PERMISSIVE DISCRIMINATION AND THE DECLINE OF RELIGION CLAUSE JURISPRUDENCE: THE WEARING OUT OF THE JOINTS

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This article argues that modern Supreme Court decisions relating to the Establishment Clause and the Free Exercise Clause have caused both clauses to lose their constitutional force. Although the Court has long recognized a "play in the joints" between the clauses, it had previously resolved this problem exclusively in favor of the Establishment Clause through its well-established doctrine of permissive accommodation. However, the Court's recent decision in Locke v. Davey *suggests that the Court is now willing to allow the overlap between the two clauses to pull in the opposite direction as well. This article explains that the Court's decision in* Locke *marks the emergence of a new doctrine of permissive discrimination that mirrors permissive accomodation. Finally, this article suggests that a system that incorporates both of these complementary doctrines is incapable of protecting the liberties behind either religion clause. Thus, the preservation of religious liberty depends on the Supreme Court's ability to reinforce the distinct principles underlying each clause.*

INTRODUCTION

In attempting to achieve the fundamental goal of preserving religious freedom,[1] the Free Exercise Clause and the Establishment Clause have produced an inherent tension that has troubled courts since religion clause litigation grew in prevalence near the middle of the twentieth century. On one hand, the Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of

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1. *See* Everson v. Bd. of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting) (At the time of drafting, "'[e]stablishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.").

religion."[2] On the other hand, the Free Exercise Clause prevents Congress from making any law "prohibiting the free exercise thereof."[3] The conflict between these two clauses and their failure to set forth any clear constitutional guidelines may not be immediately apparent in cases involving blatant violations of either principle. However, the Supreme Court rarely has the luxury of ruling on blatant violations.[4] Thus, it has been forced to develop, and lower courts are left to apply, a principle of constitutional magnitude, which "simultaneously requir[es] that religion be accorded no special treatment (the establishment clause) and that it be accorded deferential treatment (the free exercise clause)."[5]

Although the tension between the two clauses is by no means a recent development, the recent Supreme Court decision in *Locke v. Davey*[6] added a new dimension to this historical tug-of-war. By upholding a Washington state statute excluding all theology students from the state's generally available scholarship funds, the Court essentially established a doctrine of permissive discrimination to mirror that of permissive accommodation.[7] Thus, the Free Exercise Clause was removed from its pedestal as an inviolable constitutional right and placed on a level equal to that of the Establishment Clause, which had been removed from the same pedestal many years earlier through the doctrine of permissive accommodation.[8]

This article argues that the interplay between the two religion clauses and the Court's failure to fashion any workable solutions has caused both of the clauses to lose their constitutional force. In order to preserve the religious freedom that has been significant to the country since its formation, the judicial system must finally step up to the challenge the religion clauses present and revitalize the strength of each clause. In Part I, this article discusses the background of the tension between the Establishment Clause and the Free Exercise Clause, both as it arises from the inherent nature of the clauses and as it has been compounded by poorly fashioned judicial solutions. Part II examines the history of the permissive accommodation doctrine, especially as it existed at its broadest interpretation, and discusses two recent cases that have im-

2. U.S. CONST. amend. I.

3. *Id.*

4. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("A law 'respecting' the proscribed result . . . is not always easily identifiable as one violative of the Clause.").

5. William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 505 (1986).

6. 540 U.S. 712 (2004).

7. *See id.*

8. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

plicitly applied some of the doctrine's underlying principles. Part III presents *Locke v. Davey* as establishing a new doctrine of permissive discrimination and considers the constitutional discord of a Supreme Court decision that sanctions facial discrimination. Finally, Part IV argues that both religion clauses, not one or the other, have lost their influence, so that freedom of religion has been left unprotected by either clause.

I. BACKGROUND: A CONSTITUTIONAL TUG-OF-WAR

The inherent and powerful struggle between the two religion clauses is a concept that has been well-documented and often noted by both federal courts and constitutional scholars. Therefore, this article will not delve deeply into the foundation of this tension. However, some explanation of the background of this conflict is necessary as a precursor to the discussion of the emerging ineffectiveness of the Establishment Clause and the Free Exercise Clause in light of recent Supreme Court decisions. Part A of this section discusses the case of *Everson v. Board of Education*,[9] which was among the first Establishment Clause cases decided by the Supreme Court and which laid the foundation for all subsequent American religion clause jurisprudence. Part B examines the relationship between the two religion clauses and explains the Court's efforts to resolve the conflict. Finally, Part C suggests that the conflict between the clauses arises not from the express language of the First Amendment, but rather from the fundamental values underlying each clause.

A. Everson v. Board of Education*: Separation of Church and State*

The struggle between the opposing values of religious liberty traces back to the inception of the purported requirement of separation of church and state[10] in *Everson v. Board of Education*.[11] After a lengthy discussion of the history of the Establishment Clause in relation to early American concepts of religious liberty, the Court forcefully proclaimed its adoption of the Jeffersonian concept that the clause was "intended to erect 'a wall of separation between church and State.'"[12] Rather than approaching the controversial, and perhaps impractical, issue of where

9. 330 U.S. 1 (1947).

10. Numerous commentators have questioned whether the popular conception of separation of church and state is even an accurate depiction of the constitutional requirement. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 92–107 (1985) (Rehnquist, J., concurring) (describing the doctrine of separation of church and state as a "mistaken understanding of constitutional history" and a "misleading metaphor").

11. 330 U.S. 1 (1947).

12. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

that wall of separation should be placed, however, the Court did no more than provide a list of the minimum boundaries.[13]

Included in this list was the ambiguous requirement that a law cannot be passed which "aid[s] one religion, aid[s] all religions, or prefer[s] one religion over another."[14] If that requirement itself would not have led to ambiguity, the Court's ultimate holding certainly did. Immediately following its forceful proclamation of the power of the Establishment Clause, the Court stated the opposing principle with equal force: "[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[15] Thus, despite the fact that the challenged public reimbursement for children's bus transportation to parochial schools "undoubtedly" helped children to attend such schools, the Court upheld the reimbursement as a permissible public welfare benefit whose elimination would clash with free exercise principles.[16] Within two pages of the opinion, the Court found aid to religion at the minimum threshold of Establishment Clause prohibition and then held that such aid is not a violation when its withholding may "hamper . . . citizens in the free exercise of their own religion."[17] And so the constitutional tug-of-war was born, or at least thrust into the spotlight.

Since *Everson*, the Court has struggled to apply the strict separation standard of that case, especially when "separation of church and state" results in incidental discrimination against particular religious groups or against religion in general. More than 20 years after *Everson*, the Court candidly acknowledged its prolonged struggle "to find a neutral course between the two Religion Clauses" and succinctly defined the source of the conflict as the fact that either clause, "if expanded to a logical ex-

13. *Id.* at 15–16.

14. *Id.* at 15. Other prohibitions mentioned in the Court's definition by way of exclusion include the prohibition on a state-organized church, prohibition on forced attendance or belief, prohibition on punishment for religious conduct or belief, prohibition on tax to support religious activities or institutions and prohibition on government participation in religious organizations. *Id.* at 15–16.

15. *Id.* at 16 (emphasis added).

16. *Id.* at 17.

