Faith and the Law:

The Extent of Religious Freedom in Modern America

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Abstract

Since the passage of the Bill of Rights, religious liberty has been understood as one of the most important rights guaranteed by every American. However, like most rights, it is not absolute, with religious practice often clashing with the interests of the state, employers, and communities. As such, what that right to free religion looks like has changed through time, begging the questions of why and how. This paper examines the changing legal status of religion mainly by examining Supreme Court cases beginning in 1879 while paying particular attention to the shifting balance between separationist and accommodationist readings of the First Amendment. In addition, the history of American religious life will be examined, as well as the more broad theoretical problems with defining the religion. This paper will be divided into four sections. The first will unpack the history of American religion from colonization until *Reynolds v. United States*, examining how the dominance of Protestant beliefs and values shaped political life. The second will deal with Supreme Court cases between 1940 and 1971, unpacking how the judiciary dealt with the extension of the First Amendment to the states. The third will examine the status of those religious liberties from 1971 until today, regarding the complicated judicial status of the First Amendment following *Lemon v. Kurtzman* and the prominent role of religion in political life. Finally, the fourth will explore three key areas of contention in our understanding of American religious freedom today: education, workplace, and public sphere protections.

Keywords: *Supreme Court, Constitution, First Amendment, Religious Freedom, Accommodationism, Separationism*

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1. A Brief Religious History of America Through 1940

The story of the founding of America traditionally begins with a tale of the first pilgrims on the shores of New England in 1620. Finally unshackled from decades of religious persecution, these new Americans would kick off a centuries-long experiment in freedom. No longer would they have to worship under the orthodoxy of a state-prescribed church or follow the laws of a tyrannical King.

Like most founding myths, this story is reductive. Laws surrounding religious freedom are, and always have been, a complicated balancing act. This is not simply because voters, legislators, and judges have sought to instill religious values in the law but because of the nature of religious freedom itself.

Religious liberty is typically understood as the *principled protection of private religious beliefs and practices*. The right to private belief has been, for the most part, uniformly respected by American federal law. The right to practice has remained more complicated.

Perfect protection of the right to practice is impossible. For one, in diverse communities, religious practices are incompatible. For instance, imagine a faith for whom proselytization on street corners was a key tenant of their religious practice. Imagine members of this faith group living in a small town with members of another tradition, who instead believed they were divinely commanded to never listen to idolatrous messages, even accidentally. In this town, there is no possible arrangement that a government could arrange that would not in some way impede a group's freedom to practice.

These kinds of situations occur everywhere. Far less explicitly, they often occur in decisions that feel far less public than street proselytization. The construction of a community's education policy will impede a faith group's right to practice if one group requires thirteen years of schooling while another requires dropping out young. Religious beliefs often conflict with secular goals, like promoting public health or environmental preservation.

Because of this, from the beginning, this paper accepts that the total right to practice is not a right that ever has, or ever could, exist in America. Notably, the state of religious toleration should be assessed on the metric of to what extent the practice rights of certain groups are being prioritized against each other or government secular goals.

This first section will deal with the evolution of the role of religion in American political life until 1940. While not extensive, it will likely explain the changing dynamics of a country where religion was a powerful force, wielded often by a somewhat homogenous community. Essential to this is an understanding of secularism. Barbara McGraw argued, "The idea that society is divided into two spheres, one public and one private, with religion delegated to the private sphere where it is in effect hidden, is a wholly erroneous way to think about the participation of religion in the lives of the people."[1] People's political and religious lives are often indivisible. While it may be difficult to quantify how religion impacted a person's vote or how a religious group's advocacy changed a Senator's mind, it is impossible to entirely disregard an individual's religious life from their political thinking.

This is particularly important in the founding era. At that time, there existed very few alternatives to Protestant Christianity. For instance, arguing that the Founders' ideas of natural liberty were not at least somewhat influenced by *Biblical Christian liberty* seems unlikely. The Founders generally agreed that *Divine Law* lay at the foundations of civil law and was supreme over all other legal principles, but specifically, that *American common law*, "based on its British roots, recognized and incorporated express Christian norms."[2] The United Kingdom, which legally established the Church of England, heavily drew from Christian scripture when constructing its legal system. Historian John Witte Jr., in his book *The Blessings of Liberty*, drew a line from Christian theology to much of the Enlightenment thinking that would inspire the drive toward independence. Drawing from ancient philosophers and the Biblical conception of equality of men, the Founders believed that every person "was created equal in virtue and dignity and vested with inherent and unalienable rights of life, liberty, and property."[3]

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[1] Barbara A McGraw, "Introduction: Church and State in Context," in *Church-State Issues in America Today*, ed. Ann W. Duncan and Steven L. Jones (Westport: Praeger, 2007), 27.

[2] Steven K Green, *Inventing a Christian America: The Myth of the Religious Founding* (Oxford: Oxford University Press, 2015), 83.

[3] John Witte Jr, *The Blessings of Liberty* (Cambridge: Cambridge University Press, 2021), 14-44.

"The idea that society is divided into two spheres, one public and one private, with religion delegated to the private sphere where it is in effect hidden, is a wholly erroneous way to think about the participation of religion in the lives of the people."

Much ink has been spilled by academics trying to discern whether this Christian influence was intentional or essential or if it is in some way overshadowed by a broader, much more secular intention. Separating one from one's religious identity is impossible. When religion was central to identity, and there was limited diversity, it seems impossible to think that, even if unintentional, the Founders were not fundamentally influenced by Christian scripture. While this religiosity cannot be said to be the only influence, or that there was no diversity in the type of manifestation of that religious influence, insofar as the notions of liberty in the Constitution are incompatible with certain other religious and cultural notions of freedom, it holds that those religious principles are fundamentally privileged in American life.

This is only present in the Constitution. Democracy means it can be impossible to separate the religiosity of the people and the laws they produce. Religious people, or those influenced by religious thought, can and do vote based on the morality ascribed by their chosen faith. Notably, "because the moral establishment was not just an expression of religious politics and not exclusively confined to civil society, it cannot be reduced to moral suasion, or the appeal of private citizens to their fellows to do what is right."[4] This means that regardless of one's interpretation of the Establishment Clause, it is possible for laws that are religiously inspired but not explicitly religious to be passed.

"When religion was central to identity, and there was limited diversity, it seems impossible to think that, even if unintentional, the Founders were not fundamentally influenced by Christian scripture."

[4] David Sehat, *The Myth of American Religious Freedom* (Oxford: Oxford University Press, 2015), 286.

1.1 Religion and the Founding of America

Despite escaping religious persecution in the early 17th century, Puritans typically established strict, religious communities where religious freedom was non-existent. Their residents often understood these colonies as places where people could fully practice a perfect model of Christianity, acting as a beacon to the rest of the world. This idea, most famously espoused by John Winthrop in 1630, liked the Massachusetts Bay colony as *"a city on a hill"*[5] that other believers could look towards. However, as more people flocked to the continent, individual colonies adopted different policies regarding the status of religious minorities. New York, mainly for commerce, allowed relatively free practice of religion, while Massachusetts continued to mandate an official state church. Its Constitution placed religion at the center of life, reading, "As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality; as these cannot be generally diffused through a community but by the institution of the public worship of God and public instruction in piety, religion, and morality."[6] Conversely, the Constitution of New York read that the state must, "guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind."[7] This is about religious figures in politics. Importantly, this essentially replicated the status of religion in Europe at the time, where, following the Thirty Years War's destruction, some states became more open.

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[5] John Winthrop, "A Model of Christian Charity," in *A Library of American Literature: Early Colonial Literature, 1607-1675*, ed. Edmund Clarence Stedman and Ellen Mackay Hutchinson (New York: 1892), 304-307.

[6] John Adams, "Colonial Declaration of Rights: Massachusetts," in *The Separation of Church and State*, ed. Forrest Church (Boston: Beacon Press, 2011), 30-36.

[7] Paul Finkleman, "The Roots of Religious Freedom in Early America: Religious Toleration and Religious Diversity in New Netherland and Colonial New York," *Nanzan Review of American Studies* 34 (2012), 1-26.

This immense diversity in views on religious freedom continued into the founding era. This was reflected in the text of the First Amendment. Like most of the Bill of Rights, the text was written and rewritten, ping-ponging through Congress until it was ratified in 1791. The first draft of the Amendment reads, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[8]

"The final text of the First Amendment, which also included speech provisions, the press, and protest, seemingly allowed for more state discretion about protecting religion.

Debates about the Amendment included contention over the extent to which states could establish their religions and the extent to which practice, rather than belief, was protected. The final text of the First Amendment, which also included speech provisions, the press, and protest, seemingly allowed for more state discretion about protecting religion. The ultimate version read, "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"[9]

Ultimately, the text of the First Amendment is largely thought to reflect an uneasy alliance between those who wanted the church not to influence politics and those who wanted politics to play no role in the church. The wording is vague to allow groups from both camps to agree to the bill. This is reflected in the diaries and letters of those who passed the Amendment with competing visions, for instance, the tradeoff between creating a truly secular set of federal laws and providing accommodations to religious people. In 1772, Samuel Adams argued, "It is now generally agreed among Christians that this spirit of toleration, in the fullest extent consistent with the being of civil society, is the chief characteristic mark of the church."[10]

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[8] Carl H Esback, "The First Federal Congress and the Formation of the Establishment Clause of the First Amendment," in *No Establishment of Religion*, ed. T Jeremy Gunn and John Witte Jr (Oxford: Oxford University Press, 2012), 214.

[9] U.S. Const. amend I.

[10] Samuel Adams, "The Rights of Colonists," in *The Separation of Church and State*, ed. Forrest Church (Boston: Beacon Press, 2011), 13.

Other founders, like John Adams, saw a uniform understanding of religion and morality as necessary for the functioning of the state. Importantly, without a uniform understanding of the Amendment, even among those who wrote it, the interpretation of it has continued to be contentious among legal scholars. While the Amendment has shifted readings through time, two critical things remain constant. First, there has been no official establishment of a national church and no active persecution based on thought. President Washington wrote in a letter to a Jewish community in 1790, "For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens."[11] Notably, while policies regarding practice and state-level enforcement have shifted through time, these two have not.

"...without a uniform understanding of the *[First]* Amendment, even among those who wrote it, the interpretation of it has continued to be contentious among legal scholars.

