> the Court analyzed whether certain requirements of the Fair Labor Standards Act (FLSA) applied to workers involved in the commercial activities of a religious foundation.<sup>88</sup> As in *Bob Jones*, the conflict was in some measure attributable to the agency (here, the Department of Labor), which had moved to enforce FLSA's minimum wage, overtime, and recordkeeping requirements.<sup>89</sup> But the Court treated the case as principally involving a question about the reach of a statute, the FLSA.<sup>90</sup> Ultimately, the Court found that the statute did apply, and that the Free Exercise Clause did not provide a defense under the circumstances.<sup>91</sup> Given the combination of legislative and administrative decision-making at issue, the case is best classified as mixed.

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82. *Id.* at 260.

83. 461 U.S. 574 (1983).

84. *Id.* at 577.

85. *Id.* at 577–78.

86. *Id.* at 578–79, 581.

87. 471 U.S. 290 (1985).

88. *Id.* at 291–92.

89. *Id.* at 293.

90. *See id.* at 295–306.

91. *Id.* at 306.



14. *Bowen v. Roy* (1986)—**Mixed**

In *Bowen v. Roy*,<sup>92</sup> the Court analyzed a religious objection from Native American parents who could not comply with federal statutory requirements to provide a social security number in order to collect benefits under the Food Stamps and Aid to Families with Dependent Children programs.<sup>93</sup> The Court concluded that there was no Free Exercise violation.<sup>94</sup>

As in *Bob Jones* and *Tony & Susan Alamo Foundation*, there were agencies involved in the dispute, as the parents sued both state and federal administrators who were charged with administering the statutes.<sup>95</sup> Yet the Court was focused on a conflict created by a statute, rather than by a regulation or any particular action of the administrative agency. Accordingly, the case is best classified as mixed.

15. *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1989)—  
**Administrative**

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>96</sup> the Court analyzed a claim that the United States Forest Service allowed the construction of a road on federal lands that would interfere with longstanding Native American religious practices.<sup>97</sup> Although the agency's draft environmental impact report acknowledged that the area through which the road would run "has historically been used for religious purposes" by three different tribes, the agency decided to forge ahead with the project.<sup>98</sup> The Court found that the Free Exercise Clause did not provide the Tribes with a right to stop the Forest Service's plans to move forward with the road.<sup>99</sup> The conflict in *Lyng* was created by an agency.

16. *Employment Division v. Smith* (1990)—**Administrative** (though curiously discussed by the Court as if it were legislative)

The Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>100</sup> concerned an administrative determination that two discharged employees of a drug rehabilitation

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92. 476 U.S. 693 (1986).

93. *Id.* at 695.

94. *Id.* at 700.

95. *Id.* at 699.

96. 485 U.S. 439 (1988).

97. *Id.* at 442–43.

98. *Id.*

99. *Id.* at 451–52.

100. 494 U.S. 872 (1990).

center were not entitled to unemployment benefits.<sup>101</sup> The Department of Human Resources of Oregon's Employment Division found that the employees' reason for discharge—ingestion of the drug peyote during religious ceremonies—constituted disqualifying “misconduct” under the relevant statute.<sup>102</sup> Thus the conflict in *Smith* seems best classified as deriving from an administrative policy decision.

Curiously, the Court barely acknowledges that the case is administrative in nature. Instead, the Court's opinion focuses almost exclusively on a statute—Oregon's controlled substance act, which made use of peyote illegal.<sup>103</sup> Furthermore, the Court's articulated reasons for adopting its “neutral [and] generally applicable” standard seem to assume that the case is principally about what legislatures will do.<sup>104</sup> Thus the Court expresses its expectation that “a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”<sup>105</sup> Although the Court recognized that religious minorities may fare poorly in the majoritarian legislative process, it believed that “unavoidable consequence of democratic government” was preferable to a constitutional rule that required “the social importance of all laws” to be weighed against religious beliefs.<sup>106</sup>

Given that the key action creating the conflict in the case was here, as in *Sherbert*, an administrative action, the case is best classified as administrative.

17. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993)—  
**Legislative**

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>107</sup> the Court analyzed a group of city ordinances regulating the killing of animals in the City of Hialeah, Florida.<sup>108</sup> The Court found that the ordinances were not neutral and generally applicable under *Smith* because, *inter alia*, they contained many exceptions for analogous secular killings and because they did not apply to other killings that

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101. *Id.* at 874.

102. *Id.*

103. *Id.* at 874, 882. For example, the decision opens not with a discussion of the administrative unemployment decision that created the conflict, but with a discussion of the controlled substances act which no one had enforced or attempted to enforce against *Smith*.

104. *Id.* at 881–82.

105. *Id.* at 890.

106. *Id.*

107. 508 U.S. 520 (1993).

108. *Id.* at 526.

were likely to threaten the same asserted government interests.<sup>109</sup> The Court found that the laws were not neutral and generally applicable under *Smith* and that they were subject to, and failed, strict scrutiny.<sup>110</sup> The conflict in *Lukumi* was created by a legislature.<sup>111</sup>

18. *City of Boerne v. Flores* (1997)—**Administrative**

After *Smith*, overwhelming majorities in the House and Senate passed and President Clinton signed the Religious Freedom Restoration Act (RFRA).<sup>112</sup> RFRA was Congress's attempt to require courts to apply strict scrutiny in religious exercise cases rather than *Smith*'s "neutral [and] generally applicable" standard.<sup>113</sup> In *City of Boerne*,<sup>114</sup> the Court addressed whether RFRA's application to state and local governments was constitutional.<sup>115</sup> The Court found that Congress lacked power to impose the strict scrutiny test as to state and local governments.<sup>116</sup>

The underlying conflict with religious liberty in the case, however, was administrative. Local zoning authorities refused to allow a church to expand because it was located in a historic district.<sup>117</sup> Thus, while the Court devoted its opinion largely to questions involving the power of Congress, the conflict over religious liberty in the case derived from administrative power, such that the case should be classified as administrative.

19. *Gonzales v. O Centro Espirita Beneficente UNIAO do Vegetal* (2006)—**Legislative**

In *Gonzales v. O Centro Espirita Beneficente UNIAO do Vegetal*,<sup>118</sup> the Court considered a RFRA challenge concerning Congress's inclusion of the hallucinogen dimethyltryptamine (or "DMT") as a Schedule I substance under the Controlled Substances Act.<sup>119</sup> A Christian Spiritist sect from Brazil, O Centro Espirita Beneficente União de Vegetal, used

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109. *Id.* at 543.

110. *Id.* at 545–46 (citing *Smith*, 494 U.S. at 888).

111. *Id.* at 527–28.

112. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (2012).

113. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

114. *Id.*

115. *Id.* at 511.

116. *Id.* at 534.

117. *Id.* at 512.

118. 546 U.S. 418, 423–26 (2006).