17. *Id.* at 16; *see also id.* at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."). *But see* Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) (explaining that the *Everson* court "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective").

treme, would tend to clash with the other."[18] Thus, the Court recognized what had become clear in the holding of *Everson*: although the Establishment Clause clearly prohibits state aid to religious institutions, it is fundamentally unclear what state action constitutes impermissible aid.[19] In response to this difficulty, the Court held that in cases falling short of blatant Establishment Clause violations, there is "room for play in the joints" between the two clauses.[20] While *Everson* may have revealed the nature of the conflict between the clauses, it is clear that it is the nature of the clauses themselves that has produced the enduring tension.[21]

B. Judicial Attempts at Resolution

Once the Court conceded that the words of the Constitution alone could not clarify the ambiguity or relieve the tension, the Court attempted to repair the problem through formalistic tests that placed boundaries on the power of each clause. Unfortunately, these tests did no more than muddy the waters further. In *Lemon v. Kurtzman*, the Court held that salary supplements paid by states to teachers in nonpublic, and often religious, schools were unconstitutional.[22] The Court first acknowledged the lack of existing standards in Establishment Clause cases[23] and then created a three-part test that defined the boundaries of an Establishment Clause violation. Under this test, a statute is valid only if it (1) has "a secular legislative purpose"; (2) has a principal effect that "neither advances nor inhibits religion"; and (3) does not "foster an excessive government entanglement with religion."[24] Thus, despite the secular purpose and effect of the salary supplements challenged in the case, the Court held that the required administrative oversight of the program in sectarian schools produced excessive entanglement between the state government and the religious institutions.[25]

The Court made similar attempts to define the boundaries of a Free Exercise violation and in so doing, held that at least in some contexts, the

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18. *Walz*, 397 U.S. at 668–69 (holding that tax exemptions provided to religious organizations for properties used for religious worship did not violate the Establishment Clause).

19. *Id.* at 669.

20. *Id.*

21. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) ("[T]ension inevitably exists between the Free Exercise and the Establishment Clauses. . . .").

22. Lemon v. Kurtzman, 403 U.S. 602 (1971).

23. "[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.* at 612.

24. *Id.* at 612–13 (internal quotation marks and citation omitted).

25. *Id.* at 612–14.

state was required to accommodate religious beliefs.[26] In *Sherbert v. Verner*, a case brought under the Free Exercise Clause, the Court held that an otherwise neutral law that incidentally burdens religious belief is valid only if it can be justified by a compelling state interest.[27] In that case, a Seventh-Day Adventist whose religious beliefs prevented her from working on Saturday had been discharged from her employer and found ineligible for unemployment compensation on those grounds.[28] Not only did the Court find that accommodation would not violate the Establishment Clause, but it explained that the failure to so accommodate would violate the Free Exercise Clause by conditioning the availability of public benefits on a violation of religious principles.[29]

Rather than clarifying the religion clauses, these judicially created solutions only produced greater conflict and contradiction. For nearly two decades, until *Sherbert* was seriously limited by *Employment Division v. Smith*,[30] legislators faced a judicial "clarification" that merely provided a second layer to the religion clause tension. This judicial solution essentially explained that under the Establishment Clause, religious-based exemptions from facially neutral statutes are constitutionally prohibited (because they advance religion), but that under the Free Exercise Clause, similar exemptions may be required.[31]

C. Choosing Between Substantive Equality and Formal Equality

The Court has not been alone in wrestling with this conflict. Numerous commentators have searched for the source of the Court's frustration and the reasons for its failed attempts to reconcile the clauses. It may be that the tension between the clauses goes beyond ambiguity in the words to reveal a deeper conflicting vision of religious equality. One commentator suggests that the tension between the Establishment Clause and the Free Exercise Clause arises not merely because the words themselves contradict each other, but because the underlying values in support of each are in conflict.[32] Thus, the tension in the application of the

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26. Karen M. Crupi, Comment, *The Relationship Between Title VII and the First Amendment Religion Clauses: The Unconstitutional Schism of* Corporation of the Presiding Bishop v. Amos, 53 ALB. L. REV. 421, 435 (1989).

27. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

28. *Id.* at 398.

29. *Id.* at 406.

30. Employment Div. v. Smith, 494 U.S. 872 (1990).

31. Jennifer D. Malinovsky, Note, *Constitutional Law—Liberty or Luxury? The Free Exercise of Religion in the Aftermath of* Employment Division, Department of Human Resources v. Smith, 26 WAKE FOREST L. REV. 1297, 1329 (1991).

32. *Developments in the Law—Religion and the State: V. Free Exercise Accommodation of Religion*, 100 HARV. L. REV. 1703, 1719 (1987) [hereinafter *Developments in the Law*].

clauses reflects the tension, common to many areas of law, between formal equality and substantive equality.[33] While the strict neutrality and church-state separation of the *Lemon* test strives for formal religious equality, this value judgment often produces substantively unequal results.[34] For example, in *Lemon* itself, a program designed to provide equal educational opportunities for children at private schools was struck down simply because it failed to achieve the formal separation sought by the rigid *Lemon* test.[35] Likewise, an emphasis on substantive equality, such as that expressed in *Sherbert*, often undermines formal equality by singling out religious interests for special protection.[36] As both logic and past experience attest, the fact that true religious freedom in a secular society requires affirmative protection to survive means that courts cannot simultaneously serve policies of both formal and substantive equality.[37]

II. PERMISSIVE ACCOMMODATION DOCTRINE AND APPLICATION OF ITS PRINCIPLES IN RECENT CASES

In light of the perceived tension between the religion clauses and the judicial awareness and acceptance of the "play in the joints" between them,[38] the Court first responded with a resolution that favored the free exercise of religion. The doctrine of permissive accommodation, which applies at the overlap of Free Exercise and Establishment Clause rights, allows the government to specifically exempt religious observers from generally applicable laws or grant them special legal privileges, even where the Free Exercise Clause does not require such action.[39] Put simply, the doctrine of permissive accommodation recognizes that a state may sometimes act in ways that arguably violate the Establishment Clause in order to avoid violating the Free Exercise Clause.

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33. *Id.*

34. *Id.*

35. Lemon v. Kurtzman, 403 U.S. 602 (1971).

36. *Developments in the Law*, *supra* note 32, at 1719.

37. *Id.* at 1721 (Unlike other constitutional principles that encounter conflicts between formal and substantive equality, such as equal protection and free speech, "substantive equality in the religion context . . . is unattainable without accommodation.").

38. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

39. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); *Walz*, 397 U.S. at 664; *see also* Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring) ("Even where the Free Exercise Clause does not compel the government to grant an exemption, the Court has suggested that the government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause.").

A. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*: The Height of the Permissive Accommodation Doctrine*

While the foundational principles of permissive accommodation are apparent at least as early as 1970 in *Walz v. Tax Commission*,[40] the application of the doctrine continued to broaden in scope until reaching its peak in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[41] In *Amos*, the Court faced a challenge from an employee who had been discharged from a nonprofit gymnasium owned by a religious entity because he did not qualify as a member of the church.[42] Although Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of religion, § 702 of that title specifically exempts religious employers from those requirements.[43] The discharged employee argued that since his job was nonreligious, an exemption for the employer who discharged him would be special treatment unrelated to religious belief and thus would violate the Establishment Clause.[44]

Despite finding that the job in question was in fact nonreligious, the Court reversed the decision of the lower court by unanimous result and upheld the broad statutory exemption for religious employers. In doing so, the Court relied on "well established" principles of permissive accommodation, namely that "government may . . . accommodate religious practices . . . without violating the Establishment Clause"[45] and that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."[46] The Court then proceeded to apply the *Lemon* test to the statute and concluded that there was no violation of the Establishment Clause because the statute had a secular purpose, an effect that did not advance nor inhibit religion, and actually avoided unnecessary entanglement between church and state.[47] The sources cited by the Court in support of its holding may have been relatively uncontroversial, but the application of these propositions extended far beyond the logical purpose of

40. 397 U.S. 664.