1.2 The Second Great Awakening

Many feared after the passage of the Bill of Rights that the lack of a national church would lead to a mass rejection of religion. This was not the case. Lyman Beecher, a prominent opponent of the disestablishment of the church, wrote later in his life that the disestablishment of the Connecticut church was "the best thing that ever happened to the State of Connecticut."[12] This was as the clergy, now empowered to act independently, became more zealous and active in their works. This enthusiastic turn to the church would come to be known as the Second Great Awakening. The Second Great Awakening was preceded by the First Great Awakening, a comparatively shorter-lived revival movement in the colonies from around 1733-1745.

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[11] George Washington, "Letters on Religious Laws," in *The Separation of Church and State*, ed. Forrest Church (Boston: Beacon Press, 2011), 110.

[12] Lyman Beecher (1775-1863), "American Eras", *Encylopaedia.com*.

“This enthusiastic turn to the church would come to be known as the Second Great Awakening...,*[which]* was preceded by the First Great Awakening, a comparatively shorter-lived revival movement in the colonies from around 1733-1745.”

The movement began with Puritan Jonathon Edwards, who, from his church in Northampton, became famous for his ability to inspire passionate religiosity in his young people. Moving out of his church, he then began staging revivals across Connecticut. He would inspire George Whitefield, the most successful preacher of the time, who staged countless revivals throughout the colonies.[13] Whitefield and pastors like him moved up and down the thirteen colonies, staging dramatic revivals for people of all denominations. Revivals featured screaming, dramatic movement, and intense highs and lows of emotion.[14] However, the movement burned out quickly. While some historians credit the revivals for linking the colonies and creating a sense of unique social identity that would set the stage for the Revolution, they did not significantly impact how religion in America was practiced. The Second Great Awakening occurred half a century later, from around 1795 to 1835. During the early 1790s, it is estimated that only around 10% of Americans were regular churchgoers.[15] Some blamed this on the influence of so-called “*French atheism*,”[16] others on the country’s demographic makeup - primarily people that were otherwise rejected by society in the old world. Sociologist Rodney Stark argued that this lack of church-going meant “most people walking around had some nebulous notion of God even though they had never been in a church and were just vaguely Christian.”[17] It was a country that was very much still Protestant but not devout.

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[13] Robert D Rossel, “The Great Awakening: A Historical Analysis,” *American Journal of Sociology* 75, no. 6 (May 1970), 907-925.

[14] Gary Wills, *Head and Heart: American Christianities*, (New York: Penguin Press, 2007), 100-121.

[15] Constitutional Rights Foundation, “The Second Great Awakening and Reform in the 19th Century,” in *Bill of Rights in Action,* Religion and Society, Winter 2017 (32:2).

[16] Richard D Birdsall, “The Second Great Awakening and the New England Social Order,” *Church History* 39, no. 3 (September 1970), 345-364.

[17] Ricard Morin, “The Way we Weren’t: Religion in Colonial America,” *Washington Post*, November 26, 1995.

Without any law forcing people to attend church, congregations made a massive effort to get people into churches to ensure their survival. Religious collectives like The American Bible Society emerged to give every person a copy of the Bible for free.[18] Revivals again sprung up across the country, dotted across small towns and big cities. The center of these movements were thirty-two counties in Western New York, now called the burned-over district.[19] These places were known for how revivals would sweep through town, converting most to a new faith, thus radically changing town life, infrastructure, and culture, until a new revival movement soon after would do the same. This created the sense of being burned over as churches were abandoned and religious spirits were burning hot.

...this lack of church-going meant *"most people walking around had some nebulous notion of God even though they had never been in a church and were just vaguely Christian."*

While American collective memory of the Second Great Awakening is often found in these dramatic ideas of revivals, speaking in tongues, and the white-hot fervor of everyday small-town Americans, the long-term impacts on American religious culture are far more subtle. Sunday schools began popping up nationwide, and religion became heavily integrated into universities. Religious education became ingrained in the lives of most Americans. Attempts to secularize these schools were blocked. In 1816, the State of New Hampshire attempted to take over one of these religious schools, Dartmouth College, and remove the school's religious focus. The school opposed the takeover, and the case made it to the Supreme Court in *Trustees of Dartmouth College v. Woodward* (1819). Chief Justice John Marshall argued that the state had violated Dartmouth's charter. He established that states could not control private entities without a law saying they could and, resultantly, private religious institutions could not be secularized without the consent of their boards.[20] Importantly, this allowed religious communities to continue operating institutions that became very popular.

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[18] Edwin Gaustad and Leigh Schmidt, *The Religious History of America* (San Francisco: HarperOne, 2004), 139-161.

[19] Linda K Pritchard, "The Burned-over District Reconsidered: A Portent of Evolving Religious Pluralism in the United States," *Social Science History* 8, no. 3 (Summer 1984), 243-265.

[20] John R Vile, "Dartmouth College v. Woodward (1819)", *Free Speech Center*.

"While American collective memory of the Second Great Awakening is often found in these dramatic ideas of revivals, speaking in tongues, and the white-hot fervor of everyday small-town Americans, the long-term impacts on American religious culture are far more subtle."

New sects also emerged. Some of these, like the Shakers, were popular during the period but fizzled out quickly, but others endured. Mormonism emerged in the burned-over districts of New York in the 1820s after Joseph Smith was said to have gone to the woods, where he received a message from God, leading him to supposedly discover scripture left in the Americas from Jesus' time there.[21] Many pastors did not bring new sects but popularized existing charismatic Protestant groups. These pastors cratered the numbers of people who professed to be Calvinists, bringing American religion away from the vision of Puritanism that inspired the first pilgrims. These new denominations created a new sense of American religion, untethered from the old European churches. While it is difficult to quantify the increase in church attendance precisely, it is broadly agreed that these new churches inspired a significant upswing in the devoutness of the average American.

1.3 Religion as the Basis of Social Change

Journalist and diplomat John L. O'Sullivan coined the term *manifest destiny* in 1845 in an essay supporting the annexation of Texas.[22] The essay, titled Annexation, claimed that America was obligated to "overspread the continent allotted by Providence for the free development of our yearly multiplying millions."[23] God, to O'Sullivan, had promised America the lands of Texas, creating a divine obligation to follow His will through annexation.

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[21] David Brion Davies, "The New England Origins of Mormonism," *The New England Quarterly* 26, no. 2 (June 1953),147-168.

[22] John O'Sullivan, "Annexation," *United States Magazine and Democratic Review* 17, no. 1 (July-August 1845), 5-10.

[23] Ibid.

According to O'Sullivan, Adam Gomez wrote, "The United States is depicted as a direct agent of God's will on Earth."[24] He argued that this attitude was certainly not universal but widespread. It was also thinking that tied democracy directly to religiosity, where faith was a prerequisite to full citizenship. Specifically, Gomez argues that O'Sullivan excluded "African slaves, Native Americans, and Mexicans"[25] from American identity. Thus, claiming land from these groups was, as they did not have a right to it.

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The Second Great Awakening created a new group of Evangelicals who "brought with them a determination to reform society."[26] Evangelicals came from a uniquely democratic tradition emphasizing personal choice and responsibility over their faith. Charles Finney, seen by most as the most influential preacher of this era, claimed that "neglecting the church and neglecting your Bible"[27] doomed a soul to hell. This re-emphasis on choosing one's eternal destiny translated partially to political action as Evangelicals became more entrenched in American politics. Thus, through the 19th and 20th centuries, American politics can, in part, be seen as the interplay of different religious factions who fought for their idea of a heavenly world under their perceived Godly mandate. While these religious groups were interested in broad swathes of political issues, this section will deal with two issues where Evangelical Christians were most influential: Westward expansion and the fighting over slavery leading up to the Civil War.

This belief in manifest destiny, understood as the divine right of White Americans over the land, also influenced the nature of this expansion outwards. Matthew Baigel, in his study of art about Westward expansion, noted a uniform depiction of White Settlers as innocent, gentle victims.

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[24] Adam Gomez, "Deus Vult: John L. O'Sullivan, Manifest Destiny, and American Democratic Messianism," *American Political Thought* 1, no. 2 (September 2012), 236-262.

[25] Ibid.

[26] Frank Lambert, *Religion in American Politics* (Princeton: Princeton University Press, 2008), 41-73.

[27] Charles G Finney, *Sermons on Various Subjects* (Paris: Ulan Press, 2012).

At the same time, Native Americans were shown as aggressive and warlike.[28] The nature of the colonists, as ordained by God, meant to them that every action was justified, while all actions by those opposing Westward expansion were inherently against God and thus more brutal. However, beyond attempting to claim the land for God, the colonists also sought to claim the people whose land they took for God. Understanding of the dynamics of Native American religion by European settlers varied. Despite the Native tribes having what we today would call religion, with theological and cultural practices that had deep historical roots, White Americans broadly understood them as either being godless or as devil worshippers.[29] Notably, partly because they failed to recognize these traditions as religious, the government refused to extend religious freedom to these communities. Conversions with these settlers became important. The Baptism of Pocahontas by John Gadsby Chapman was painted in 1840 and depicts a young Pocahontas, the daughter of Algonquian Chief Powhatan, being baptized as an Anglican in Jamestown in 1613 or 1614.[30] Painted more than two decades after the event and later hung in the Capitol rotunda, the painting reflects the cultural obsession with the conversion of Native Americans at the time.

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In part, this would create a century-long policy of "assimilation," where Native Americans were systematically stripped from their culture, religion, and communities. This can be seen in the boarding schools that appeared across the country, where children were kidnapped from their homes and taught white Christian values.[31] Religion was also used to justify the subjugation of adult Native Americans.

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[28] Matthew Baigell, "Territory, Race, Religion: Images of Manifest Destiny," *Smithsonian Studies in American Art* 4, no. 3-4 (Summer - Autumn 1990), 2-21.

[29] "First Encounters: Native Americans and Christians," *Harvard Pluralism Project*.

[30] John Gadsby Chapman, *Baptism of Pocahontas*, 1840.

[31] Rebecca Peterson, "The Impact of Historical Boarding Schools on Native American Families and Parenting Roles," *The McNair Scholars Journal*, (2012).