119. *Id.* at 423–26.

hoasca tea for sacramental purposes of receiving communion.<sup>120</sup> Hoasca tea, however, contains DMT. After U.S. Customs agents seized a shipment of hoasca and threatened prosecution, the sect filed suit under RFRA, seeking an injunction against enforcement of the ban.<sup>121</sup> The Court unanimously found that the statute's ban violated RFRA.<sup>122</sup> The decision to include the substances in hoasca on Schedule I was Congress's decision,<sup>123</sup> and thus the burden in *O Centro* was imposed by the legislature.

20. *Hosanna-Tabor Lutheran Church and School v. EEOC* (2012)—  
**Administrative**

In *Hosanna-Tabor Lutheran Church & School v. EEOC*,<sup>124</sup> the Court considered a lawsuit initiated by the Equal Employment Opportunity Commission seeking reinstatement of a fourth grade teacher at a religious school under the Americans with Disabilities Act.<sup>125</sup> Although most courts had previously recognized a “ministerial exception” that would forbid the government from seeking to force a religious organization to accept a particular teacher of the faith, the EEOC brought suit anyway and argued that there was no basis for a ministerial exception at all.<sup>126</sup>

Although the underlying cause of action in *Hosanna-Tabor* was statutory, it seems clear that it was a policy choice by the agency, EEOC, rather than the legislature, that created the conflict with religious liberty. To be sure, Congress could have avoided the conflict by expressly including a ministerial exception in its statute. But it was the EEOC that decided to file suit against the church, to take the position that the ministerial exception should not exist despite decades of precedent to the contrary, and to assert a view of religious autonomy that the Court unanimously rejected as “untenable” and “remarkable.”<sup>127</sup> The burden in *Hosanna-Tabor* is thus best viewed as administrative.

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120. *Id.* at 425.

121. *Id.* at 425–26.

122. *Id.* at 439.

123. 21 U.S.C. § 812 (2012) (listing Schedule I controlled substances).

124. 565 U.S. 171 (2012).

125. *Id.* at 180.

126. *Id.* at 188–89.

127. *Id.* at 189.

21. The Contraceptive Mandate Cases (*Hobby Lobby* (2014) and *Zubik* (2016))—**Administrative**

In *Burwell v. Hobby Lobby Stores, Inc.* and *Zubik v. Burwell*,<sup>128</sup> the Court considered whether RFRA requires a religious exemption from the contraceptive mandate imposed by the Department of Health and Human Services under the Affordable Care Act.<sup>129</sup> Congress had delegated to the Health Resources and Services Administration, a department within HHS, the decision about what services should be included within the required preventive services for which some employers must provide employer-sponsored health coverage.<sup>130</sup> In contrast to the approach taken under the Controlled Substances Act in *O Centro*, in the mandate cases the decision to require coverage for all FDA-approved contraceptives was made entirely by administrative agencies, rather than the legislature. It was also entirely a decision of the agencies, rather than Congress, to create and extend to only some religious objectors an “accommodation” which many objectors believed did not solve the problem.<sup>131</sup> Accordingly, the burden in *Hobby Lobby* and *Zubik* is best classified as administrative.

22. *Holt v. Hobbs* (2015)—**Administrative**

*Holt v. Hobbs*<sup>132</sup> concerned the decision by the Arkansas Department of Corrections not to allow a Muslim prisoner to grow a beard for religious reasons.<sup>133</sup> Although the Department’s grooming policy allowed prisoners to grow short beards for medical reasons (namely, if diagnosed with a skin condition), the Department would not allow comparable beards for religious reasons.<sup>134</sup> Failure to adhere to the grooming policy would be “grounds for disciplinary action.”<sup>135</sup> Applying the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court found that the Department’s policy failed strict scrutiny.<sup>136</sup> The burden in *Holt* was imposed entirely by administrative action.

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128. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

129. *Hobby Lobby*, 134 S. Ct. at 2759 (2014); *Zubik*, 136 S. Ct. at 1559 (2016).

130. *Hobby Lobby*, 134 S. Ct. at 2762.

131. *Id.* at 2763.

132. 135 S. Ct. 853 (2015).

133. *Id.* at 859.

134. *Id.* at 860.

135. *Id.*

136. *Id.* at 859.

23. *Trinity Lutheran v. Comer* (2017)—**Administrative/mixed**

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,<sup>137</sup> the Court considered the constitutionality of a decision by the Missouri Department of Natural Resources to exclude religious organizations from participating in the State’s “Scrap Tire Program.”<sup>138</sup> The program provided grants to non-profit organizations to purchase recycled tires to be used to resurface playgrounds.<sup>139</sup> Citing a state constitutional restriction, the Department excluded religious applicants.<sup>140</sup> The Court ultimately found such discrimination forbidden under the Free Exercise Clause.<sup>141</sup>

The decision to exclude churches at one level seems to have been made by the state’s Constitution—in fact, that is precisely how the Department initially explained its rejection to the church.<sup>142</sup> At the Supreme Court, however, the Department acknowledged that it had subsequently changed its position on this point and would no longer exclude religious entities.<sup>143</sup> This position suggests that the state constitution did not require the exclusion of religious ministries in the first place, and that the burden in the case was caused by the administrative choice to exclude.<sup>144</sup>

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137. 137 S. Ct. 2012 (2017).

138. *Id.* at 2017.

139. *Id.*

140. *Id.*

141. *Id.* at 2024.

142. *Id.* at 2018.

143. *Id.* at 2019 n.1; *see also* Letter from Mo. Att’y Gen’s Office to Clerk of the Supreme Court of the U.S. (Apr. 17, 2017), <http://www.scotusblog.com/wp-content/uploads/2017/04/15-577-Response-to-Court-of-Missouri-Attorney-Generals-Office-2017.04.17.pdf> [<https://perma.cc/N9RR-7WDJ>].

144. Indeed, several state supreme courts have interpreted parallel provisions of state constitutions to not require exclusion in similar circumstances. *Taylor v. Town of Cabot*, 178 A.3d 313, 326 (Vt. 2017) (holding that disbursing public funds to repair historic church did not violate state constitution); *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 288 (Wash. 2002) (holding that public funding could be used for any institution of higher learning); *Ams. United v. Rogers*, 538 S.W.2d 711, 713 (Mo. 1976) (holding that public funds used for private education did not violate state constitution); *Advisory Opinion re Constitutionality of P.A.1970, No.100*, 384 Mich. 82, 180 N.W.2d 265, 274 (Mich. 1970) (holding that state funds used to aid nonpublic schools did not violate state constitution). This further suggests that the burden was imposed by administrative choice, rather than a state constitutional requirement.

24. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*  
(2018)—**Administrative**

In 2018, the Court decided *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*,<sup>145</sup> which addressed whether the Colorado Civil Rights Commission engaged in impermissible religious discrimination when it punished a Christian baker who refused to make custom wedding cakes for same-sex weddings.<sup>146</sup> The Commission took the position that refusing to sell cakes for same-sex weddings constitutes discrimination based on sexual orientation, that there is no First Amendment religious exercise or speech defense, and that the baker must therefore pay damages and undergo “comprehensive staff training” to avoid further discrimination.<sup>147</sup>

On one hand, the Commission was enforcing a provision of state law enacted by the legislature. But the Court’s decision made clear it was the action of the agency—here, the Commission—rather than the legislature, that created the conflict. In particular, the Court found that the Commission had engaged in impermissible religious discrimination, and had applied the law in a way that allowed a different baker to refuse to bake a cake with Bible verses condemning homosexuality because that would be an objection to the message, rather than the purchaser or event.<sup>148</sup> Furthermore, the Court found that the Commission violated the Constitution by denigrating the baker’s religious beliefs and equating them with racism.<sup>149</sup> For these reasons, the Court found that the Commission had violated the Free Exercise Clause.<sup>150</sup> The conflict with religious liberty in *Masterpiece* therefore was created by administrative action.

*B. Observations: A Significant Increase in Administrative Cases*

This survey of the Court’s religious exercise cases reveals two interesting trends. First, there has been a recent increase in the frequency of religious liberty disputes reaching the Supreme Court that derive from administrative, rather than legislative, policy choices. Second, at times when the Supreme Court has been considering a conflict created by an administrative agency, it nevertheless discusses the situation as if the conflict were caused by a legislative act—as if the Court at times has been unable to see past the usual legislative paradigm.

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145. 138 S. Ct. 1719, 1723 (2018).

146. *Id.* at 1723.

147. *Id.* at 1726.

148. *Id.* at 1728.

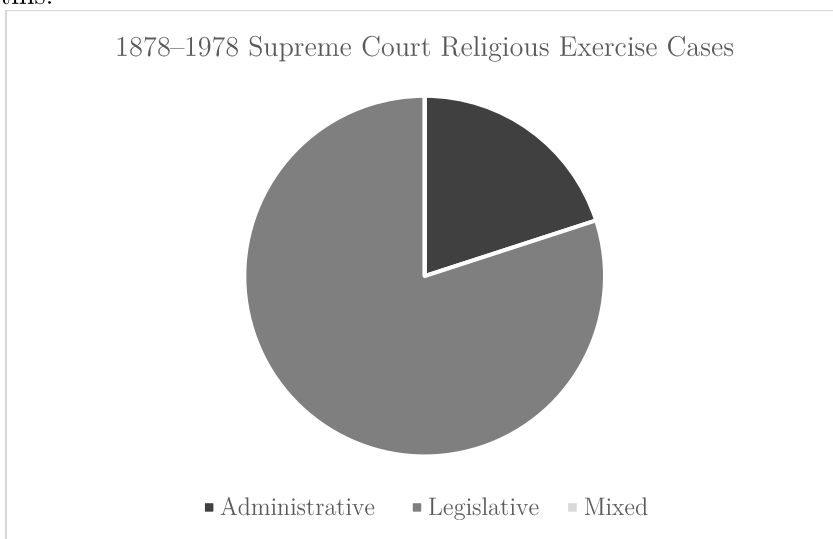
149. *Id.* at 1732.

150. *Id.*

1. A Shift Toward Administrative Cases

First, from the above overview of the Supreme Court's religious exercise cases, it seems clear that there is a trend toward cases in which the burdens are created by administrative actors, rather than legislative actors. For the first 100 years of the Court's religious exercise docket—that is, from *Reynolds* in 1878 to *McDaniel* in 1978—most of the burdens imposed on religious exercise appear to have come from legislative decisions. There were two exceptions to this general rule—the pledge cases (*Gobitis* and *Barnette*)<sup>151</sup> and the unemployment case, *Sherbert*.<sup>152</sup> Otherwise, the vast majority of the Court's religious exercise doctrine for the first 100 years was developed in the legislative context.

A chart of the breakdown of the Supreme Court's religious liberty cases based on the rough categorization set forth would look like this:<sup>153</sup>



Over the past forty years, however, we have seen a steady increase in the number of the Court's cases that have involved administrative power. In some, the agency seems to be involved simply in terms of enforcing policy decisions that the Court attributes to Congress. *Bob*

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151. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625 (1943); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940).

152. *Sherbert v. Verner*, 374 U.S. 398 (1963) was followed in later employment benefits cases such as *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) and *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

153. *See supra* notes 19–78 and accompanying text.



*Jones*,<sup>154</sup> *Tony & Susan Alamo Foundation*,<sup>155</sup> and *Bowen v. Roy*<sup>156</sup> all fall into this category—there is agency involvement, but the Court is principally engaged in resolving a conflict between a legislative policy choice and a religious exercise. These cases are classified as “mixed,” but they surely show the increase of administrative involvement in creating conflict with religious liberty.

Beginning in the late 1980s, we begin to see more and more cases in which the conflict seems more directly attributable to an administrative policy choice. In *Lyng*, for example, it was the United States Forest Service, and not Congress, that ultimately decided to allow a highway to be built through sacred Native American lands.<sup>157</sup> *Employment Division v. Smith* concerned what was fundamentally an administrative decision that partaking of a religious sacrament could still be deemed “misconduct” under the state’s unemployment scheme.<sup>158</sup> In *City of Boerne*, the decision to refuse the church’s renovation permit was entirely administrative.<sup>159</sup> The same is true of EEOC’s refusal to recognize a ministerial exception (*Hosanna-Tabor*),<sup>160</sup> HHS’s decision to impose a contraceptive mandate (*Hobby Lobby* and *Zubik*),<sup>161</sup> the Arkansas Department of Corrections’ refusal to allow prisoners to grow short religious beards (*Holt*),<sup>162</sup> the Missouri Department of Natural Resources’ exclusion of religious groups from its Scrap Tire Program (*Trinity Lutheran*),<sup>163</sup> and the Colorado Civil Rights Commission’s determination that bakers cannot refuse to sell cakes for same-sex weddings (*Masterpiece*).<sup>164</sup> These cases strongly suggest that we are in a new era in which many of the religious exercise conflicts considered by the Supreme Court have been created by administrative power.

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154. 461 U.S. 574, 577–78 (1983).

155. 471 U.S. 290, 295–305 (1985).

156. 476 U.S. 693, 695 (1986).

157. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 443 (1988).

158. *Emp’t Div. v. Smith*, 494 U.S. 872, 874 (1990).

159. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

160. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

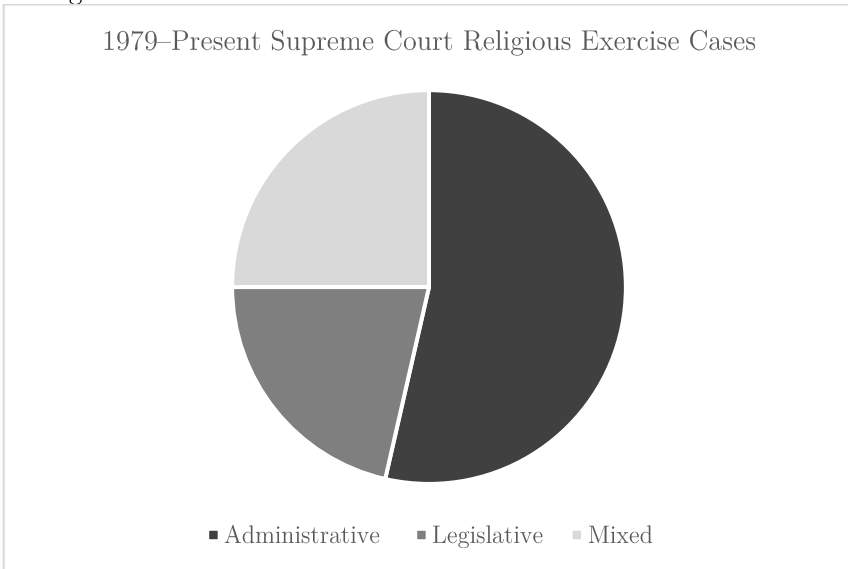
161. *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

162. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

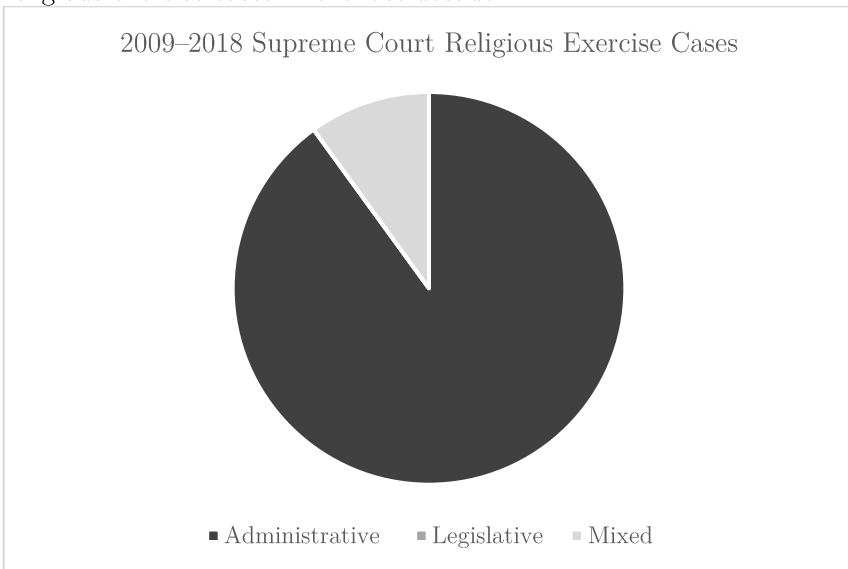
163. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

164. *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

A chart of the Court's post-1979 religious liberty cases illustrates the significant increase in administrative cases.<sup>165</sup>



And this trend is even more pronounced if we look at the Court's religious exercise cases in the last decade:<sup>166</sup>



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165. *See supra* notes 79–150 and accompanying text.

166. *See supra* notes 124–150 and accompanying text.

## 2. An Oddity in the Supreme Court's Discussion of Administrative Cases

Second, even in the cases that appear more administrative in nature (including *Gobitis*, *Barnette*, and *Smith*), the Court at times appears somewhat stuck in the legislative paradigm. Thus, even though the key impositions on religious liberty in *Gobitis*, for example, were imposed by the Board of Education, the Court repeatedly framed its analysis as a conflict between a religious claimant and the will of the legislature.<sup>167</sup> Likewise, in *Smith*, even though the Court was dealing with an administrative decision to treat religious peyote use as “misconduct,” the Court proceeded as if it were judging a legislative decision about the permissible scope of Oregon’s criminal ban on the drug.<sup>168</sup> Thus, even when the Court has historically been addressing religious liberty conflicts created by administrative actions, it has at times simply continued to view and discuss religious liberty conflicts in decidedly legislative terms.

This practice seems particularly noteworthy in *Smith*. The Court in several previous unemployment cases (*Sherbert*, *Thomas*, *Hobbie*, and *Frazee*) addressed a mere administrative judgment about whether a religious reason constituted good cause for either quitting or not accepting an available job. The Court in *Smith*, however, seemed to go out of its way to treat the case as a clash between a generally applicable statute (the criminal peyote ban) and a religious exercise. In fact, the *Smith* Court expressly distinguished prior unemployment cases as outside of its “neutral and generally applicable” standard, because they involved “individualized governmental assessment[s]” of the reasons for challenged conduct.<sup>169</sup> Thus having instituted the compelling interest test by acknowledging findings in the unemployment process to be “administrative proceedings” in *Sherbert*,<sup>170</sup> the Court eventually replaced that test by treating the same context as primarily legislative in *Smith*.<sup>171</sup>

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167. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940).

168. *Emp’t Div. v. Smith*, 494 U.S. 872, 874 (1990) (“This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug . . .”).

169. *Id.* at 884.

170. *Sherbert v. Verner*, 374 U.S. 398, 401 (1963) (noting that it was the employment commission “in administrative proceedings under the statute” that determined Mrs. Sherbert’s religious reasons for avoiding Saturday work did not constitute “good cause”).

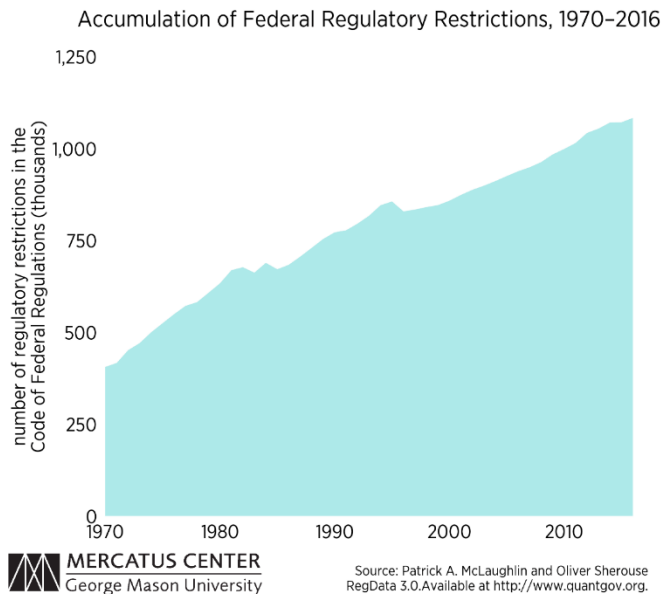
171. *Smith*, 494 U.S. at 874.

## II. FOUR THEORIES ABOUT THE REASONS FOR THE INCREASE IN ADMINISTRATIVE CASES

### A. *Growth of the Administrative State*

It seems quite likely that one significant reason for the increase in religious liberty conflicts caused by administrative agencies is the sheer growth and reach of the administrative state.