41. 483 U.S. 327 (1987). "Permissive accommodation hit its high-water mark" in *Amos*. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 254 (1994).

42. *Amos*, 483 U.S. at 330.

43. *Id.* at 331.

44. *Id.*

45. *Id.* at 334 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987)).

46. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

47. *Id.* at 335–39.

the permissive accommodation doctrine. Rather than exempting only religious activity in an effort to avoid unlawful restriction, the Court found that exemptions may validly apply to non-religious activity as well, thus giving religious entities an advantage outside of the religious context.[48]

B. Criticism of Permissive Accommodation and Its Prompt Limitations

As is often the case with constitutional decisions involving the interplay between the religion clauses, the decision in *Amos* and the doctrine of permissive accommodation have been heavily criticized by scholars as a poor solution to a difficult problem. Immediately following the *Amos* decision, critics argued that the Court had extended the doctrine of permissive accommodation far beyond its constitutional boundaries and, in doing so, had essentially rendered the Establishment Clause superfluous.[49] While the Court found that the exemption challenged in *Amos* did not have the primary effect of fostering religion, commentators questioned the validity of this finding, arguing that it allowed religious employers to "demand absolute religious obedience from secular employees."[50] Furthermore, the efforts of the concurrence to limit the holding to nonprofit organizations suggested a subtle distinction between more established religions and developing religious organizations.[51]

Criticism has not been confined to the specific holding of *Amos*, however, but has extended to form a constitutional argument against permissive accommodation in general.[52] This argument often centers around two basic premises. First, permissive accommodation places the power of constitutional interpretation almost entirely in the hands of the legislature. Since courts are unable to exercise discretion in interpreting the First Amendment, the power of the courts reaches only those instances in which the Establishment Clause prohibits state action. Thus, each of the other political branches may exercise unfettered discretion in choosing which religious activities to accommodate, as long as they do

48. The Court noted this extension of the doctrine and addressed the issue in different ways. The majority focused on the difficulty in defining which activities are religious and which are not. *Id.* at 336. Each of the concurrences emphasized that the holding was limited to non-profit activities and that "the constitutionality of [the exemption] as applied to for-profit activities of religious organizations remains open." *Id.* at 349 (O'Connor, J., concurring).

49. Crupi, *supra* note 26, at 464.

50. *Id.* at 468.

51. *Id.* at 469.

52. Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 779 (1992) (arguing that permissive accommodations should be forbidden).

not overstep the disappearing boundaries of the Establishment Clause.[53] Second, by placing this discretion entirely in the hands of the legislature, critics argue that permissive accommodation breeds discrimination. By definition, permissive accommodation allows the government to prefer religion over non-religion, which is arguably itself a threat to religious liberty.[54] More troubling, however, is the hidden effect of preference for dominant "traditional" religions over nontraditional minority religions.[55] When responsibility for making religious accommodation is placed solely on the shoulders of the legislature elected by majority vote, favoritism toward majority religions and well-known minority sects is inevitable.[56]

Soon after the expansion of the permissive accommodation doctrine in *Amos*, the Court retreated from its unanimity on the controversial issue. Just two years after the decision, the Court decided *Texas Monthly, Inc. v. Bullock*,[57] a fractured opinion that severely cut back on the breadth of permissible accommodation. In an apparent effort to limit the effect of *Amos*, the Court arguably ignored applicable precedent[58] in holding that a tax exemption for religious periodicals was unconstitutional because it effectively required secular magazines to directly subsidize religious organizations.[59] In this case, the Court attempted to limit the discriminatory effect of permissive accommodation by focusing not solely on the exempted activity, but also on the burdens imposed on nonreligious entities.[60] Thus, just when it appeared that the Court was moving toward an attitude of complete deference to legislated religious ac-

53. *Id.* at 753.

54. Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1017 (2001) ("Evenhandedness not only prevents the government from preferring one religion to another but also from preferring generally religion to nonreligion.").

55. *See* Lupu, *supra* note 52, at 776–78; *see also* Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1108–11 (1989) (discussing an implicit "constitutional grandfather clause" in religion clause jurisprudence).

56. Lupu, *supra* note 52, at 777 (noting that even where exemptions are granted to minority religions, the exemptions often do not apply to less influential sects).

57. 489 U.S. 1 (1989).

58. *See id.* at 35–38 (Scalia, J., dissenting) (arguing that *Walz* and *Amos* produced opposite results on identical facts); *see also id.* at 32–33 (pointing out that religious tax exemptions have permeated state and federal codes for years).

59. *Id.* at 15.

60. Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 884 (2002) (identifying three limits imposed by *Texas Monthly*: permissive accommodation "cannot favor particular sects, favor religious groups over nonreligious groups, or burden nonbeneficiaries").

commodations, *Texas Monthly* served as an indication that the Court was not nearly as unified as *Amos* may have suggested.

C. *Continued Retreat from Church-State Separation: Recent Examples of a Weakening Establishment Clause*

Despite the purported limitations on permissive accommodation and the efforts of some members of the Court to strengthen the Establishment Clause, two recent well-publicized decisions by the Supreme Court have demonstrated the Court's implicit approval of indirect state support for traditional religion. Although not presenting the fact pattern and reasoning of a permissive accommodation case, similar principles of religious favoritism presented themselves in both *Zelman v. Simmons-Harris*[61] and *Elk Grove Unified School District v. Newdow*.[62] At the outset, it must be noted that neither of these cases serves as an example of permissive accommodation. Rather, they represent additional contexts in which the Court has manifested its reluctance to find Establishment Clause violations and its deferential willingness to uphold state religious support, even as the permissive accommodation doctrine has been questioned.

In *Zelman*, the Court first weighed in on the growing controversy of school voucher programs, which allocate government funds directly to students at private schools for the theoretical purpose of improving statewide education. Challengers of the school voucher program in this case and others had won in lower courts on Establishment Clause grounds, based on the substantial aid that the programs provide to religious schools. Nevertheless, the majority in *Zelman* focused on past precedent to establish a "distinction between government programs that provide aid directly to religious schools . . . and programs . . . in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[63] As to the particular program at issue in the case, the Court found that despite the aid that would indirectly flow to religious teaching, the voucher program was sufficiently neutral with respect to religion that it did not have the effect of government endorsement.[64] Furthermore, in joining the majority, Justice O'Connor seemed to recognize the futility of attempts at pure

61. 536 U.S. 639 (2002).

62. 124 S.Ct. 2301 (2004).

63. *Zelman*, 536 U.S. at 649 (citations omitted). "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge . . . ." *Id.* at 652.