President Andrew Jackson, in his speech to Congress on the Indian Removal Act, argued that the moving of Native tribes off their land and onto Reservations, where with less land and with more government oversight, would allow them "to cast off their savage habits and become an interesting, civilized, and Christian community."[32] Through all this, it can be seen that part of the moral foundation for Westward expansion, as well as the treatment of Native Americans during that process, was motivated by a desire to spread and affirm Evangelical Christianity. The Westward expansion created a new problem the church intervened on: the question of slavery in the new states. The end of the Transatlantic slave trade in 1808 meant slavery became fully indigenized. Abolitionism was present across American history and long preceded independence. The first organized abolition societies in the continent can be traced to 1775, when a group of Quakers founded the Pennsylvania Abolition Society (PAS).[33] However, the importance of the debates over slavery grew in the early 19th century, particularly after the admission of Missouri to the Union. With abolition popular in the North, southern states feared that the admission of more free states to the Union would create a balance of power, resulting in the national outlawing of slavery.

In contrast, states in the North feared the admission of slave states would expand a practice they considered morally repugnant. The Missouri Compromise, passed in 1820, tried to balance both of these interests by dividing the state down the 36th parallel,[34] allowing the state to be part free, part enslaved person. As more states were added and animosity grew, these agreements became untenable.

Religion was influential in the abolition movement in three critical ways:

1. There was a robust religious fight against slavery amongst white Americans in the North,
2. There were similarly powerful pro-slavery religious movements in the South, and
3. Black religious traditions became a tool of enslaved Black people and abolitionists resisting slavery.

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[32] Andrew Jackson, "Speech to Congress on Indian Removal", *National Archives*, (speech, Washington, DC, December 6, 1830).

[33] J. R. Oldfield, *Transatlantic Abolitionism in the Age of Revolution* (Cambridge: Cambridge University Press, 2013), 11-101.

[34] U.S. Congress. *Statutes at Large*, Volume 3, 13th-17th Congress (1815-1825). United States.

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White abolitionists and slavers equally brandished Biblical teachings in support of a decrying of slavery. Angelina Grimke, an abolitionist, pointed to the story of Genesis, where Adam is not granted dominion over his fellow man, and argues that the servitude system present in the Bible has no likeness to the system of American slavery, where enslaved people have no individual rights. Thus, Grimke argues that the dehumanization of enslaved people was a subversion of the natural order and thus against Godly design.[35] In her famous work Appeal to the Christian Women of the South, she pointed to *Psalm 8*, in which God told Adam everything he had dominion over on earth. Other people were not one of them. While she accepts that there was a system of slavery present in the Bible, she argues it was one where the "servants" were protected from "violence, injustice, and wrong."[36] It was a system with far more stringent protections for the enslaved people, where people often opted in and where the time in which people were held in bondage was only six years. Importantly to Grimke, those who held enslaved people in the South were not doing so with any care towards those they kept in bondage. She argued that if the institution was one that slaveholders would never wish to place their children into, it violated the "Golden Rule" and, in turn, Biblical standards of decency.

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[35] Angelina Grimke, "Angelina Grimke Uses the Bible to Justify Abolishing Slavery, 1838," in *Major Problems in American Religious History*, ed. Patrick Allitt (Belmont: Wadsworth, 2013), 178-181.

[36] Angelina Grimke, *Appeal to Christian Women of the South* (New York: American Anti-Slavery Society, 1836).

Enslavers like Thomas Stringfellow also pointed to Biblical passages about how to care for enslaved people. In his work *A Brief Examination of Scripture Testimony on the Institution of Slavery*, he wrote that if slavery were to be sinful, regardless of any secondary economic or social concerns, those who practice it ought to stop and repent. However, he argued, the Bible allowed for the practice. Stringfellow first pointed to Genesis XII, where Abraham is said to own "men-servants and maid-servants."[37] God also is shown giving a servant to Abraham and Sarah. He argued that these servants were never shown consenting to their servitude. Instead, they existed almost exactly like enslaved people did at the time in America. Stringfellow pointed to letters from Paul, writing about the proper way to treat a runaway enslaved person and the appropriate response to enslaved people who steal from their masters. Having slavery as something codified in the law approved by God meant to Stringfellow that God surely did not object to the practice. At the same time, he argued that slavery was made moral because slaveholders strictly engaged in converting their enslaved people to Christianity, which in turn was thought to save those enslaved people's souls.[38]

The extent to which these religious arguments convinced white Americans to support or reject slavery is impossible to know. While the basis of the support of slavery was, for most, rooted in economic advantage and racism, invoking the Bible allowed people to shield themselves from compelling moral attacks, which likely stopped some from thoroughly questioning the enterprise. However, one critical way these attacks changed religious life was splitting all three of the most prominent Protestant denominations at the time among geographic lines.

"While the basis of the support of slavery was, for most, rooted in economic advantage and racism, invoking the Bible allowed people to shield themselves from compelling moral attacks, which likely stopped some from thoroughly questioning the enterprise."

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[37] Thornton Stringfellow, "A Brief Examination of Scripture Testimony on the Institution of Slavery, in an Essay," in *Documenting the American South* (Chapel Hill: University of Chapel Hill, 2000).

[38] Thornton Stringfellow, "Thornton Stringfellow Argues That the Bible Is Proslavery, 1860," in *Major Problems in American Religious History*, edited by Patrick Allitt (Belmont: Wadsworth, 2013), 183-185.

At the same time, enslaved people developed their interpretations of Christian doctrine. This so-called "invisible institution" spread through much of the enslaved population in the country. White slaveholders attempted to indoctrinate enslaved people into understanding scripture by telling them to silently and unquestioningly obey the violence of their masters.

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Thinkers pointed out the tension between the institution of slavery and the Bible, helping to undermine these messages. In a biography written by an enslaved person called Aaron, he drew parallels between the stories of the Israelites, whom the Pharaoh and enslaved people in America subjugated.[39] At the same time, religion often inspired those who wanted to try to escape or revolt against their enslavers. Thomas Lewis Johnson cited his faith as inspiring his two attempts to escape,[40] while Nat Turner wrote that his belief in God partly inspired the slave revolt he executed.[41] While enslavers attempted to use religion to pacify those they subjugated, many used it as fuel to fight against the institution.

1.4 Rapid Pluralisation

Throughout history, the United States has received significant inflows of immigrants worldwide. One of the most critical periods of this immigration was from around 1845 to 1920, encompassing several mass migration events, including the Irish Potato Famine, the California Gold Rush, and the industrialization of much of the US industry. The end of this period corresponds to the passage of the 1924 Johnson-Reed Act. The law sought to restrict the percentage of immigrants per year from any country to two percent of their total nationality within the US while excluding Asian migrants.[42]

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[39] Aaron, "The Light and Truth of Slavery. Aaron's History," in *Documenting the American South* (Chapel Hill: University of Chapel Hill, 2000).

[40] Thomas L Johnson, "Twenty-Eight Years a Slave, or the Story of My Life in Three Continents," in *Documenting the American South* (Chapel Hill: University of Chapel Hill, 2000).

[41] Nat Turner, *The Confessions of Nat Turner, the Leader of the Late Insurrection in Southampton, Virginia* (Chapel Hill: University of North Carolina Press, 2011).

[42] Immigration Act of 1924, Public Law 68-139, US Statutes at Large 43 (1924), 153.

By 1920, roughly 14 million immigrants lived in the US, making up approximately 13.2% of the total population. According to data from the Migration Policy Institute, this proportion of immigrants peaked in 1890 at 14.8%, higher than any period before 1850.[43] This migration period was unique for its scale and the demography of who chose to come to the Americas. Historian Mark Grandquist wrote that American migration before this period was dominated by British and similarly Protestant people, who would be able to assimilate to distinctively American Protestant traditions quickly.

"...American migration before this period was dominated by British and similarly Protestant people, who would be able to assimilate to distinctively American Protestant traditions quickly."

There was not much diversity in the religious identity of the migrants. Comparatively, the waves of migration in the nineteenth and early twentieth centuries mainly brought Catholic, Orthodox, and Jewish populations to the United States, along with small amounts of continental European Protestant sects, like Lutherans and Reformed groups.[44] Migrants came from across Europe, from Britain to the Balkans, and small populations from Asia and Africa. In 1789, the Catholic population of the country stood at just 35,000, which grew to 1.7 million by 1850 due to rising immigration in the 1830s, which then rapidly grew to four million by 1866 and then 16 million by 1910. While Protestants then and today outnumbered Catholics, Roman Catholicism became the largest stand-alone denomination within the United States.[45] The story of this migration is most famously found in William Herberg's classic work Protestant, Catholic, Jew, where he tells the story of these immigrant groups arriving in a new country to see that the churches they were used to were different. The German Catholics, for instance, were said to "[resent] the "Irish-dominated" churches they found."[46]

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[43] "U.S. Immigrant Population and Share over Time, 1850-Present," Migration Policy Institute.

[44] Mark A Grandquist, "Religion and Immigration, Old and New," *Faculty Publications* 77, no. 3 (2009), 217-226.

[45] José Casanova, "Roman and Catholic and American: The Transformation of Catholicism in the United States," *International Journal of Politics, Culture, and Society* 6, no. 1 (1992), 75-111.

[46] William Herberg, *Protestant, Catholic, Jew; an Essay in American Religious Sociology* (Garden City: Anchor Books, 1960), 23.

While this first generation was said to stay mainly in their ethnic enclaves, Herberg pointed to the third generation of immigrants, who he argues continued to practice their religion while being "not expected to retain his old language or nationality."[47] Religion, to Herberg, thus acted as a way to remember some pre-migrant sense of identity. The collapsing of national identity thus created three distinctive categories of Americans based on their religion: Protestant, Catholic, and Jew. However, recently, commentators have come to doubt this hypothesis. For one, the fact of ethnic assimilation, while "taken-for-granted,"[48] by Herberg, was called out by later writers, pointing to the limited analysis of factors like race and similar misunderstandings of the dynamics in American Catholicism.

However, this is not to say that he was wrong that religious groups often became both Americanised and forms of resistance to the creation of a monolithic, dominant American culture. As Charles Hirschman noted, "religious values [could] also provide support for other traditional beliefs and patterns."[49] These religious communities provided alternatives to mainstream institutions, with Catholic schools, hospitals, newspapers, and social welfare organizations springing up. Groups also organized politically, with Catholic groups like the newspaper The Truth Teller organizing in opposition to the Whig party.[50] The Apostolic Nuncio, the Pope's representative in the United States, began publishing a document every election year discussing issues that bishops ought to consider while voting.[51] While considering economic and other sociocultural factors, a study in the Journal of Politics reflected on the importance of these religious preferences and found that religion still played a significant role in predicting a person's voting behavior.[52]

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[47] William Herberg, *Protestant, Catholic, Jew; an Essay in American Religious Sociology*, 40.