One way to think about the growth of the administrative state is to look at the number of federal regulatory restrictions in effect at any given time. Since 1970, the number of federal regulatory restrictions has increased dramatically. According to the chart below, there were approximately 400,000 regulations in 1970; 750,000 regulations in 1990; and more than a million such regulations in 2016.<sup>172</sup> Mercatus depicts the regulatory growth as follows:<sup>173</sup>



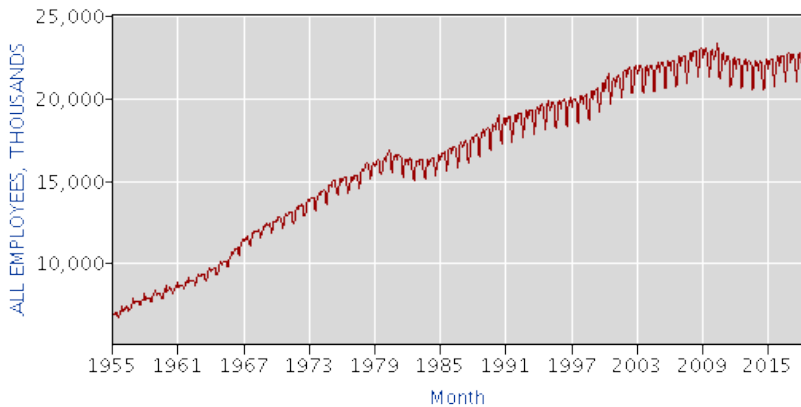
A second way to think about the growth of the administrative state is to think about the number of government employees working in agencies, both at the federal and state/local levels. According to the Bureau of Labor Statistics (BLS), there are approximately twenty-two million government employees in 2018, about triple the number of

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172. Patrick McLaughlin & Oliver Sherouse, *Regulatory Accumulation Since 1970*, MERCATUS CTR. (Aug. 31, 2017), <https://www.mercatus.org/publications/regulatory-accumulation-1970> [<https://perma.cc/E457-T8SP>].

173. *Id.*

government employees from 1955.<sup>174</sup> This BLS graph<sup>175</sup> shows the growth:



Thus, in recent years there are simply far more regulations and far more employees working for governments who are likely to be making or enforcing those regulations. The sheer growth and reach of the administrative state, therefore, makes it more likely that agencies will be issuing regulations that might conflict with religious liberty (or, for that matter, any other value).

*B. Administrators and Administrative Agencies Tend to be Specialists—  
but in Areas Other than Religious Liberty*

Individual administrative agencies tend to have a narrow focus, and administrators tend to be specialists. This should not be a surprise. One of the major reasons Congress creates and delegates power to agencies is precisely that they are specialists and are expected to have and develop expertise on a particular issue.<sup>176</sup> Thus, for example, in 1934

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174. *Databases, Tables & Calculators by Subject*, BUREAU OF LAB. STAT., <https://www.bls.gov/data/> (follow “Series Report” hyperlink; then enter “CEU9000000001” in field; then follow “retrieve data” hyperlink; then select “include graphs”; then select “Go”) (last visited Nov. 1, 2018).

175. *Id.*

176. *See FCC v. RCA Commc’n, Inc.*, 346 U.S. 86, 96 (1953) (noting that “a major reason for the creation of administrative agencies” is that they are “better equipped . . . for weighing intangibles ‘by specialization, by insight gained through experience, and by more flexible procedure.’”) (quoting *Far E. Conference v. United States*, 342 U.S. 570, 575 (1952)); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (agency decisions are made “based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case”).

Congress created the Federal Communications Commission with a narrow and specialized task: “regulating interstate and foreign commerce in communication by wire and radio.”<sup>177</sup> The job of the Securities and Exchange Commission is to regulate securities; the job of the Equal Employment Opportunity Commission is to enforce laws against workplace discrimination; the job of the Department of Health and Human Services is to promote public health.<sup>178</sup>

To be sure, there is nothing wrong, and arguably much right, with specialization. But specialization does mean that agencies (and administrators) are likely to be quite different from legislatures (and legislators). Legislatures tend to deal with a broad range of issues, and therefore need to balance a broad range of interests. Legislators need to be elected by at least a considerable segment of the population who will have a varied set of interests. Almost by definition, then, legislatures and legislators are more likely to be generalists. They will need to pass laws on a wider range of issues, secure votes in the legislature from colleagues with a wider range of concerns, and engage with voters and stakeholders with a wider range of interests in order to get elected and re-elected. By contrast, administrative agencies and administrators have a much narrower scope of interests and less practical need to engage with or care about competing values.<sup>179</sup>

Of course, even while carrying out a narrower mandate, administrative agencies and their employees remain subject to statutory law and constitutional law concerning other values such as avoiding race discrimination. But it is probably unavoidable that, in the exercise of their specialized mandates, agencies will be more likely to have a single-minded focus on a particular goal and therefore more likely to undervalue, ignore, or simply be unaware of competing interests that

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177. 47 U.S.C. § 151 (2012).

178. *About HHS*, U.S. DEP’T HEALTH AND HUMAN SERVS., <https://www.hhs.gov/about/index.html> [https://perma.cc/E4KT-3P5X] (last visited Oct. 21, 2018). (“It is the mission of the U.S. Department of Health & Human Services (HHS) to enhance and protect the health and well-being of all Americans. We fulfill that mission by providing for effective health and human services and fostering advances in medicine, public health, and social services.”).

179. See Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1941–42 (2015) (noting that administrators are not as easily pressed as elected officials to legislate in ways that protect the needs and beliefs of religious minorities because Americans do not elect administrative lawmakers).

are outside of their specialty field.<sup>180</sup> Religion and religious liberty are simply not likely to be areas of agency expertise.

For these reasons, scholars have noted that administrative agencies may be less sensitive to religious concerns. Philip Hamburger has observed that administrators may not be “as sensitive to religious sensibilities as are representative lawmakers” because they are insulated from “political pressures” and characterized by “self-conscious rationalism and scientism” making them “relatively indifferent . . . to religious concerns.”<sup>181</sup> Eugene Volokh has noted the prospect of “agencies’ tunnel vision” when weighing religious concerns “alongside their more traditional concerns.”<sup>182</sup> Gregory Sisk has noted the “insensitivity of governmental bureaucracy” to the concerns of religious people, especially “religious minorities.”<sup>183</sup>

For these reasons, while legislators are of course also capable of burdening religion, “Congress is far more sensitive to religious sensibilities than administrators.”<sup>184</sup>

### C. *Politics*

Two political realities likely also contribute to the growth of religious liberty conflicts caused by administrative agencies.

First, agencies are at least sometimes easier to control than legislatures. It is thus common for Presidents to use agencies to accomplish goals that cannot be achieved legislatively.<sup>185</sup> This is a practice common to both political parties.<sup>186</sup> For example, when President Trump’s initial efforts to repeal the Affordable Care Act failed in Congress, he instead took action through executive orders and agency rules to try to limit the law’s impact.<sup>187</sup> President Obama

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180. *See id.* at 1939, 1941 (explaining that administrative agencies’ laws are enacted in response to the executive’s policy rather than the varied demands of the diverse American people).