64. *Id.* at 655.

church-state separation in her argument that state support provided by the voucher program "pales in comparison to"[65] and "is neither substantial nor atypical of existing government programs."[66]

While the majority argued that its decision was the sole outcome that could be drawn from existing precedent, the dissent pointed out that such an outcome was clear only by "ignoring *Everson*" and "ignoring the meaning of neutrality."[67] The four dissenting justices argued that the voucher program had the obvious effect of benefiting religious schools and that it therefore worked not through personal choice but through unconstitutional direct aid.[68] In support of this argument, Justice Souter pointed out that parents chose private schools based on educational opportunity[69] and that "[f]or the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."[70] Unfortunately, the majority dispensed with these valid concerns, and the ultimate result of *Zelman* provides further support for the argument that, despite limitations on permissive accommodation, the Establishment Clause is still being severely weakened.

The Court's decision in *Elk Grove v. Newdow*, in which the Court faced a challenge to teacher-led recitation of the Pledge of Allegiance in public schools, differed from *Zelman* in two significant ways. First, unlike the split decision and passionate dissent that characterized *Zelman*, the justices in *Elk Grove* were unanimous as to the ultimate decision not to overturn the state practice on Establishment Clause grounds. Second, the unique facts of the case provided a way for many of the justices to avoid the issue and passively approve of the school district's policy without directly weighing in on the merits of the case. Because the majority in *Elk Grove* based its decision to reject the challenge on a standing doctrine separate from the religion clauses, the explicit holding of the case has little to do with the premise of this article. However, the implicit underlying position of the Court is reflected in its willingness to overturn the lower Court and reinstate the school policy. Thus, despite the arguments relied on by the majority, the ultimate outcome demonstrates a sense of judicial restraint and indirect support of arguably religious activities that underlies the doctrine of permissive accommodation as well.[71] Both *Elk Grove* and *Zelman* serve as evidence that even

65. *Id.* at 665 (O'Connor, J., concurring).
66. *Id.* at 668.
67. *Id.* at 688 (Souter, J., dissenting).
68. *Id.*
69. *Id.* at 704.
70. *Id.* at 707.
71. Although the Court's reliance on prudential standing doctrine poses some difficulties to this argument, this article argues that the Court's efforts to find a standing issue where one

though the Court has begun to frame its arguments in other terms, it is still trying to find some way around invalidating the entanglement of state and religion.

III. *LOCKE V. DAVEY*: THE EMERGING DOCTRINE OF PERMISSIVE DISCRIMINATION

For years, it appeared as if the Court's majority had chosen to resolve the conflict between the two religion clauses in favor of the Free Exercise Clause whenever the two clauses appeared to be in conflict. However, the recent case of *Locke v. Davey* indicates that this is no longer the case. In fact, it appears that the Court has begun to fashion a new doctrine of permissive discrimination that acts as the counterpart to the doctrine of permissive accommodation that had applied at the "play in the joints" for so long. Following this recent decision, the Court seems just as willing to disregard the liberty behind the Free Exercise Clause as it had previously been to ignore the values of the Establishment Clause. This section begins by examining the decision of *Locke v. Davey* and concludes with a discussion of that case as the origination of a doctrine of permissive discrimination.

A. Locke v. Davey*: The Holding and Dissent*

Unlike each of the cases previously discussed, the monumental decision of *Locke v. Davey* reached the Supreme Court not under a claim of unconstitutional state endorsement of religion, but rather as a claim of unconstitutional religious restriction under the Free Exercise Clause. The case involved a scholarship program offered by the State of Washington that provided financial assistance to academically gifted students pursuing a college education.[72] Under the program, each graduate of a Washington high school who satisfied certain academic, income and college enrollment requirements would automatically qualify to receive ap-

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was not clearly established demonstrates that perhaps it was not the standing doctrine that kept it from deciding the case, but rather its opinion on the merits. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 (2004) (Rehnquist, C.J., concurring) ("The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."). If the Court had in fact believed the practice to be unconstitutional, it could have produced that result simply by refusing to adopt a "novel" prudential limitation. It is significant to note that no justice argued that the plaintiff lacked constitutional standing under Article III of the Constitution. *See id.* at 2309–11 (repeatedly describing the refusal to intervene in domestic relations issues as "custom").

72. Locke v. Davey, 124 S. Ct. 1307, 1309 (2004).

proximately $1,500 per academic year to aid with education expenses.[73] However, an additional provision—the one at issue in the case—provided that the scholarship could not be used by any student at an institution in which the student was pursuing a degree in theology.[74] Thus, while the scholarship applied generally and routinely to fund studies at all postsecondary institutions in the state, including private religiously affiliated schools, the state singled out theology as the only course of study excluded from the program.[75]

The plaintiff in the case attended an eligible private college in the state and otherwise satisfied each of the requirements to receive the scholarship.[76] Nevertheless, the state refused to distribute scholarship funds to him upon learning that he would pursue a degree in devotional theology.[77] In response to this perceived unfairness, the plaintiff brought a number of claims, including a claim of religious discrimination that was eventually considered by the Supreme Court.[78] Essentially, the plaintiff alleged that the state scholarship program denied his free exercise of religion because he was forced to give up a public benefit in exchange for the opportunity to act on his religious beliefs.

Despite a finding of unconstitutionality by the Ninth Circuit[79] and precedent that made the student's case appear to be a "slam dunk,"[80] the Supreme Court held in a 7-2 decision that the claimed discrimination was constitutional in light of the nation's separationist tradition.[81] As in the permissive accommodation cases, the Court again cited the proposition that "there is room for play in the joints" between the two religion clauses and indicated that this was one of those cases where such play

73. *Id.* at 1310.
74. *Id.* at 1309.
75. *Id.* at 1310.
76. *Id.*
77. *Id.* at 1311.
78. *Id.* This article equates religious discrimination with prohibition on the free exercise of religion. Although it could be argued that religious discrimination is not necessarily a prohibition on religious exercise, this article argues that it is at least a prohibition on the believer's *free* exercise. Indeed, because discrimination requires religious believers to sacrifice the right to equal treatment as the cost of their religious beliefs, it cannot be said that religious devotion subject to discrimination is free. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . .").
79. Davey v. Locke, 299 F.3d 748, 760 (9th Cir. 2002).
80. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 173 (2004). "[I]f funding is permitted and discrimination is forbidden, it seemed to follow that a discriminatory refusal to fund is forbidden." *Id.* at 156.
81. Locke v. Davey, 124 S. Ct. 1307, 1313–14 (2004).

was necessary.[82] Furthermore, the Court confirmed that distribution of the funds to students pursuing a theology degree would not rise to the level of unconstitutional endorsement of religion.[83] Nevertheless, the majority found the alternative option of withholding scholarship funds to be constitutional as well because it presented only a minor obstruction to religion[84] and showed no hostility toward religion.[85] The Court thus held that while complete funding of religious education would be permitted under *Zelman* and *Witters*,[86] the denial of otherwise available funds could not qualify as impermissible discrimination.[87]

The dissent, consisting only of Justices Scalia and Thomas, rested its argument directly on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which held that a law that is facially discriminatory must be subject to strict scrutiny.[88] Justice Scalia contended that the scholarship was sufficiently generally available as to make it "the baseline against which burdens on religion are measured."[89] Thus, when the state excluded theology students from the distribution of this "generally available public benefit," the state was not constitutionally refusing special treatment based on religious practices, but rather unconstitutionally refusing equal treatment.[90] In making this argument, the dissent questioned the relevancy of traditional hostility toward state financial support of clergy because this hostility had always been toward special treatment, not mere inclusion in general public benefits.[91] In other words, the dissent characterized the majority's decision not as one espousing Establishment Clause freedom of conscience, but rather as one of court-sanctioned religious discrimination.