[48] Philip Gleason, "Looking Back at 'Protestant, Catholic, Jew,'" *U.S. Catholic Historian* 23, no. 1 (2005), 51-64.

[49] Charles Hirschman, "The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States," *The International Migration Review* 38, no. 3 (2004), 1206-1233.

[50] Sean McGonigle, "Sectarianism and Citizenship: Church and State Debates in Nineteenth Century New York," *American Studies Senior Theses* 2, (2011).

[51] Ibid.

[52] Samuel DeCanio, "Religion and Nineteenth-Century Voting Behavior: A New Look at Some Old Data," *The Journal of Politics* 69, no. 2 (2007), 339-350.

"While considering economic and other sociocultural factors, a study in the Journal of Politics reflected on the importance of these religious preferences and found that religion still played a significant role in predicting a person's voting behavior."

Importantly, with religious diversity came profound religious differences, which both motivated people to engage politically. Religious groups also challenged orthodox visions of institutions, law, and community. These challenges to power resulted in crackdowns on minority groups and the most "unorthodox" of social practices, leading people from these religious groups to take the government to Court.

1.5 *Reynolds v. United States* (1879)

In the middle of the previously discussed period of migration came the first major court case to test the limits of the First Amendment. In 1879, the Court heard the case *Reynolds v. United States*, challenging the constitutionality of bans on polygamous marriage. George Reynolds, a Mormon, was charged with bigamy after he married Amelia Schofield despite already being married. Polygamy was a vital teaching of the Latter-Day Saints (LDS) church at the time, after Joseph Smith's 1843 revelation that "if any man espouse a virgin, & desire to espouse another & the first give her osen [own] consent & if he espous [espouse] the secon [second] & they are virgins & have vowed to no other man, then is he justified,...".[53] Plural marriage within the faith was said to increase a man's glory in the afterlife, and save the women he married.[54] In its ruling, the Court believed that Reynolds sincerely believed in the doctrine; however, it unanimously rejected his challenge to the law. Justice Waite wrote for the majority that "A party's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land."[55]

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[53] The Joseph Smith Papers, *Joseph Smith's Notes on Revelation*, (12 July 1843).

[54] Joanna Brooks, "Explaining polygamy and its History in the Mormon Church," *The Conversation*, August 18, 2017.

[55] *Reynolds v. United States*, 98 U.S. 145 (1878).

The Court held that religion was primarily an internal system of beliefs rather than a community or behaviors. Justice Waite understood, "The word 'religion' is not defined in the Constitution."[56] He instead turned to the personal writings of Jefferson and Madison, whose understanding of religion largely came from the consensus of thinking from the Enlightenment. With belief as the central star of religious identity, the practice could be regulated without infringing on a person's religious freedom. Justice Waite instead argued that allowing faith-based exemptions to the law would "be to make the professed doctrines of religious belief superior to the law of the land."[57] Therefore, if the state had a compelling interest that required the regulation of the practice, the Court found that it ought to regulate.

"Justice Waite... argued that allowing faith-based exemptions to the law would "be to make the professed doctrines of religious belief superior to the law of the land."

Marriage has always been understood as an essential part of American life. As Vivian E. Hamilton wrote, "Marriage itself is seen as a tool to ensure the wellbeing of families and children, and federal and state family policies continue to rely heavily on it to do so."[58] Marriage, endowed with significant social value, was also incredibly moralized, leading Justice Waite to express disgust polygamy in their opinion, writing, "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people."[59] This disgusting social quality was thought to impact those within the marriages and the community around them. Particular fears existed about some social stain infecting communities surrounding polygamous families. Objections were also raised about the impacts on women, who were thought to be victimized within these relationships. Regardless of the validity or the implications of these concerns, the Court found them compelling enough to allow the state to infringe on the practice rights of Mormons to further them.

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[56] *Reynolds v. United States*, 1878.

[57] Ibid.

[58] Vivian E Hamilton, "Mistaking Marriage for Social Policy," *Virginia Journal of Social Policy & the Law* 11, no.3 (2004), 308-371.

[59] *Reynolds v. United States.*

While the Court affirmed a right to free belief, this case established the right of the state to "reach actions which were in violation of social duties or subversive of good order."[60] Importantly, by establishing that religious practices could be regulated, this case set the stage for future battles about the extent of this regulatory power.

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2. Early Court Cases

With the passage of the Fourteenth Amendment in 1866, the protections of the Bill of Rights were applied to the states for the first time. While the last state to have an official church, Massachusetts, abandoned its support for Congregationalism (a version of Puritanism) three decades prior in 1833,[61] it was not until the passage of the Fourteenth Amendment that state-sponsored churches were unconstitutional.

With the extension of the First Amendment to the states, the judiciary was primed for fights over the limits of the protections as the federal government had not been mainly concerned with matters concerning religion for the last hundred years. While the significant First Amendment case against a state would not reach the Supreme Court until 1940, those cases would quickly become frequent.

In this section, the paper will discuss some of the major Supreme Court cases from 1940-1972 discussing religious freedom. Notably, the Court cases are an essential tool in understanding religious freedom in this period as religious issues quickly became conceptualized as a unique class of issues the government dealt with.

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[60] "Reynolds v. United States," *Berkley Center for Religion, Peace & World Affairs*, Georgetown University.

[61] John R. Vile, "Established Churches in Early America," *The First Amendment Encyclopedia*, Middle Tennessee State University.

2.1 *Minersville School District v. Gobitis* (1940)

In 1940, with *Minersville School District v. Gobitis*, the question of religious objections to the law was brought to the Court for the first time since the passage of the Fourteenth Amendment. In 1935, siblings Lillian and William Gobitis were expelled from their school after refusing to salute the flag since it violated their religious beliefs.[62] As Jehovah's Witnesses, the church "believe[d] that bowing down to a flag or saluting it, often in conjunction with an anthem, is a religious act that ascribes salvation."[63] Pointing to biblical verses that condemn idolatry, they argued that this seeming veneration of the flag would constitute a grave sin.

"Pointing to biblical verses that condemn idolatry, ...this seeming veneration of the flag would constitute a grave sin."

The Court concluded 8-1 that the children should be compelled to salute the flag. Justice Frankfurter, in the decision, affirmed that the children sincerely believed that saluting the flag went against their religious beliefs but that to deny everyone exemptions to the law based on their conscience would "deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration."[64] Justice Frankfurter thought the school district had good reason to institute compulsory flag salutes, namely that they created a sense of cohesion and national unity. Critically, it had further ramifications for the defense, as the Court believed "National unity is the basis of national security."[65]

In particular, Justice Frankfurter saw symbols as incredibly important to transmitting those ideas of national unity and believed the Constitution allowed for their forcible propagation in the name of that security. Chief Justice Stone dissented on the case, arguing instead that the flag salute constituted a public affirmation violating the Gobitis children's religious beliefs.

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[62] "Minersville School District v. Gobitis," Oyez.

[63] "*Keep Yourself in God's Love,"* (Allegheny: Watch Tower Bible and Tract Society Publishers, 2008).

[64] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[65] Ibid.

Justice Stone believed that this did not constitute an educational measure, as "there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions."[66] He also implicitly questioned the effectiveness of these affirmations for engendering a sense of American identity. To Justice Stone, the state was justified in violating a person's religious freedom only in cases where no alternative policy would require someone to profess a religious belief.

"To Justice Stone, the state was justified in violating a person's religious freedom only in cases where no alternative policy would require someone to profess a religious belief."

This case would go on to be overturned just three years later based on freedom of speech in the case Court in *Board of Education v. Barnette* (1943). The 6-3 decision again concerned the rights of Jehovah's Witnesses children to refuse to salute the flag. After the Gobitis decision, flag salute laws sprung up across the country, resulting in an uptick in persecution in other ways against the children of Jehovah's Witnesses. This became particularly troubling to leaders across the country, primarily concerned with ensuring that America appeared tolerant in the face of war with the Nazis. Justice Jackson, delivering the opinion of the Court, interpreted the salutes differently to Justice Frankfurter's 1940 opinion. These salutes were not just a practice but an act of speech that violated the children's fundamental beliefs. Jackson wrote that the right to believe and speak freely was the "fixed star in our constitutional constellation"[67] that could not be limited by any foreseeable circumstance. Regardless of the legislative objective of compelling speech, there was no legitimate reason to make it impossible to express a difference in opinion. Justice Jackson wrote that the country ought to "apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[68]

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[66] *Minersville School District v. Gobitis*, 1940.

[67] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[68] Ibid.

Justice Jackson also refuted the importance of the pledge to the military and defense institutions, arguing that those institutions functioned on the freedom that people had to opt into pledging their allegiance. In dissent, Justice Frankfurter wrote that despite personally disagreeing with the West Virginia law, more active citizenship constituted a "legitimate legislative end."[69] The government ought, he believed, to have broad discretion to be allowed to try to work towards their legitimate goals. The case ultimately established religious confession as a crucial part of religious belief that legislative action should not infringe on.

2.2 *Cantwell v. Connecticut* (1940)

In 1940, with *Cantwell v. Connecticut*, the Court unanimously found that states could not favor certain sects over others regarding laws that governed proselytization. Newton Cantwell and his two sons, all Jehovah's Witnesses, attempted to go door-to-door playing religious messages in New Haven, CT, then a Catholic area. After stopping a pair of men on the street, Cantwell played a record called Enemies, which attacked organized religion generally and Roman Catholicism explicitly. The men got mad and demanded that the Cantwells leave. They were ultimately found both in violation of a Connecticut law that required all proselytizers to get permission from the state before sharing their messages and in breach of the peace.

The Connecticut law was argued to be a protection against religious fraud. Connecticut required that proselytizers who solicited donations had to prove that they were not scammers to be allowed to operate. Those wishing to procure permission had to seek permission from the state's public welfare council. The Court unanimously found this law to be unconstitutional. Justice Roberts argued that while the state could place general restrictions on proselytization to "safeguard the peace, good order and comfort of the community,"[70] law could not stop a person from ever being able to proselytize. Restrictions on the time and location of these efforts were thus legitimate, but the requirement of licenses was not. Notably, the law unconstitutionally restricted large swathes of religious speech for those who did not procure a license. The Court also expressed concerns about the ability of the public welfare council to determine whether or not a group was religious uniformly.

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[69] *West Virginia State Board of Education v. Barnette*, 1943.