181. *Id.* at 1921.

182. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1487 n.57 (1998).

183. Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1025 (2005).

184. *See* Hamburger, *supra* note 179, at 1943.

185. *See* Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL’Y 362, 366–67 (2008) (describing instances when Presidents Clinton and George W. Bush used agencies when legislative efforts failed).

186. *See id.*

187. *See, e.g.*, Amy Goldstein & Juliet Eilperin, *Trump to End Key ACA Subsidies, A Move That Will Threaten the Law’s Marketplaces*, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/national/health-science/>

likewise relied on administrative power to, for example, pursue his economic agenda.<sup>188</sup>

Second, because agency action can be somewhat opaque to the average voter, it will sometimes be the case that elected officials will prefer to achieve a controversial goal through agency action (often clothed with the aura of expertise and non-partisanship) rather than legislatively. For example, although Congress had never before required insurance coverage for contraceptives—for anyone, much less for religious groups—HHS imposed such a requirement, leading to the *Burwell v. Hobby Lobby*<sup>189</sup> and *Zubik v. Burwell*.<sup>190</sup>

#### D. Bias

Agencies also seem likely to create conflicts with religious liberty because, by nature, agencies and agency administrators must *do something*. There are now more than twenty million employees who work for the government at the federal, state, and local levels.<sup>191</sup> As a matter of human nature, these employees are likely to have a bias toward exercising and expanding the power of their offices. This means they will have a bias in favor of regulating and taking actions which, in turn, means it is more likely that those actions will end up interfering with someone's religious exercise.<sup>192</sup>

Relatedly, it also seems likely that the same pressures would also lead agencies and agency administrators to reject claims for exemptions. This is both because granting exemptions can be burdensome (thus creating more work)<sup>193</sup> and because religious exemptions may strike

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trump-to-sign-executive-order-to-gut-aca-insurance-rules-and-undermine-marketplaces/2017/10/11/40abf774-ae97-11e7-9e58-e6288544af98\_story.html?utm\_term=.bc6bc49e2ac5 [https://perma.cc/F4RR-W5DE].

188. See, e.g., Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014, 3:36 AM), <https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone> [https://perma.cc/6Z2N-2YRU].

189. 134 S. Ct. 2751 (2014).

190. 136 S. Ct. 1557 (2016).

191. *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS (Mar. 30, 2018), <https://www.bls.gov/oes/current/999001.htm#00-0000> [https://perma.cc/3AB2-SY49].

192. See Hamburger, *supra* note 179, at 1975 (“Many of the recent conflicts between law and religious belief have arisen not from the supreme law of the land, but from mere administrative lawmaking . . .”).

193. Cf. *Gonzales v. O Centro Espirita Beneficente UNIAO Do Vegetal*, 546 U.S. 418, 436 (2006) (“The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”).



administrators as undermining the substantive goals of the agency and not advancing or empowering agencies or agency administrators.<sup>194</sup>

### III. ANALYSIS: WHAT CAN WE LEARN FROM RECENT CASES CONCERNING RELIGIOUS LIBERTY AND ADMINISTRATIVE POWER AT THE SUPREME COURT?

In the first century of its religious exercise jurisprudence, the Court made most of its key precedents in cases where the burden was either imposed legislatively (e.g., *Reynolds*)<sup>195</sup> or administratively, but was discussed by the Court as if it were legislative (e.g., *Gobitis* and *Smith*).<sup>196</sup> The resulting doctrine has focused heavily on aspects of the law often associated with legislative enactments, namely majority support and generality.

Only recently has the Court begun its steady diet of religious exercise cases in which administrative agencies, rather than legislatures, are understood as the part of government imposing the burden on religion. Interestingly, the Court's most recent religious exercise cases about administrative action provide an almost perfect cross-section of the Court's religious exercise cases. They include a case on church autonomy (*Hosanna-Tabor*);<sup>197</sup> a controversy over RFRA (*Hobby Lobby* and *Zubik*);<sup>198</sup> a prisoner case under RLUIPA (*Holt*);<sup>199</sup> a free exercise case about government funding (*Trinity Lutheran*);<sup>200</sup> and a free exercise case about government discrimination against unpopular religious beliefs (*Masterpiece*).<sup>201</sup>

As a result, these cases provide us with an excellent opportunity—though, to be sure, an early opportunity—to look at how the involvement of administrative power has impacted the Court's recent decisions, and how it might be expected to impact the Court's religious exercise decision-making going forward. Several preliminary observations and predictions present themselves.

#### *A. The Conflict Level is Likely to Remain High*

The recent flurry of Supreme Court religious exercise cases prompted by administrative actions is consistent with the overall

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194. See Hamburger, *supra* note 179, at 1975.

195. See *supra* notes 19–27 and accompanying text.

196. See *supra* notes 167–171 and accompanying text.

197. See *supra* notes 124–127 and accompanying text.

198. See *supra* notes 128–131 and accompanying text.

199. See *supra* notes 132–136 and accompanying text.

200. See *supra* notes 137–144 and accompanying text.

201. See *supra* notes 145–150 and accompanying text.

increase in regulations and other administrative actions.<sup>202</sup> Given that administrative actions have simply become more common, it seems likely that the overall prevalence of administrative agencies and actions will continue to result in conflicts between religious liberty and administrative power. This high level of conflict is the likely continued result of the proliferation of administrative agencies; the size, reach, and power of such agencies; and the specialized nature of agencies. Nothing about those attributes of administrative power seems likely to change in the near term.

*B. Questions of Deference Are Likely to Take on Increasing Importance*

Additionally, the combination of agency action and religious liberty conflicts suggests that the Court will be forced to confront thorny questions about agency deference. There is a danger—already visible in some of the recent controversies to reach the Court—that courts will be excessively deferential to administrative decision-making and argument in religious liberty cases. This deference can at times lead lower courts to make somewhat embarrassing errors that need to be corrected at the Supreme Court.

Agencies often receive deference because they have specialized expertise. Deference is particularly appropriate where the agency is administering “a complex and highly technical regulatory program” which involves “the identification and classification” of criteria that involve “significant expertise and entail the exercise of judgment grounded in policy concerns.”<sup>203</sup>

The problem that arises in religious liberty cases is that the agency typically has only partial expertise—it may know its own substantive area well, but lack the expertise in religious matters necessary to properly respect religious liberty. Three examples from the Supreme Court’s recent cases demonstrate the problem:

***Hosanna-Tabor.*** In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>204</sup> there is no question that the EEOC possesses broad expertise concerning employment discrimination and, in particular, violations of the Americans with Disabilities Act. But the agency had no comparable expertise concerning the proper scope of church autonomy under the First Amendment. This led the agency to overvalue the (obviously important) interests served by the ADA and to undervalue the religious liberty interests at stake.