82. *Id.* at 1311.

83. *Id.* at 1311–12.

84. *Id.* at 1312 (noting that the statute does not place sanctions on any religious rite, deny ministers the right to participate in the political community, nor force students to choose between religious beliefs or government benefits).

85. *Id.* at 1314–15 (noting that the scholarship program actually includes religion in many of its benefits by allowing the scholarship funds to be used at religious schools, as long as they are accredited).

86. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

87. *Locke*, 124 S. Ct. at 1312.

88. 508 U.S. 520, 546 (1993).

89. *Locke*, 124 S. Ct. at 1316 (2004) (Scalia, J., dissenting).

90. *Id.*

91. *Id.* at 1316–17.

B. Permissive Discrimination: Comparison of the Reasoning of Locke v. Davey *to the Reasoning of Permissive Accommodation*

While the recognition of a "play in the joints" between the two religion clauses was by no means a novel concept in light of past religion clause jurisprudence, *Locke* marked a significant divergence from past decisions. Rather than the favoritism toward religion that had long characterized permissive accommodation, the ultimate holding of *Locke* appears to be the mirror image of that doctrine. Under permissive accommodation, even separationist judges could recognize the need for particular exemptions as a form of political tolerance and as a compromise necessary to sustain true individual liberty.[92] However, *Locke* was the first time a majority of the Court permitted the flexibility in the clauses to pull in the opposite direction. This emerging doctrine of "permissive discrimination" essentially states that in situations of overlap between the religion clauses, a legislature may choose to favor Establishment Clause concerns, even at the expense of facial discrimination against religious practices.[93]

The premise of this article and a discussion of the emerging doctrine of permissive discrimination rest on the assumption that the *Locke* Court did in fact authorize facial discrimination. Of course, a court in the United States, priding itself on cultural tolerance and individual freedom, would never admit to promoting a principle of government-sanctioned discrimination, but a closer look at *Locke* makes it clear that a combination of judicial restraint[94] and Establishment Clause concerns provided precisely this result. First, the statute at issue in the case was clearly discriminatory on its face,[95] as theology was the only course of study carved out for exclusion from the generally available scholarship. The-

92. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (explaining that if an activity is part of a religious practice, individual religious liberty requires that the religious organization have complete autonomy in performing that activity).

93. The characterization of permissive accommodation and permissive discrimination as mirror images will underlie the remainder of the article and therefore deserves additional explanation. Simply stated, permissive accommodation cases favor Free Exercise concerns and permit claimed violations of the Establishment Clause to avoid violating the Free Exercise Clause. On the other hand, permissive discrimination, as it is used in this article, favors Establishment Clause concerns and permits argued violations of the Free Exercise Clause to avoid violating the Establishment Clause.

94. *See infra* Part IV.B.

95. Laycock, *supra* note 80, at 171 ("There was no subtlety to the discrimination in the Washington State Promise Scholarships.").

ology, stipulated in the case to represent only devotional theology,[96] necessarily implicates religion and therefore the First Amendment, which distinguishes it from an exclusion based solely on disdain for a secular course of study.[97] Second, in cases of facial discrimination, past precedent was clear: "[The law] is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[98] Despite the seemingly clear-cut case, however, the Court rejected strict scrutiny and held that the refusal to fund the plaintiff's education did not constitute presumptive discrimination, simply because it was "of a far milder kind" than state practices that had previously been found unconstitutional.[99] In other words, seven members of the Court found that the facial discrimination at issue in the case did not violate the Constitution, simply because it was "not that bad."[100]

There are two ways to interpret the relaxed attitude toward religious discrimination exposed in the *Locke* decision. First, it is possible to interpret the Court's decision as a reflection of the nation's shift toward a more secular society and the resulting increased hostility toward religion.[101] Unlike permissive accommodation, permissive discrimination certainly favors the separationist tradition of *Everson* and disfavors religious practices and beliefs. Perhaps not since *Plessy v. Ferguson*[102] has the Supreme Court so willingly used the Constitution to permit discrimination against particular groups or beliefs, and the fact that this case involved the majority religion of Christianity could conceivably signal the Court's disapproval of religion in general. However, other recent cases, such as those discussed above, suggest that this is not the case.[103]

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96. Locke v. Davey, 124 S. Ct. 1307, 1310 (2004) (defining theology as a degree that is "devotional in nature or designed to induce religious faith").

97. "[T]he minimum requirement of neutrality is that a law not discriminate [against religion] on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

98. *Id.*

99. *Locke*, 124 S. Ct. at 1312.

100. It could be suggested that some members of the Court may have been influenced by underlying federalism themes because a state constitutional provision was at issue. However, even the strongest proponent of states' rights would agree that states have no right to violate the Federal Constitution. Thus, if the Court had found a Free Exercise violation, state sovereignty could have provided no independent justification.

101. *See, e.g.*, Andrew R. Cogar, Comment, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279 (2002).

102. 163 U.S. 537 (1896).

103. Both sides of the argument that recent religion clause jurisprudence reflects a hostility toward religion will be considered further in Part V below.

The second way to interpret the creation of the permissive discrimination doctrine is that it reflects not hostility toward religion, but rather a growing reluctance of the Court to forcefully decide on and enforce religious constitutional principles. In an era where some argue that the nation is disregarding many individual liberties, it appears that religious liberty may also be withering away. It is not that the Court is against religion, but rather that the Court is against getting involved on either side of the debate. This argument will be developed throughout the remainder of this article, but it is on this premise that the *Locke* decision and permissive discrimination can most closely be compared to permissive accommodation. Like permissive accommodation, permissive discrimination allows the states to act more broadly in "protecting" religious liberty than is required by the Constitution. Permissive accommodation allows the states to do more to accommodate religion than is actually required by the Free Exercise Clause;[104] permissive discrimination allows the states to withhold more aid to religion than is actually required by the Establishment Clause. However, permitting overbroad protection of one of the clauses inevitably increases the conflict in an area of the law in which distinguishing lines are already blurred. Thus, common to both doctrines is the reality that in strengthening one clause beyond what is constitutionally required, the Court allows limitations on the other beyond what is constitutionally permitted.

IV. THE JOINTS IN THE RELIGION CLAUSES HAVE "PLAYED" OUT

In the wake of the *Locke* decision, it appears that the incessant "play in the joints" of the religion clauses and the constant push and pull by members of the Court has finally caused these joints to wear out so that neither clause can serve its initial intended purpose. With the recent focus on the inherent tension between the clauses, it is often forgotten that both clauses rest on the common value of religious liberty. Thus, as the Court began chipping away at the Establishment Clause, it was simultaneously weakening the Free Exercise Clause by attacking its very foundation. In this most recent wave of religion clause cases, it appears that the Court, faced with centuries of conflicting precedent and contrasting constitutional principles, has finally thrown its hands in the air and given up, declaring that the religion clause tug-of-war has simply become more difficult than it is worth.