[70] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

With these people having the ability to make their judgments about the nature of religious belief, there were understood to be potential issues if the council misidentified a religious group as non-religious. Like in Barnette, the Court found that other legislative remedies would better protect communities against fraud, including requiring that solicitors identify themselves and the group for whom they are raising money at the beginning of each conversation. In the decision, the Court embraced balancing the interests of the government and religious communities, arguing that restriction was acceptable insofar as it did not "unduly [infringe] the protected freedom [to practice religion]."[71] This case was the first to extend protections to practice religion to the states formally and freely.

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2.3 *Everson v. Board of Education* (1947)

In 1947, with *Everson v. Board of Education*, the Supreme Court, in a 5-4 decision, established the right of the state to provide funding to support religious education. The Ewing township in New Jersey reimbursed parents to support the cost of bus transportation to and from school, provided that their children were not attending a for-profit school. Everson, a resident of Ewing, sued the Board of Education, arguing that reimbursements for parents of children in parochial schools violated his First Amendment right not to pay taxes to support the establishment of a religion.

Justice Black, writing the majority opinion, argued that insofar as the policy provided funding for other non-state, non-profit schools, denying students of religious schools the funding would be discriminatory. Black found that the policy's goal was not to support those Catholic schools but to facilitate school attendance more generally with a goal of secular justification.

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[71] *Cantwell v. Connecticut*, 1940.

As for some families, religious elements are needed for students' participation in school; denying them access to funds to facilitate that schooling would be discriminatory when those whose faith did not require religious schooling did get access to those funds. He argued that as a result, "New Jersey cannot hamper its citizens in the free exercise of their own religion."[72] Therefore, religious students ought to receive transportation allowances.

"As for some families, religious elements are needed for students' participation in school; denying them access to funds to facilitate that schooling would be discriminatory when those whose faith did not require religious schooling did get access to those funds."

Justice Black likened these school vouchers to other public services like police and sewage, which the state partially or wholly subsidized. If it were true that the First Amendment meant that the state could not provide any funding for anything that could help a religious group, then Justice Black would hold that they should shut off the sewage and ban the police from assisting at these schools. This, however, would be a significant hindrance to the practice of religion in these schools. Religious groups would have to create parallel systems or deal with a total denial of services in all other aspects of society. As a result, parents would be less willing to send their children to these schools, even if they are core to their faith. Thus, insofar as a government program is neutral concerning "believers and non-believers, [the Constitution] does not require the state to be [religion's] adversary."[73] The government was able to provide services if they were the same. Justice Jackson pointed out the exclusion of for-profit schools from the program in dissent. As the program only extended to some private schools, he argued that the program cannot be said to have generally supported school attendance. Instead, it supported students attending specific kinds of schools, regardless of which school was best for the student or family. Additionally, he argued that parochial schools in the area were overwhelmingly Catholic, meaning that this support was not equally allocated to all religious groups.

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[72] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[73] Ibid.

"If it were true that the First Amendment meant that the state could not provide any funding for anything that could help a religious group, then Justice Black would hold that they should shut off the sewage and ban the police from assisting at these schools.

A fundamental tension in the interpretation of Justices Jackson and Black is whether or not these schools could serve secular purposes. Justice Black believed that parochial schools functioned as secular schools with a religious element. In contrast, Justice Jackson believed the schools could only be secular insofar as no religious element existed. He wrote about state schools, "[they are] organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion."[74] Religiosity would otherwise infect the capacity of a school to teach about secular issues meaningfully. Justice Frankfurter, joining in dissent, argued that the purpose of the First Amendment was "broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[75] Importantly, to Justice Frankfurter, there was never a legitimate reason to support a religious group, as that would always have the effect of privileging one group over another. In rejecting these arguments, the Court established that if there is a secular legislative objective, the state can give some aid to parochial schools. Further, if there are programs that help other not-for-profit schools, they also ought not to discriminate against religious not-for-profit schools.

2.4 *Braunfeld v. Brown* (1961)

In 1961, with *Braunfeld v. Brown*, the Supreme Court decided 6-3 that the states were constitutionally allowed to enact Sunday laws. In this case, Sunday laws, banning business and trading on Sundays, were imposed in Pennsylvania. Braunfeld, an Orthodox Jew, argued that refraining from labor on the Sabbath (Friday night through Saturday) was essential to his religious practice.

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[74] *Everson v. Board of Education,* 1947.

[75] Ibid.

As a result, the requirement to close his business on Sundays threatened the viability of his business, which made up for the lack of Saturday trading with Sunday trading. Justice Warren, writing for the majority, again affirmed the importance of not regulating religious thought and speech. Once again, the question of the case was the extent to which the state could regulate religious practice. The law was found to "[regulate] a secular activity and, as applied to appellants, [operating] to make the practice of their religious beliefs more expensive."[76]

"...if there are programs that help other not-for-profit schools, they also ought not to discriminate against religious not-for-profit schools."

This critically meant that the law did not directly impose costs on religious practice but entirely incidentally impacted Orthodox Jews. Notably, Justice Warren found that law had an essential secular purpose. It allowed workers to have "a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility."[77] Thus, the Court established that the state could impose laws that indirectly imposed a cost on Braunfeld based on his religion.

...Justice Warren found that law had an essential secular purpose...*"a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility."*

Additionally, Justice Warren argued that the absence of Sunday laws similarly harmed religious groups, or with exceptions established for Orthodox Jews, as businesses that wanted to open on Sunday, in turn, had to "hire employees who themselves qualified for the exemption because of their own religious beliefs,"[78] constituting religious discrimination.

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[76] *Braunfeld v. Brown*, 366 U.S. 599 (1961).

[77] Ibid.

[78] Ibid.

In this, Justice Warren explained why Sunday laws could have a secular purpose; however, he did not necessarily contend with the fact that Sunday laws to the average person probably have very religious origins. Sunday is a day of rest for the Christian church, but not necessarily for other faiths. In his concurring opinion, Justice Frankfurter established the secular nature of Sunday rest. The opinion, spanning 120 pages and being shared between several different cases, traced the origins of Sunday laws and attempted to find their origins. The first Sunday laws in English common law were found to be explicitly religious, as they were designed to assist the veneration of God in Christianity. However, "even in this period of religious predominance, notes of a secondary civil purpose could be heard."[79] While Sunday, as Justice Frankfurter understood the rest day as religious, a shared day of rest was essential in aiding public health and allowing community building (amongst other goals). At the turn of the 20th century, Sunday laws were seen as critical in protecting labor from the crushing work schedule that accompanied industrialization. He wrote that in the 1930s, legislators further argued that government coercion was essential to avoid the coercion of Christians from other businesses that chose to open on Sundays. Here, Justice Frankfurter explained that Sunday laws might not be secular in their choice of Sunday as the rest day but that there was a sufficient historical secular purpose that the laws could be understood as genuinely secular.

"Justice Frankfurter explained that Sunday laws might not be secular in their choice of Sunday as the rest day but that there was a sufficient historical secular purpose that the laws could be understood as genuinely secular."

Interestingly, here, Justice Frankfurter saw this as almost inherent to law. He wrote, "Religious beliefs pervade, and religious institutions have traditionally regulated virtually all human activity."[80] This meant that it was likely true that some religious beliefs informed all historical laws. In 1964, the Minnesota Law Review argued that this case was critical in "[setting] out a test for indirect burden cases."[81]

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[79] *McGowan v. Maryland*, 366 U.S. 420 (1961).

[80] Ibid.

[81] Editorial Board, Minn. L. Rev., "A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion," *Minnesota Law Review*, (1964).

Crucially, it allowed for this incidental burden as long as "legislation imposing a burden on religion effects [had] no valid state purpose or if the purpose could be substantially accomplished without burdening religious exercise, the legislation is suspect of having as its real purpose interference with religious activity and is invalid "even though the burden may be characterized as being only indirect?"[82] In dissent, Justice Brennan agreed with much of the reasoning of Justice Warren; however, he differed on the extent of the harm that came with that economic sacrifice. He argued that the Court "has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous."[83] He argued that other legislative approaches should have been considered due to the centrality of Sabbath observance to the Jewish faith.

"*[Justice Brennan]* argued that other legislative approaches should have been considered due to the centrality of Sabbath observance to the Jewish faith."

2.5 *Torcaso v. Watkins* (1961)

In 1961, with *Torcaso v. Watkins*, the Supreme Court unanimously found all religious tests to hold public office unconstitutional. Rory Tocaso, an atheist, was appointed to the position of Notary Public by the Governor of Maryland, which was a position that required an affirmation of a belief in God. He refused to take this oath and sued the state for violating his religious liberty.

The Court unanimously found that the compulsory oath violated the Establishment Clause. Justice Black wrote, "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers."[84] Having previously established religious thought and speech as absolutes that the state could not infringe, the Court found that this statute forced speech. While the State of Maryland argued that Torcaso was not being compelled to hold public office, Justice Black wrote that this constituted discrimination.

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[82] "A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion," (1964).

[83] *Braunfeld v. Brown*, 366 U.S. 599 (1961).

[84] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Justice Black pointed to the opinion in *Weiman v. Updegraff* (1952), which struck down an oath at Oklahoma College, affirming that the taker was not affiliated with a communist group. In the case, the Court found that "it is sufficient to say that constitutional protection does extend to the public servant whose exclusion under a statute is patently arbitrary or discriminatory."[85] *Torcaso* and *Weiman* decisions concluded that even if the state was not obligated to provide every citizen a job, those public employees given a job should not be discriminated against. In his concurring opinion, Justice Frankfurter pointed to a letter by Oliver Ellsworth (1745-1807), a member of the Constitutional Convention and the third Chief Justice of the Supreme Court, that argued that religious test laws were "utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them."[86] Therefore, the history of using religious tests as a substitute for a moral test was not just unconstitutional but ineffectual. All it did was discriminate against ethical non-theists. Further, if the state believed religion was the basis for morality, Justice Frankfurter pointed to religions, like Buddhism and Taoism, that did not have notions of a God.

"*Torcaso* and *Weiman* decisions concluded that even if the state was not obligated to provide every citizen a job, those public employees given a job should not be discriminated against."