To their credit, all nine justices of the Supreme Court rejected the EEOC’s view. While the Court acknowledged the “undoubtedly

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202. See *supra* Part I.

203. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

204. 565 U.S. 171 (2012).

important” interest in enforcing anti-discrimination statutes,<sup>205</sup> it refused to defer to the agency’s balancing of that interest against the First Amendment’s protection for church autonomy. The agency had suggested that churches could rely on an implicit “constitutional right to freedom of association,” rather than a ministerial exception.<sup>206</sup> The Court rejected this argument as “untenable” and “remarkable”;<sup>207</sup> rather than deferring to the agency’s balancing, the Justices unanimously concluded that “the First Amendment has struck the balance for us” in favor of religious liberty.<sup>208</sup> The Court thus refused to defer to the agency’s balancing of religious interests.

**Holt.** In *Holt v. Hobbs*,<sup>209</sup> the Court explicitly confronted the question of how much deference courts should grant to prison officials who denied a prisoner a religious accommodation because of security concerns. After pointing out that the lower courts had thought the prison officials were entitled to deference, the Court unanimously found that RLUIPA “does not permit such unquestioning deference.”<sup>210</sup> Rather, prison authorities must be required “not merely to explain” why they denied an exemption but also “to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest.”<sup>211</sup> The Court explained:

Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA’s rigorous standard. And without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a ½-inch beard actually furthers the Department’s interest in rooting out contraband.<sup>212</sup>

The Court was thus unwilling to allow deference to prison authorities to overcome the strict standards imposed by Congress for protecting religious liberty.

**Contraceptive Mandate Cases.** In the contraceptive mandate litigation (which reached the Supreme Court for either emergency applications or merits decisions in *Little Sisters of the Poor Home for*

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205. *Id.* at 196.

206. *Id.* at 189.

207. *Id.*

208. *Id.* at 196.

209. 135 S. Ct. 853 (2015).

210. *Id.* at 863–64.

211. *Id.* at 864.

212. *Id.*

*the Aged v. Sebelius*,<sup>213</sup> *Burwell v. Hobby Lobby*,<sup>214</sup> *Wheaton College v. Burwell*,<sup>215</sup> and *Zubik v. Burwell*<sup>216</sup>), the lower federal courts spent years deferring to the judgment of federal agencies about how the contraceptive mandate worked. As a result, those courts had often found that religious plaintiffs were not even burdened by, and thus had no religious liberty claim against, the contraceptive mandate.<sup>217</sup>

As I have detailed elsewhere, these lower court decisions were largely based on misplaced deference to agencies.<sup>218</sup> Ironically, this deference was so misplaced that it did not need to be corrected by the Supreme Court. Rather, the arguments of the agencies were so facially weak that they were abandoned by the Solicitor General at the Supreme Court.

Perhaps the most embarrassing example of this deference came from a judge renowned for his intellect and rigorous interrogation of lawyers: Richard Posner. Deferring to agency explanations about the mandate, Judge Posner repeatedly criticized *Wheaton* for claiming that the government wanted to make emergency contraceptive coverage part of *Wheaton's* plan.

“So when *Wheaton College* tells us that it is being ‘forced’ to allow ‘use’ of its health plans to cover emergency contraceptives, it is wrong.”<sup>219</sup>

Emergency contraceptive coverage under the mandate is “not part of the college’s health plans.”<sup>220</sup>

“Call this ‘using’ the health plans? We call it refusing to use the health plans.”<sup>221</sup>

“Almost the entire weight of its case falls on attempting to show that the government is trying to ‘use’ the college’s health plans, and it is this alleged use that it primarily asks us to enjoin. But the government isn’t using the college’s health plans, as we have explained at perhaps excessive length.”<sup>222</sup>

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213. 134 S. Ct. 1022 (2014).

214. 134 S. Ct. 2751 (2014).

215. 791 F.3d 792 (7th Cir. 2015).

216. 136 S. Ct. 1557 (2016).

217. See *Hobby Lobby*, 134 S. Ct. at 2765 ; *Wheaton Coll.*, 791 F.3d at 801.

218. Mark L. Rienzi, *Fool Me Twice: Zubik v. Burwell and the Perils of Judicial Faith in Government Claims*, 2015 CATO SUP. CT. REV. 123, 125.

219. *Wheaton Coll.*, 791 F.3d at 795.

220. *Id.* at 796.

221. *Id.*

222. *Id.* at 801.

Yet just a few weeks later, the Solicitor General told the Supreme Court that the agency view that Judge Posner had deferred to had been exactly wrong. It turned out the emergency contraceptives were—in the Solicitor General’s own words—“part of the same ‘plan’ as the coverage provided by the employer.”<sup>223</sup> This concession forced the government’s argument to collapse, resulting in a somewhat unprecedented round of supplemental briefing and a remand to the lower courts to resolve the cases.<sup>224</sup>

As these cases demonstrate, religious liberty conflicts caused by administrative action will often force courts to think through the proper level of, and proper topics for, deference to agencies. While agencies may merit deference in their areas of expertise (i.e., employment discrimination, prison security, healthcare, etc.), they will almost always lack sufficient expertise or knowledge to merit deference when making decisions about how or whether to accommodate religion.

For these reasons, courts ought to proceed with extreme caution before deferring to agencies in the context of religious liberty disputes. Indeed, given the inherent pressures to overvalue the agency’s own area of expertise over competing interests such as religious liberty, it is hardly surprising that Congress imposed the same rule of anti-deference (namely, strict scrutiny, with the burden on the government) on agencies as all other parts of the government.<sup>225</sup>

*C. Agencies Should Often Lose Religious Exercise Cases Under Statutes Like RFRA and RLUIPA*

For the reasons set forth above, it is reasonable to expect that agencies will continue to create burdens that will lead to religious liberty litigation. That is because agencies are large, have many employees, have broad powers, and have many different tools available to pursue policy objectives.

Ironically, those same attributes also come with a silver lining for supporters of religious liberty. That is because the very same agency characteristics that generate friction with religious groups will almost always simultaneously mean that the agency has many less restrictive ways to advance its interests without burdening religion.

Consider again the contraceptive mandate cases. Ultimately, the government lost those cases not because the Court found that contraceptive access was unimportant (the Court actually assumed,

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223. Brief for Respondents at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted).

224. *Zubik*, 136 S. Ct. at 1561. As of this writing, the *Wheaton College* case and most other mandate cases have since been resolved by permanent injunctions against the government.