In the following sections, this article discusses the problems that have arisen in this new era of religion clause timidity and argues that

104. Locke v. Davey, 124 S. Ct. 1307, 1311 (2004).

with such a fundamental liberty as religion, the Court cannot afford to avoid the conflict. Part A establishes that the widespread defects in religion clause jurisprudence are in fact caused by the Court's avoidance of difficult issues, rather than any biased view for or against religion itself. The remaining sections note in more detail the results of such a position. Part B demonstrates that the Court's recent non-decisions reflect and continue to foster a sense of unnecessary and unjust judicial restraint and constitutional deference. Part C examines the way this emerging outlook has allowed religion to become a political battlefield with each side deciding based not on constitutional principles but on political ideologies. Finally, Part D suggests that the recent religion clause cases and the Court's passiveness have bred contradiction and uncertainty and have diminished judicial integrity.

A. Alarmist Response From Both Sides of the Fence

Unsurprisingly, the Court's timid reaction to the challenging problem has drawn extreme criticism from across the political spectrum. Separationist scholars responded first with cries that the principles of permissive accommodation have led to the death of separationism and excessive entanglement between church and state.[105] At the same time, similar criticism has come from the other side of the fence, as commentators argue that beginning with *Employment Division v. Smith* and continuing through *Locke*, it is in fact the Free Exercise Clause that has lost its power.[106] The following paragraphs will briefly consider the arguments on each side of this debate. However, the unfortunate reality is that both arguments are correct: the current state of the struggle between the clauses is that each clause has been permitted to swallow the other so that neither has survived with any significant power intact.

The first to respond with the alarming notion that religion clause jurisprudence was altering constitutional liberties were separationists who claimed that the decision in *Amos* and the growth of the permissive accommodation doctrine had killed the Establishment Clause. In this camp, scholars argue that the willingness of the Supreme Court to defer to state legislatures on the issue of religious accommodation has all but eliminated the wall of church-state separation.[107] In addition to the claim that accommodations provide special benefits to religious people, separationists assert that this treatment involves an implicit unconstitu-

105. *See, e.g.*, Lupu, *supra* note 41.

106. *See, e.g.*, Lupu, *supra* note 52, at 755–59; Cogar, *supra* note 101.

107. Lupu, *supra* note 41, at 256 ("[T]he signs of a near-fatal assault on the concept of church-state separation are unmistakable.").

tional value judgment that while religious conscience always justifies an exemption, secular conscience never can.[108] This argument, taken literally, ignores the underlying fact that the Constitution itself chooses to favor religious beliefs over secular beliefs through the Free Exercise Clause. However, there is significant support for the contention that a number of Supreme Court justices appear less than anxious to enforce the Establishment Clause, especially against Christianity.[109]

On the other side, many champions of free exercise rights have propounded a similarly dismal outlook for the deteriorating condition of the Free Exercise Clause. Since *Smith*, commentators have argued that developing American religion clause jurisprudence reflects a growing attack on religious belief and practice prevalent throughout society.[110] Rather than acting as a protector of this fundamental civil liberty, many argue that the Court has joined the onslaught, "wield[ing] the Establishment Clause as a 'sword' to exclude religious expression from publicly supported forums."[111] Unlike every other clause in the First Amendment, the Establishment Clause has been construed not as a protection of individual rights from society, but rather as a protection of society from the "unreasoned, aggressive, exclusionary, and divisive force" of religion.[112] Arguments that the Free Exercise Clause has been damaged beyond repair have only become stronger in light of the Court's groundbreaking decision in *Locke*. With the combination of the Court's endorsement of state-sponsored religious discrimination in *Locke* and the unwillingness to require religious exemptions in *Smith*, it has become difficult to imagine a Free Exercise Clause violation short of blatant religious hostility.

In many ways, each side of the religion clause debate is correct and on one major point, each side is wrong. On one hand, both the Establishment Clause and the Free Exercise Clause have been severely weakened, if not eliminated, by recent religion clause jurisprudence. Under the Establishment Clause as recently applied by the Supreme Court, a state may validly use public funds to pay for religious education[113] and

108. Malinovsky, *supra* note 31, at 1328; *Developments in the Law*, *supra* note 32, at 1715.

109. Titshaw, *supra* note 55, at 1086–87 ("[A] growing number of Supreme Court Justices share the American public's general antipathy to the first amendment establishment prohibition, asserting essentially that the United States is and always has been a Christian nation.").

110. Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 293–94 (1992) ("A watershed in official hostility or indifference to religion was reached" in *Employment Division v. Smith*.).

111. Cogar, *supra* note 101, at 294.

112. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

113. Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

encourage children to proudly declare on a daily basis that ours is a "nation under God"[114] without violating the Constitution. In other words, the Court has implied that financial assistance and early childhood indoctrination, two of the most powerful methods of religious preservation, do not constitute religious support. Furthermore, states remain free to selectively provide significant subsidies to religious institutions by way of tax exemptions and deductions.[115] Similarly, the Court has now adopted an equally narrow interpretation of the Free Exercise Clause to declare that a facial exclusion based solely on a religious practice does not in any way obstruct the free exercise of religion.[116] Where the Free Exercise Clause was originally intended to protect religion entirely, it has now been rendered powerless against even the most obvious governmental obstructions.

The recognition that both sides are correct in their assertions, however, carries with it the understanding that both sides are also fundamentally wrong in the underlying reason for the decline. The Establishment Clause has not disappeared because of the Court's settled conservative favoritism toward majority religion, nor has the Free Exercise Clause disappeared under a blanket of court-sponsored religious hostility. In fact, the weakening of the religion clauses has little to do with the Court's feelings toward religion itself and everything to do with the Court's passivity with respect to difficult (or even not so difficult) issues in religion clause jurisprudence as a whole. Only in an era of disappearing religion clause jurisprudence could the Court have nearly unanimously upheld a clear Free Exercise violation in *Locke* just months before declining to overturn a clear Establishment Clause violation in *Zelman*. Only in an era of disappearing religion clause jurisprudence could the Chief Justice argue vehemently that a state may require an af-

114. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). Although a majority of the Court in *Elk Grove* did not reach the constitutionality of the pledge of allegiance, three of the justices did in fact apply the Establishment Clause to reach a result that the pledge was constitutional. Since those were the only justices that reached the issue, it is assumed that application of the Establishment Clause by the other justices would likely have resulted in the same conclusion.

115. *See Zelman*, 536 U.S. at 665 (O'Connor, J., concurring) (listing various tax exemptions that apply solely to religious organizations). While the validity of these tax exemptions has been debated by commentators and has occasionally been addressed by the Supreme Court, this article does not directly address the constitutionality of these exemptions. Rather, they should serve as continuing examples, similar to school vouchers, of the prevalence of indirect state support for religious institutions. O'Connor uses the fact that "most of these tax policies are well-established" to support the majority holding in *Zelman*, but the mere fact that the Court has sanctioned these subsidies in the past should not alone serve as proof that no Establishment Clause violation has occurred in the present.