2.6 *Engel v. Vitale* (1962)

In 1962, with *Engel v. Vitale*, the Supreme Court struck down prayer in public schools. Justice Black argued that the act of prayer, even non-denominational prayer, had been established as religious. He wrote, "The nature of such a prayer [had] always been religious,"[87] and no party had thought otherwise. Crucially, this prayer did not just exist; instead, it "was composed by governmental officials as a part of a governmental program to further religious beliefs."[88]

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[85] *Wieman v. Updegraff*, 344 U.S. 183 (1952).

[86] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[87] *Engel v. Vitale*, 370 U.S. 421 (1962).

[88] Ibid.

...this prayer did not just exist; instead, it *"was composed by governmental officials as a part of a governmental program to further religious beliefs."*

This violated the Establishment Clause in two ways. First, through the government writing of prayer, the government established religion by only supporting monotheistic faith. Second, the prayer written by government officials represented the government attempting to control the expression of individuals' faith. This was even if the state argued that the prayer was denominationally neutral. Justice Black argued that the law was inherently coercive: "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[89]

Writing concurrently, Justice Douglas argued that the issue was not just prayer in a government building but that by having state-funded teachers asked to run the prayers during class time, the state was actively funding a religious exercise. Thus, Justice Douglas argued that this was not about the constitutionality of prayer in public life but about "whether the Government can constitutionally finance a religious exercise."[90] He argued that the government could not do this, as that would establish religion.

Crucially, despite claiming this was a more narrow reading of the case, he also implied that the prayer reading in places like Congress and the Supreme Court was similarly unconstitutional. He further argued that public prayer was coercive. Notably, while things like religious education took long periods, the short 22-word nature of the regent's prayer, taking place between the Pledge of Allegiance and class, made it functionally difficult for children wanting to leave to be able to since prayer was too inconvenient to opt out of and "few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given."[91] In response, Justice Stewart, the lone dissenter, argued that prayer functioned less as a religious exercise and more as an acknowledgment of the spiritual nature of the foundation of America.

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[89] *Engel v. Vitale*, 1962.

[90] Ibid.

[91] Ibid.

"...despite claiming this was a more narrow reading of the case, *[Justice Douglas]* also implied that the prayer reading in places like Congress and the Supreme Court was similarly unconstitutional."

Justice Stewart argued that as children were allowed to opt out and that ruling school prayer as unconstitutional, "[denied] the [wishes] of these school children to join in reciting this prayer is [denying] them the opportunity of sharing in the spiritual heritage of our Nation."[92] These claims were rejected by the majority, meaning that the case not only banned school prayer but established prayer legally as something inherently religious.

2.7 *Sherbert v. Verner* (1963)

In 1963, with *Sherbert v. Verner*, the Supreme Court established that those who refused certain kinds of employment based on religious beliefs could still be eligible for unemployment benefits if they could not find work that accommodated them. Adell Sherbet, a Seventh-Day Adventist, could not work on Saturdays because of her religious beliefs, leading her to be rejected by all employers she attempted to work for. As a result, she filed for unemployment benefits, which the State of South Carolina denied her. She argued that by rejecting her claim for benefits, South Carolina was discriminating against her.

Justice Brennan, writing for the majority, argued that the practice of denying unemployment benefits to those who refused some work on religious grounds "forces [people] to choose between following the precepts of her religion and forfeiting benefits."[93] While Justice Brenan did not argue that unemployment benefits were a right, and states had the discretion in offering them, the state denial of a benefit was inevitably a deterrence against "the exercise of First Amendment rights of expression."[94]

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[92] *Engel v. Vitale*, 1962.

[93] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[94] Ibid.

As this policy coerced the religious expression of South Carolinians, Justice Brenan argued that there must be a significant public interest in the passage of the policy for it not to violate the First Amendment. Justice Brenan argued that South Carolina would need to prove that exemptions for the Seventh Day Adventists "[presented] an administrative problem of such magnitude, or [afforded] the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[95] They could not prove that exemption would either make the workforce unproductive or that it was so helpful that it coerced the public to convert to Seventh-Day Adventism. Justice Brenan argued that South Carolina's inability to prove this meant that the policy failed to meet the public interest test established by Braunfeld.

"As this policy coerced the religious expression of South Carolinians, Justice Brenan argued that there must be a significant public interest in the passage of the policy for it not to violate the First Amendment."

In concurrent opinions, Justices Douglas and Stewart argued against the relatively narrow ruling the majority reached. Douglas argued that the state ought not "compel a minority to observe their particular religious scruples [even if] as the majority's rule can be said to perform some valid secular function,"[96] as the Court argued. This would allow religious exemptions far more broadly. Justice Stewart went further, arguing that under the precedent of Braunfeld, the Court ought to have ruled against Sherbet.

Insofar as the Court would have accepted South Carolina rejecting the claim of someone who wanted benefits but did not want to work due to a desire to watch television, the state did have a compelling interest to force "would-be beneficiaries" to work on Saturdays. "The Court nevertheless holds that the state must prefer a religious over a secular ground,"[97] which ultimately privileges religion. Justice Stewart argued that the ruling, in this case, ought to mean that the Court abandon Braunfeld and the secular interest test.

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[95] *Sherbert v. Verner*, 1963.

[96] Ibid.

[97] Ibid.

In dissent, Justice Harlan argued along similar lines to Justice Stewart. He argued Sherbet "was denied benefits just as any other claimant would be denied benefits who was not 'available for work' for personal reasons."[98] The law was not targeted at those who observed the Sabbath; instead, like Braunfeld, it incidentally affected those who did. Thus, the Court required South Carolina to remove religious exemptions to general law to accommodate Sherbet's religious beliefs. He argued that this overturned Braunfeld, with the "secular purpose of the statute before us today is even clearer than that involved in Braunfeld."[99] Justice Harlan suggested that this created a "requirement of neutrality" that "may violate the constitutional limitations on state action."[100] Ultimately, this case complicated the secular interest test, with the Court rejecting the interest of incentivizing work given by South Carolina.

Justice Harlan suggested that this created a *"requirement of neutrality"* that *"may violate the constitutional limitations on state action."*

2.8 *Lemon v. Kurtzman* (1971)

In 1971, *Lemon v. Kurtzman* (8-0) set firm limits on the government's support of religion. By establishing the critical *Lemon* test, this case would go on to be used by the Supreme Court in its broader arbitration of religious freedom cases for the next half-century. The case was fought over the constitutionality of two laws.

The first, in Rhode Island, provided 15% toward the salary for teachers in private schools. The second, in Pennsylvania, segmented off secular parts of private religious schools (such as mathematics classes) and provided funding for those teachers. In both these cases, these private schools had religious purposes. In Rhode Island, the courts found that 95% of the private schools were Catholic, with the schools being an essential part of practice, while in Pennsylvania, the policy specifically targeted religious schools, which the Court found were primarily Catholic.

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[98] *Sherbert v. Verner*, 1963.

[99] Ibid.

[100] Ibid.

Writing for the majority, Justice Burger argued that these laws were both unconstitutional. He wrote that violating the First Amendment was not contingent on effectively establishing a religion; instead, it was any action that could be reasonably thought to contribute to that goal. He acknowledged that the states did not intend to establish the religion but rather to improve the quality of education more broadly. He also recognized that there was no world in which there did not exist at least some intermingling between church and state. Therefore, to evaluate the law's constitutionality, he wrote that the Court should "examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."[101]

"*[Justice Burger]* wrote that violating the First Amendment was not contingent on effectively establishing a religion; instead, it was any action that could be reasonably thought to contribute to that goal."

It was under these metrics that Justice Burger said that the laws were unconstitutional. Religious schools were inherently religious, with extremely blurred boundaries between faith instruction and other classes. While these schools could teach mathematics and science effectively, stopping this enforcement bleeding took time. Thus, the perfect division in funding would require invasive amounts of monitoring. This difference allowed Justice Burger to support state funding for things like textbooks and bus rides for religious schools but not teacher and class funding, arguing, "A textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher is under religious control."[102]

Even the best teachers, to Justice Burger, would "find it hard to make a total separation between secular teaching and religious doctrine."[103] Establishing that these funds would likely support religious groups, he then explained how, historically, only certain sects tended to establish parochial schools, and therefore, government funds ultimately worked to prop up these sects over others. Justice Douglas wrote about the potential harms of government monitoring religious schools in his concurring opinion.

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[101] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[102] Ibid.

[103] Ibid.

There was the potential, he argued, for states to work to make sure that their funds were not used for religious instruction by monitoring how teachers speak in classrooms. This would require significant resources and violate the First Amendment rights of the religious schools, as their religious speech would be severely infringed. According to Justice Douglas, this monitoring would be required otherwise, "the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause."[104]

"Even the best teachers, to Justice Burger, would *"find it hard to make a total separation between secular teaching and religious doctrine."*

Justice Douglas also provided historical context as to why it was always true that religious schools provided religious education. This case represented a critical turning point in America's interpretation of religious liberty. To differentiate between the constitutionality of state-funded textbook programs and teachers in religious schools, the Court effectively established what excessive entanglement looked like. Religion and government always intermingled, but the extent to which this happened could be mitigated. The resulting test, the *Lemon* test, had three prongs. These three conditions stipulated that the law must "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster an excessive government entanglement with religion."[105] While seeming vague, the Court argued one could determine the third prong through examination of, "the character and purpose of the institution that benefited, the nature of the aid the state was providing, and the resulting relationship between the government and the religious institution."[106]

" To differentiate between the constitutionality of state-funded textbook programs and teachers in religious schools, the *[Supreme]* Court effectively established what *excessive entanglement* looked like."

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[104] *Lemon v. Kurtzman*, 1971.

[105] Ibid.

[106] Richard L. Pacelle Jr, "Lemon Test," *The First Amendment Encyclopedia*, Middle Tennessee State University, October 17, 2023.

3. Religious Freedom Today

The test created by the *Lemon* decision became the primary metric for judging religious freedom litigation through the latter half of the 20th century until it was whittled down and then eventually "abandoned"[107] in the 2020s. This test helped frame how scholars understood religious liberty issues through this period but was insufficient in dealing with many more specific issues in religious liberty.