225. Religious Freedom Restoration Act (RFRA) § 5, 42 U.S.C. § 2000bb-2(1) (2012) (defining “government” to include “agency.”).

without deciding, that the government had a compelling interest in the issue),<sup>226</sup> but because the Court found that the agencies had many other ways to achieve its stated goal.<sup>227</sup> In particular, the Court found in *Hobby Lobby* that “the most straightforward way” for the government to provide contraceptive access “would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”<sup>228</sup> But the Court found that the agencies had failed to demonstrate that this was not a viable alternative.<sup>229</sup> And two years later, in *Zubik*, the agencies admitted to the Court that the system they had since imposed “could be modified” to lessen religious burdens, prompting the Supreme Court to remand the case for resolution by the lower courts.<sup>230</sup>

Eventually, after many years of litigation and Supreme Court losses, the agencies took precisely this step. On May 3, 2019, a new HHS rule will change Title X regulations to allow participation by all “women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers’ religious beliefs.”<sup>231</sup> It turns out that the agency with broad enough powers to try to force the Little Sisters of the Poor to provide contraceptive coverage *also* has broad enough powers to provide contraceptives directly to those who seek them.

The same pattern can be seen in *Holt v. Hobbs*.<sup>232</sup> Prison authorities wield enormous day-to-day control over the lives and actions of prisoners. This is why the Arkansas prison authorities were able to impose the prohibition on Holt’s efforts to grow a beard for religious reasons. But that same broad control is also why the Court found that the prison authorities had many other ways of providing prison security without forcing Holt to violate his religion. For example, the Court found that the prison authorities also had sufficient control to search an inmate’s beard (like they already do for clothing and even longer hair on the top of the head), or to require the inmate to run a comb through the beard, or to require the inmate to submit to before-and-

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226. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (“We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.”).

227. *Id.*

228. *Id.* at 2780.

229. *Id.*

230. *Zubik*, 136 S. Ct. at 1560.

231. Compliance with Statutory Program Requirements, 83 Fed. Reg. 25502, 25514 (proposed June 1, 2018) (to be codified at 40 C.F.R. pt. 59.2).

232. 135 S. Ct. 853 (2015).

after photos to ensure that the beard cannot be used as a means to quickly alter appearances after an escape.<sup>233</sup>

These cases suggest that, when governments are forced to meet the “exceptionally demanding” least restrictive means test under RFRA and RLUIPA, they will often lose, precisely because agencies have broad powers and many tools with which to achieve them.

*D. Agencies Should Often Lose Religious Exercise Cases Under the Free Exercise Clause*

For slightly different reasons, the recent religious liberty cases also suggest that agencies should often lose cases decided under the Free Exercise Clause as well. Three of the recent cases were decided in whole or in part on Free Exercise grounds: *Hosanna-Tabor* (which was both a Free Exercise and an Establishment Clause decision); *Trinity Lutheran*; and *Masterpiece Cakeshop*.

One way to look at all three of these cases is that each one showed the agencies valuing some other interest more highly than religious liberty. In *Hosanna-Tabor*, the EEOC attempted to value the interest in enforcing discrimination laws more highly than religious liberty. In *Trinity Lutheran*, the state agency attempted to value avoidance of Establishment Clause concerns more highly than the church’s Free Exercise rights. In *Masterpiece Cakeshop*, the agency had valued other bakers’ interests in not endorsing messages they found offensive more highly than *Masterpiece’s* religious interest in not providing a cake for a same-sex wedding.

In this respect, all of these cases run afoul of the requirement from *Smith* and *Lukumi*, that the Free Exercise Clause is violated where the government has valued secular interests over religious interests. The agency in each case, therefore, “devalue[d] religious reasons” for conduct by at least implicitly “judging them to be of lesser import than nonreligious reasons.”<sup>234</sup>

There are good reasons to believe that these three cases are the norm, rather than the exception. As explained above, agencies typically lack expertise in religious matters, and they are likely to overvalue their primary mandate at the expense of religious liberty, particularly for unknown or unpopular minority faiths. Agencies are also less likely than legislatures to issue rules that truly meet *Smith’s* “neutral and generally applicable” standard, as agencies are often involved in more targeted activities.

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233. *Id.* at 864.

234. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993); *see also* *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990) (“[W]here the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”).

## CONCLUSION: RECONCILING ADMINISTRATIVE POWER AND RELIGIOUS LIBERTY

The recent increase in clashes between administrative power and religious liberty at the Supreme Court should be a cause for concern, both for supporters of religious liberty and supporters of administrative power. Agencies would be better able to achieve their goals if they were not confronted with litigation over religious disputes. Likewise, religious groups would be better able to focus on their own work if not forced to defend themselves for years in court. In this sense, a world of increasing conflict between the two seem like a loss for everyone.

But the six Supreme Court cases over the past decade on this issue actually suggest that we may be entering a better future. After all, the agencies lost all six cases. And in many instances, they lost the cases not because the goals they were pursuing were invalid, but because they had many other available ways to achieve those goals. Thus, while religious liberty claimants were protected, the agencies were also often able to advance their interests.

The contraceptive mandate cases and *Holt v. Hobbs* are particularly good examples. While the agencies lost all of the contraceptive mandate cases, they lost not because the Court found the agencies forbidden from providing contraceptives or securing prisons, but because the Court found the agencies had many alternative ways of achieving those goals. The resulting litigation then did not hamper the agencies' ability to achieve their goals; it just forced them to achieve those goals in ways that respected religious liberty.

If agencies fail to learn from these cases, it is of course possible that they continue to provoke conflict with religious actors and continue to lose in court. While that result might be in some way beneficial to religious liberty (at least indirectly, as religion-protective precedents continue to pile up), it is undoubtedly not beneficial for either agencies or the interests they are supposed to serve. Ideally, agencies will actually learn from this string of losses and begin considering religious interests much earlier in their rule-making process, so as to avoid lengthy and unnecessary litigation.

The contraceptive mandate cases offer a prime example. During the Obama Administration, the agencies argued that the mandate—including the forced involvement of the Little Sisters of the Poor and other religious groups—was necessary as a way to provide women with contraceptives. Over six years of litigation, it became extraordinarily clear that the agencies had many different ways to provide these products without using religious objectors' health plans. But because they were embroiled in litigation, these agencies never actually made the drugs available directly.

By contrast, ironically, it is the Trump Administration that has moved to make contraceptives more available to employees of religious objectors, allowing them to obtain the products for free under Title X.



Had the agencies been forced to consider religious interests earlier in the process, they might have implemented such a solution in 2010, rather than waiting until 2018. That would have been a win for everyone: people who wanted contraceptives would have received them much sooner, the agency would have avoided many years of litigation, and the religious groups would have been left out of the process, which is what they wanted.

There are indications that the federal government is learning. The Department of Justice recently issued guidance to all federal agencies instructing them to consider religious burdens under RFRA and the First Amendment when making new rules:

In formulating rules, regulations, and policies, administrative agencies should also proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens. Agencies should consider designating an officer to review proposed rules with religious accommodation in mind or developing some other process to do so.<sup>235</sup>

This suggests that the federal government is, in fact, learning from this string of losses and is taking steps to ensure that agencies are able to find ways to pursue their interests without unnecessarily burdening religious actors, and without suffering years of courtroom losses in the process.

Supporters of administrative power and supporters of religious liberty should all welcome that development.

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235. Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668, 49671 (Oct. 26, 2017).

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