116. *See* Locke v. Davey, 124 S. Ct. 1307 (2004).

firmation that we are a nation under God and then allow a state to refuse a scholarship to someone who ultimately seeks to teach about that same God.[117]

B. Extreme Judicial Restraint and Unnecessary Constitutional Deference

In the current judicial landscape that honors the principles of both permissive accommodation and permissive discrimination, the first unfortunate side effect is a level of unprecedented judicial restraint on religion clause issues. Essentially, in any case that could at all be considered a "close case," the Court may now use an "established" constitutional framework to uphold the challenged law. If the challenge is one of religious discrimination, the Court may properly explain that such discrimination may be permitted;[118] if it is one of religious accommodation or benefits, the Court may similarly argue that such accommodations,[119] and even direct benefits,[120] are permitted as well. Rather than struggle to interpret the ambiguities of the Constitution, the Court has essentially used past precedent to make the Constitution irrelevant in these difficult cases. Unfortunately, it is these "hard cases" in which the Supreme Court and its protection of constitutional principles are the most necessary.[121]

Like any other area of the law, the direct counterpart to an increase in judicial restraint is an increase in the unchecked discretion of other branches. In the specific context of religion clause jurisprudence, this increased judicial deference now means that legislatures may freely choose whether to support a religious belief or harm a religious belief, neither of which should be constitutional and both of which inevitably are affected by the legislators' own belief systems.[122] For example, nearly twenty years before *Locke*, the Court considered a scholarship program similar to that in *Locke*, except that the program contained no theology exclusion and the scholarship was equally available to a student

117. *Compare Elk Grove*, 124 S. Ct. at 2312–20 (Rehnquist, J., concurring) *with Locke*, 124 S. Ct. 1307 (majority opinion written by Chief Justice Rehnquist).

118. *See* Locke v. Davey, 124 S. Ct. 1307 (2004).

119. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

120. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

121. *Id.* at 686 (Souter, J., dissenting) ("Constitutional limitations are placed on government to preserve constitutional values in hard cases . . . .").

122. *See infra* Part IV.C (discussing the fact that when legislators have discretion to choose, it is the majority religions they choose to support and the minority religions they choose to harm).

studying to become a pastor.[123] In rejecting an Establishment Clause challenge to the program, the Court emphasized three important facts, all of which would have applied to the program in *Locke* if not for the controversial exclusion: (1) the aid reached the religious institution only as a private choice of the recipient; (2) the aid was equally available for religious and secular education; and (3) no significant amount flowed to religious education.[124] By expressly acknowledging and affirming the holding in *Witters*,[125] the Court in *Locke* confirmed that it would continue to reject Establishment Clause challenges when aid is provided, while also rejecting Free Exercise Clause challenges when aid is withheld.[126] Thus, the ultimate result is that the Court has ordained the legislature with the sole power to decide which direction to take.

There is a legitimate argument that judicial deference should be considered a positive change rather than a negative one because it places the power back into the hands of the popularly elected legislature in an area where the law permits discretion. However, this argument is misapplied in the context of the religion clauses for two reasons. First, the extent of discretion in this area is not inherent in the law, but has been judicially created. Second, the potential for discrimination by the majority requires that the Court retain at least some of its constitutional obligation to serve as a check on the majority and a safeguard of individual liberty. While judicial restraint may have positive attributes, "judicial deference to all legislation that purports to facilitate the free exercise of religion [or the separation of state] would completely vitiate the [religion clauses]."[127] In other words, while government discretion is not always bad if exercised to a limited extent, extreme judicial restraint has begun to maximize this discretion beyond its beneficial degree, thus threatening religious liberty in the process.[128] Where the Court refuses to enforce

123. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986).

124. *Id.* at 488.

125. Locke v. Davey, 124 S. Ct. 1307, 1311–12 (2004) ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology.").

126. *See* Laycock, *supra* note 80, at 161 ("[The] new middle ground [of the Supreme Court] is to permit most funding but to require hardly any."). The combination of *Locke* and *Zelman* provides a similar example in which the Court was given the opportunity to decide when, and to what extent, states should or should not provide aid to religious education. Rather than making efforts to clarify the issue, however, the Court's practice of extreme judicial restraint allowed it to avoid the issue by holding that the Constitution permitted both the withholding of generally available funds, or the granting of funds available predominantly to religious institutions.

127. Wallace v. Jaffree, 472 U.S. 38, 82 (1985).

128. Laycock, *supra* note 80, at 161; *see also id.* at 195 (discussing the problems that will arise in the religion clause context as a result of unchecked governmental discretion).

either of the religion clauses, it is clear that the clauses will be unable to protect the individual liberty they were each designed to protect.

C. Religion as a Political Battlefield

In addition to increasing the discretion of other governmental branches, the deterioration of the religion clauses has increased the discretion of the Court itself to the extent that religion clause cases often become no more than a political stage. Left without workable tests, members of the Court typically find themselves with no more than their own ideology to fall back on, and cases often are decided with "conservative" justices on one side and "liberal" justices on the other. For example, Justices Scalia and Thomas, widely recognized as two of the most conservative justices on the Court, aligned with the views of religious believers in each of the recent cases discussed in this article.[129] On the other hand, Justices Stevens and Ginsburg, both on the liberal side of the political spectrum, came out against the religious believers in those same cases.[130] Furthermore, religion (at least Christianity) has become synonymous with conservative views, so that the majority of the Court often seems to vote "for or against religion instead of for or against religious liberty."[131] This concept may seem unremarkable in light of the fact that nearly every social issue in modern society is divided sharply along political lines; however, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[132] As the religion clauses are weakened and constitutional interpretation gives way to a "value judgment,"[133] selective application of the First Amendment becomes more justifiable and religion is more likely to emerge as simply another political issue.

While it is at least somewhat true that votes of the justices often align with their views on religion in general, it is important to note that this alignment tends to depend even more strongly on the character of the

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129. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Justices Scalia and Thomas each joining the majority opinion); Locke v. Davey, 124 S. Ct. 1307, 1316 (2004) (Scalia, J., dissenting); *id.* at 1320 (Thomas, J., dissenting); Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2327 (2004) (Thomas, J., concurring) (finding standing but finding no violation of the Establishment Clause).

130. *See Zelman*, 536 U.S. at 684–728 (Justice Stevens dissenting and joining dissenting opinions of Justices Souter and Breyer, and Justice Ginsberg joining dissenting opinion of Justice Souter); *Locke*, 124 S. Ct. 1307 (Justices Stevens and Ginsburg each joining the majority opinion).

131. Laycock, *supra* note 80, at 158.

132. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

133. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (discussing religion clause decisions as involving value judgments).

religious institution in question. With respect to Christianity, conservative justices tend to favor the Free Exercise Clause and freedom of the religious practice while the liberal justices tend to favor the Establishment Clause and strict separation.[134] This leads to the seemingly inverted outcome that the liberal view is one of discrimination against religion and reduction of civil liberties while the conservative view is one of equal protection. Of course, the weaknesses of this argument are that it typically applies only with respect to majority religions and that it uses a narrow definition of civil liberty that minimizes the other half of religious liberty completely. Nevertheless, it is interesting to note that, unlike every other civil liberty in which liberals have been at the forefront of non-discrimination, religious freedom, at least from the point of view of the religious institutions themselves, depends on protection by conservatives against the discriminatory efforts of the liberal movement. On the other hand, where the religious practice in question is one of a minority religion, votes on the Court will often reverse so that it is the liberals again returning to the fight against discrimination, even at the "expense" of favoring religion.[135]

On a larger scale, the predictable effect of religion transforming into a political issue is that certain groups tend to lose disproportionately more than other groups.[136] Thus, as the Court becomes less willing to enforce religion clause values, it becomes less likely that either clause will remain sufficient to protect minority groups. For example, in *Smith*, the Court effectively ignored existing precedent in its effort to find the use of peyote by a Native American religious group unprotected by the Free Exercise Clause, despite its religious significance.[137] Although the Court argued that required religious exemptions risk allowing an individual "to become a law unto himself" based solely on his beliefs,[138] it is difficult to imagine the Court taking such pains to brush aside religious conviction if it were Protestant Christian convictions that were threatened by the generally applicable law.