3.1 The Application of *Lemon v. Kurtzman*

In the 1970s, the *Lemon* test was used to strike down several financial programs aimed at religious communities. In *Committee for Public Education and Religious Liberty v. Nyquist* (1973), with a 6-3 decision, the Court struck down state funds to subsidize the upkeep of parochial schools, with Justice Powell arguing "[the law's] effect, inevitably, is to subsidize and advance the religious mission of sectarian schools."[108] In *Stone v. Graham* (1980), a Kentucky law requiring schools to display copies of the Ten Commandments purchased with private funds was similarly struck down with a 5-4 decision. Writing for the majority, Justice Brennan argued that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[109] The application of the *Lemon* test here was generally comprehensive, with the Court taking a generally skeptical view of government support of religion. Any funds that could not be delineated as exclusively secular programs were eliminated. In the next decade, this began to change. The Cornell Legal Information Institute argued that "starting in 1980, the Supreme Court almost uniformly rejected Establishment Clause challenges to financial aid provisions."[110] Notably, the Court began to express the neutrality of some of these programs. Still citing the *Lemon* test, this neutrality principle was first expressed in *Mueller v. Allan* (1983). The case was about a Minnesota statute that allowed parents, including those of children in religious school, to deduct expenses like transportation and tuition associated with that education.

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[107] *Kennedy v. Bremerton School District*, 597 U.S. (2022).

[108] *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

[109] *Stone v. Graham*, 449 U.S. 39 (1980).

[110] "Amdt1.3.4.4 Application of the Lemon Test," *Legal Information Institute*, Cornell Law School.

In writing for the 5-4 majority decision, Justice Rehnquist argued that the program "permits all parents—whether their children attend public school or private—to deduct their children's educational expenses."[111] Importantly, insofar as the benefit was also for parents of public schools and secular private schools, the grants provided uniform benefits to parents, thus meaning it did not incidentally benefit religion.

Writing in 1991, Gillian Peele, a retired Associate Professor at the University of Oxford, argued that through the 1980s, "[Ronald Reagan's] political agenda had a marked impact on the Supreme Court itself."[112] While the influence of politics on the Court was not new, she argued that this was even truer than what occurred typically. She chalked this up to three critical factors:

1. The increasing visibility of the issues the Court dealt with,
2. The rise of the conservative movement, and
3. A collapsing consensus about the role of courts in society.

"...starting in 1980, the Supreme Court almost uniformly rejected Establishment Clause challenges to financial aid provisions."

During his eight years in office, President Reagan elevated a Chief Justice (William Rehnquist-1986) to the Supreme Court and had three nominations confirmed in the Senate as Associate Justices (Sandra Day-O'Connor-1981, Antonin Scalia-1986, and Anthony Kennedy-1988).[113] While Justice Kennedy is now remembered as a "swing member," he voted with the conservative faction of the Court in most cases.[114] Justices Scalia and Day-O'Connor are remembered correctly as solid conservatives. Justice Rehnquist is described by David Schultz as being "not known as a sympathetic defender of First Amendment rights."[115]

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[111] *Mueller v. Allen*, 463 U.S. 388 (1983).

[112] Gillian Peele, "Supreme Court in the 1980s," *Contemporary Record* 4, issue 4 (1991), 26-29.

[113] "Justices 1789 to Present," Supreme Court of the United States.

[114] Amelia Thompson-DeVeaux, "Justice Kennedy Wasn't a Moderate," *FiveThirtyEight*, July 3, 2018.

[115] David Schultz, "William Rehnquist," *The First Amendment Encyclopedia*, Middle Tennessee University.

[Gillian Peele]* chalked *[the influence of politics on the Supreme Court through the 1980s]* up to three critical factors*:

1. The increasing visibility of the issues the Court dealt with,

2. The rise of the conservative movement, and

3. A collapsing consensus about the role of courts in society.

These more conservative justices, operating in a more right-wing political environment with a more tenuous political position, thus began to expand the power of the religious majority. This is not to say that previous interpretations of religious freedom were not, in part, politically motivated. In the book *The Myth of Religious Freedom*, David Sehat argues that the attitude of Justice Frankfurter and other Justices of his era could be seen as an extension of President Roosevelt's politics. He wrote, "The Court's invocation of the myth of American religious freedom instead positioned it as the conservative keeper of a uniquely American tradition that countered that of godless communism."[116] However, this era could not be seen as one where the *Lemon* test was wholly abandoned. Instead, the law was selectively applied in cases not involving financial aid provisions.

"[Justice Frankfurter]* wrote, *"The Court's invocation of the myth of American religious freedom instead positioned it as the conservative keeper of a uniquely American tradition that countered that of godless communism."

In *Marsh v. Chambers* (1983), a case challenging the constitutionality of the Nebraska legislature opening its sessions with a Chaplain's prayer, the *Lemon* test was ignored in a 6-3 decision despite the fact, as the Bill of Rights Institute argues, "the practice does not pass"[117] the test.

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[116] David Sehat, *The Myth of American Religious Freedom* (Oxford: Oxford University Press, 2015).

[117] "Religious Liberty: Landmark Supreme Court Cases," Bill of Rights Institute.

Instead, the Court pointed out that "prayer is deeply embedded in the history and tradition of this country,"[118] even though they acknowledged that history often involved explicit attempts to establish religion. However, then, just two years later, in a 6-3 decision, the Court found in *Wallace v. Jaffree* (1985) that an Alabama law that mandated quiet time in school for voluntary prayer was unconstitutional because the *Lemon* test "requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."[119] The *Lemon* test was similarly used to strike down a Connecticut law in an 8-1 decision that allowed workers the absolute right not to work on their day of religious practice in the *Estate of Thornton v. Candor, Inc.* (1985). Chief Justice Burger argued that the law meant "religious concerns automatically control over all secular interests at the workplace,"[120] thus privileging religion over all other workplace concerns in a way that acted to establish religion. The test was also used in cases where the Court sided with state governments, such as in *Lynch v. Donnelly* (1984). In this case, the city of Pawtucket, Rhode Island, was defending a Nativity scene that they placed in a public park. In a 5-4 decision, writing for the majority, Justice Burger wrote that it "depict[ed] the origins of [the Christmas] Holiday."[121]

Because Christmas was a national holiday, education about the origins of the holiday served a secular purpose, even if that history was religious. Crucially, in *Lynch v. Donnelly* (1984), Justice Day-O'Connor's concurrent opinion attempted to "suggest a clarification of [the Court's] Establishment Clause doctrine,"[122] which meant tweaking the *Lemon* test. She argued that the question the Court asks of any given law ought not be one of secular intent because there likely was secular intent behind some of the laws that the Court struck down based on the *Lemon* test.

Chief Justice Burger argued that the law meant *"religious concerns automatically control over all secular interests at the workplace,"...*

[118] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[119] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[120] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

[121] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[122] Ibid.

Instead, according to Day-O'Connor, the Court should ask "whether the government intends to convey a message of endorsement or disapproval of religion"[123] with any given law. A decade later, Justice O'Connor would clarify that her test focused on the perceptions of informed observers who were "aware of the history and context underlying a challenged program or religious display."[124] Treated generally by lower courts as part of the *Lemon* test, Justice Day-O'Connor ultimately appeared to increase the privilege of majority religions. Notably, if religion was near-ubiquitous, its symbols and traditions likely are not understood by the majority as religious. Instead, perhaps they understand them as historical or cultural. The *Lemon* test continued to be used haphazardly through the 1990s and early 2000s. In *Lee v. Weismann* (1992), the Court applied the *Lemon* test to rule the inclusion of a Rabbi's non-denominational prayer at a high school graduation unconstitutional in a 5-4 decision.[125] It was also used two years later in the *Board of Education of Kiryas Joel Village School District v. Grumet* (1994) in a 6-3 decision to rule against the creation of a particular school district in New York that benefited "disabled children in the Satmar Hasidic Jewish neighborhood."[126] Although many critical religious freedom cases were discarded with the test, such as *Church of the Lukumi Babalu Aye v. City of Hialeah*[127] (1993) and *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*[128] (2010), the official website of the national judiciary still lists it as the foundational test to determine whether a statute violates the First Amendment.[129]

Justice O'Connor...*[clarified]* that her test focused on the perceptions of informed observers who were *"aware of the history and context underlying a challenged program or religious display."*

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[123] *Lynch v. Donnelly*, 1984.

[124] David L. Hudson Jr, "Endorsement Test," *The First Amendment Encyclopedia*, Middle Tennessee State University.

[125] *Lee v. Weisman*, 505 U.S. 577 (1992).

[126] "Religious Liberty: Landmark Supreme Court Cases," Bill of Rights Institute.

[127] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[128] *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S. 661 (2010).

[129] "First Amendment and Religion," United States Courts.

The bounds of religious freedom became codified more concretely in federal law in 1993 with the passage of the *Religious Freedom Restoration Act* (RFRA). With Congress finding that "laws "neutral" towards religion may burden religious exercise as surely as laws intending to interfere with religious exercise,"[130] they established that law could only burden practice if there was a compelling interest and if it was the least restrictive way to achieve the interest. In 1998, the United States made religious freedom a cornerstone of its foreign policy by passing the *International Religious Freedom Act* (IRFA). The act required that the US Department of State prepare reports on the status of religious freedom worldwide, establish an Office of International Religious Freedom, and consider the status of religious freedom when allocating development assistance. Along with other directives, the act required the President to shift policy in countries where religious freedom was not recognized.

"The bounds of religious freedom became codified more concretely in federal law in 1993 with the passage of the Religious Freedom Restoration Act (RFRA)"

3.2 The Problems of Defining Religion

Scholars of religion have long struggled to define religion that encompasses all faiths and excludes all non-religions. This process has proved difficult. Religions, drawn from traditions worldwide, with radically different systems of belief, practice, and community, often do not seem particularly unique from "secular social organizations like clubs."[131]

Under Title VII, the Civil Rights Act's national prohibition on discrimination based on "race, color, religion, sex or national origin"[132] in 1964, religion is defined as concerning personal beliefs on the "ultimate ideas" of "life, purpose, and death."[133]

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[130] US Congress, House, Religious Freedom Restoration Act of 1993, H.R.1308, 103rd Con., 1st sess, introduced in House March 11, 1993.

[131] Victoria Harrison, "The Pragmatics of Defining Religion in a Multi-cultural World," *The International Journal for Philosophy of Religion* 59, (2006), 133-152.

[132] Title VII Statute, 42 U.S.C §§ 2000e - 2000e-17.

[133] "What is "religion" under Title VII?", US Customs and Border Control.

Under Title VII, the Civil Rights Act's national prohibition on discrimination based on *"race, color, religion, sex or national origin"* in 1964, religion is defined as concerning personal beliefs on the *"ultimate ideas"* of *"life, purpose, and death."*

There is no distinction between theistic and nontheistic religions, but political, economic, and other fundamental beliefs are excluded. Critically, religion is not defined in the First Amendment nor the RFRA (1993).[134] While religion seems obvious to most, this lack of formal definition necessarily limits the scope of religious freedom for many religious minorities.