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134. *See, e.g.*, *Locke*, 124 S. Ct. 1307.

135. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (holding that the practice of a non-Christian religion through the sacrifice of animals constituted a valid free exercise challenge).

136. Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1218–19 (listing traditional "losers" as Mormons, conscientious objectors, Jehovah's Witnesses, and Black Muslims). *But see* Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005) (presenting statistical evidence that shows minority religions fare better in courts than traditional Christian faiths).

137. Employment Div. v. Smith, 494 U.S. 872 (1990).

138. *Id.* at 885.

Furthermore, the Court's decisions to defer to the judgment of states through permissive accommodation and permissive discrimination have served as a less explicit, but similarly powerful, adoption of these politically charged discretionary judgments.[139] In essence, where legislators are given the choice whether accommodation or discrimination is proper, it is highly likely that customary, majority practices will be treated much more favorably than unusual, minority practices.[140] By asserting an unwillingness to step into these situations, the Court grants its implicit approval and thus leaves religious protection to the political process, which is the very evil the framers sought to avoid.

D. Loss of Judicial Legitimacy

The combination of maximizing governmental discretion and transforming religion clause jurisprudence into a political debate has arguably initiated a decline in the judicial integrity of the Supreme Court. This reduction in legitimacy has manifested itself in two fundamental ways throughout recent religion clause cases. First, the difficulties presented by opposing theories of extreme deference have caused members of the Court to waver on their own individual views, creating case-by-case contradiction by individual judges. Second, the willingness of the Court to adjust standards based on a desired conclusion has created a sense of uncertainty in an area of the law where certainty is particularly important. Each of these problems derives from the fact that as the Court practices extreme judicial restraint but reserves the right to exercise political values at any time, religion clause jurisprudence has become an area of inconsistent, case-by-case, value-laden determinations.

The inconsistency of individual justices stems directly from the first two consequences of the disappearing religion clause jurisprudence. Both extreme judicial restraint and political considerations require members of the Court to periodically alter their arguments to arrive at the desired outcome. In a recent example, Chief Justice Rehnquist used a similar historical analysis in the last term both to support the nation's support and foundation of religion[141] and to support separation of church and state.[142] Although both principles do in fact have a historical foundation,

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139. *See* Gaffney, *supra* note 110, at 274–79 (discussing the level of hostility to Muslims in America and the fact that they "continue to experience lack of accommodation similar to that afforded to the members of other religious communities").

140. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 586 (1991).

141. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2317–19 (2004) (Rehnquist, J., concurring) (listing examples of "patriotic invocations of God").

142. Locke v. Davey, 124 S. Ct. 1307, 1313–14 (2004).

the inconsistency arises from the fact that in the first example, history was used to minimize the power of the Establishment Clause, while in the second it was used to maximize it. Similar inconsistencies have plagued members of the Court on both sides of the political spectrum with many of the justices choosing which religion clause to honor (and finding arguments to do so) based on the relation between their political perspective and the facts of the case.[143]

With members of the Court demonstrating difficulty in pinning down their individual predictive patterns of decision, it is unsurprising that religion clause jurisprudence as a whole has fallen prey to a pattern of uncertainty. One need look no further than the decision in *Locke* to see evidence of this ambiguity. The first evidence comes from the holding itself. As previously discussed, past precedent had made it relatively clear that scholarship funding in such a situation was permitted and that facial discrimination on the basis of religion was prohibited.[144] Nevertheless, despite this "certain" victory, the Court was able to stretch the weakening joints of the religion clauses in such a way to turn even certain victory into defeat. Thus, the fact that even a facially discriminatory statute can be found to be non-discriminatory demonstrates that there no longer remain any definite principles in religion clause jurisprudence.

Additional evidence of the religion clause uncertainty arises procedurally from the fact that *Locke* reached the Supreme Court on appeal from a decision of the Ninth Circuit striking down the law as facially discriminatory.[145] In an era in which religious favoritism has become a conservative value, a decision by the liberal Ninth Circuit that sided with religion would seem to be firm. However, the Supreme Court not only overruled the decision, but did so by a decisive margin that included Justice Kennedy and Chief Justice Rehnquist, two of the more conservative justices of the Court. This unusual chain of events further signaled that, with respect to religion clause jurisprudence, any certainty that may reside in the law has vanished along with the law itself.

CONCLUSION

There is no easy solution to the inherent tension between the Establishment Clause and the Free Exercise Clause, and it is likely that the interpretation of the First Amendment will continue to trouble the Court

143. *See* Laycock, *supra* note 80, at 174–75 (discussing inconsistencies on the Court involving claims of discriminatory funding); *see also* Part IV.C *supra* (discussing political battle between justices).

144. *See supra* note 80 and accompanying text.

145. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002).

well into the future. While this article does not pose a detailed solution to the tension the clauses provide, the Court may begin to solve the problem by limiting its consideration of each clause to the situations in which it applies. In the cases cited by this article, the Court has been far too willing to consider the values underlying one of the two religion clauses, even after previously explaining that the remedy sought would not violate that clause. Essentially, the Court often chooses to strengthen one clause beyond its constitutional requirement, at the expense of the rights that are actually at question in the case. For example, in *Locke*, the Court unequivocally declares that a state could constitutionally provide the scholarship for theology students,[146] but nevertheless continues to use Establishment Clause concerns as a justification for the exclusion.[147]

Where a particular right has no constitutional counterpart, it makes sense for the Court to consider the furthering of the values underlying that right as a valid state interest, even where such furthering is not required. In the religion clause context, however, the Court must recognize that unnecessarily considering these values allows the Court to uphold a state action that has no other justification. While efforts to avoid a constitutional violation may validate an otherwise unconstitutional action, the opposing clause should not be used in this manner where the avoided state action would cause no constitutional problems. Thus, once the Court finds that the opposing religion clause poses no problem, it should no longer consider that clause and should decide the case based solely on the clause under which the action is brought. In other words, the Court should not create tension where none would otherwise exist.

More than proposing a solution, however, this article aims simply to draw attention to the fact that the current course of passiveness taken by the Supreme Court is the wrong direction and will continue to chip away at religious liberty if the Court does not reverse its path. The basic suggestion of this article is that the Court must again step up to the challenge the religion clauses present and begin enforcing violations when they occur. If the Court continues to allow "permissive" violations, either of the Establishment Clause or the Free Exercise Clause, simply because there is no easy solution, no barriers will remain to protect religious liberty when legislatures exceed their permission.

146. Locke v. Davey, 124 S. Ct. 1307, 1311–12 (2004).

147. *See id.* at 1313–14 (discussing Establishment Clause concerns as a historical justification for excluding members of the clergy from receiving tax funds).