The definition of religion under Title VII addresses this tension. Most followers of Tom Brady would not argue that he answers their questions about life, purpose, and death, regardless of how devout their following of him is. However, despite generous allowances for unique and minor religions, this definition excludes the lived experience of being religious. For instance, if thirty followers of a religion all have different understandings of that faith's position on those "ultimate questions," it would appear that those questions are not the critical tenet of membership to that group.

In his book *Secular Ideology and the Roots of Modern Conflict*, William Cavanaugh argued that there are no "transhistorical or transcultural definitions of religion,"[135] with a culture's understanding of religion coming from the arrangement of power within their community. Religion, therefore, is always defined relationally to the secular. Importantly, Cavanaugh argued that religion was not a concept in the West until the Renaissance when Christian thinkers sought to define how their practice differed from that of their Muslim and Jewish counterparts. Through the Reformation, this turned to defining religion as a "state of mind."[136] This increased tolerance of religious diversity meant political, economic, and ethical activities had to be divided from religious thought. This line of thinking was then exported globally during colonization.

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[134] US Congress, House, Religious Freedom Restoration Act of 1993.

[135] William T Cavanaugh, *Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009), 59.

[136] Ibid., 73.

This division could have been better. For one, in most communities with only one religion, the line between faith and culture, politics and economics was challenging to define. Cavanaugh pointed to Hinduism, which he argued did not exist in pre-colonial India. What we call Hinduism today is a system of life encompassing some elements of faith but also standards of propriety and law. In many places, fundamentally religiously derived modes of understanding human nature, morality, and propriety were made secular and universal.

Jason Wallace noted that this mistake occurred during the founding of the United States, with "The pattern of at once endorsing the ethical precepts of Christianity while avoiding assent to any specific… system can be found in the rhetoric of most founding fathers."[137] While the Founders often explicitly noted that the country was not a Christian theocracy, much of their thinking about human rights and liberties is indivisible from their religion. Part of this thinking can be seen in the understanding of religion present in the Founders' writings.

"*...*this mistake occurred during the founding of the United States, with *"The pattern of at once endorsing the ethical precepts of Christianity while avoiding assent to any specific… system can be found in the rhetoric of most founding fathers."*

The Supreme Court has debated questions of the nature of religion. In the *United States v. Ballard* (1944), the Court found that "heresy trials are foreign to our Constitution. Men may believe what they cannot prove."[138] The case surrounded the Ballards, leaders of the "I AM" movement, who were indicted for mail fraud. Local courts believed their religious claims were demonstrably false and being used to solicit donations from people who were being lied to. While the Court established that truth claims could not be part of litigation, challenging the extent of a person's belief could.

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[137] Jason Wallace, *Church-State Issues in America Today* (Westport: Greenwood Publishing, 2007), 114.

[138] *United States v. Ballard*, 322 U.S. 78 (1944).

Charles McCrary, in his book *Sincerely Held*, wrote about how this often was used by the Courts to erase minority faiths, particularly Native American traditions, as they "have had a particularly difficult time, as their cultural and political practices and knowledge do not translate easily to the language and metalanguage of "sincerely held religious belief."[139] When law relies on intuitive definitions of faith that secularized culture, economics, and politics, it allows for the dominant group, in this case, Protestants, to enforce their implicitly religious conception of these institutions while sidelining the fundamental and religiously important alternative conceptions of those institutions by other groups.

3.3 Accommodationist versus Separationist Readings of the First Amendment

The variance in Supreme Court decisions reflects not only the Court's changing nature, politics, or an unclear definition of religion but also a fundamental need for more clarity in the First Amendment. It says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..."[140] The government is told not to assist a religion but to not make it difficult to practice or deny accommodations based on their religion. Historical analysis does not aid in figuring out what direction the government should take, providing accommodations or denying assistance.

One of the Founding Fathers, John Adams, believed that "civil government essentially depends upon piety, religion, and morality."[141] He helped establish a state church in Massachusetts. He thought it in the best interest of the state to foster an intense state of religiosity in the people, just not of a national religion.

"*[John Adams]* thought it in the best interest of the state to foster an intense state of religiosity in the people, just not of a national religion."

[139] Charles McCrary, *Sincerely Held* (Chicago: University of Chicago Press, 2022), 1-28.

[140] U.S. Constitution. amend. I.

[141] John Adams, "Colonial Declaration of Rights: Massachusetts," in *The Separation of Church and State*, ed Forrest Church (Boston: Beacon Press, 2011), 33.

At the same time, Thomas Jefferson believed any intermingling of church and state could reverse the tyranny of the old world,[142] instead declaring that "religion is a matter which lies solely between Man & his God,"[143] thus preferring more substantial barriers. While there is great diversity in the interpretation of the First Amendment, the two broad categories of thought are *accommodationism* and *separationism*. Accommodationism is the general belief that the government should make accommodations to make religion as easy as possible to practice. At the same time, separationism is the general belief that there should be a stricter separationism between church and state. Separationist jurisprudence is generally seen as originating with *Everson v. Board of Education* (1947), where the Court argued that the wall between church and state "must be kept high and impregnable."[144] On the other hand, with *Lemon v. Kurtzman* (1971), Justice Burger, one of the most prominent accommodationist jurists, argued that that wall is "a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship."[145] These divergent readings reflect a vagueness in the text of the First Amendment. However, not only is it the Amendment that is written vaguely, but the legal tests are used to assess if cases violate it. Richard Jones argued that "the fundamental differences in the underlying sense of what "establishes" religion not only embodied in the tests themselves are the real source of difficulty in Establishment Clause cases."[146]

"...with *Lemon v. Kurtzman* (1971), Justice Burger, one of the most prominent accommodationist jurists, argued that that wall is "*a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship*."

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[142] Peter Onuf, "Thomas Jefferson's Christian Nation," in *Religion, State, and Society: Jefferson's Wall of Separation in Comparative Perspective*, edited by Robert Fatton Jr. and R. K. Ramazani (New York: Palgrave MacMillan, 2009), 22.

[143] Thomas Jefferson, "To the Danbury Baptist Association, letter", from *The Papers of Thomas Jefferson*, vol 36, 1 December 1801-1803, March 1802, ed. Barbara B. Oberg, (Princeton: Princeton University Press, 2009), 258.

[144] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[145] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[146] Richard H. Jones, "Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions," *Journal of Church and States* 28, no. 2 (Spring 1986), 192-223.

Tests like *Lemon*, in order not to be prescriptive, end up being so vague that they, too, come down to being decided on the whims and prejudices of judges who adjudicate cases. What differentiates a legitimate secular purpose and one used as a flimsy excuse is unclear, nor is the difference between a direct and indirect burden. The extent to which these tests should be authoritative is also unclear, with some accommodationists like Justice Burger arguing that these tests should be used as "signs" or "guidelines."[147]

Comparatively, most separationists see these tests as absolute. While Jones acknowledges that not every statute could be judged simultaneously legitimate and illegitimate by the same test, he argues that significant flexibility exists within the reading of every test.[148] Notably, within this is revealed a foundational problem with this kind of jurisprudence: at every step relies on the impulses and personal biases of the Court of the day.

"...a foundational problem with this kind of jurisprudence: *[is]* at every step *[it]* relies on the impulses and personal biases of the Court of the day."

It is also worth noting that some have particularly idiosyncratic interpretations of the First Amendment. Of particular note is Justice Clarence Thomas, who argued in *Elk Grove Unified School District v. Newdow* (2004) that the Establishment Clause did apply to the states, being excluded from the expansion after the passage of the Fourteenth Amendment. He wrote, "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause".[149] This drawing from doctrine is acknowledged by some on the Court, with former Justices Kent, Story, and Scalia finding this compelling to allow "significant religious control of the law."[150]

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[147] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[148] Richard H. Jones, "Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions," *Journal of Church and States* (1986).

[149] *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

[150] David Sehat, *The Myth of American Religious Freedom* (Oxford: Oxford University Press, 2015), 286-287.

3.4 Religion in Politics

In a deeply religious country like America, Christianity has played an explicit role in America's political life. Pew Research found that in the early 1990s, around 90% of the country identified as Christian, with that being around 63% in 2022.[151] Congress has historically been even more religious than the population as a whole. The 118th Congress was about 87.8% Christian. Only one representative in a Congress of 535 was not religiously affiliated.[152] The extent to which religion impacts voting decisions, and then the legislative decisions of those they select, is difficult to quantify.

"Pew Research found that in the early 1990s, around 90% of the country identified as Christian, with that being around 63% in 2022".

In a study of voting habits in the 2000 and 2004 elections, Professor Aimée K. Gibbs found that thinking about issues like abortion and homosexuality was correlated both with religious affiliation and voting behavior.[153] However, this relationship may not be straightforward. For one, the causality may be in the opposite direction, with some people deciding to join or remain in religion because of political conservatism. Additionally, the focus on issues that people understand as religious issues in recent elections—abortion, school prayer, LGBTQ+ rights, and the changing role of women—have been theorized by some sociologists as being held as important by those with anxieties about changing demography. Instead of a sense of piety, these issues represent a desire to, "capture the "symbols of national life," making the country appear culturally more in line with formerly homogenous White Protestants.[154] After the election of former President Obama in 2008, there were for instance attempts to mark him as unfit to hold office based on him supposedly being Muslim.[155]

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[151] "How U.S. religious composition has changed in recent decades," Pew Research Center, September 13, 2022.

[152] Jeff Diamant, "Faith on the Hill: The religious composition of the 118th Congress," Pew Research Center, January 3, 2023.

[153] Aimée K. Gibbs, "Religiosity and Voting Behavior," *McKendree University Scholars Journal* 6, (Summer 2005).

[154] William Schultz, "Don't You Know There's a War On?", *University of Chicago Divinity School*, September 17, 2021.

[155] Adam Serwer, "Birtherism of A Nation," *The Atlantic*, May 13, 2020.

While these values may be tied to religion, the extent to which people view it as important to vote on them may instead be tied to insecurity over changing racial and social hierarchies. Samuel Perry wrote that "for whites, religious heritage is infused with racial meaning."[156] Particularly as White Protestant Christianity falls from its position as the single most powerful faith group in America, some understand the influence of religious values more as a reaction to this shift in power. Religion is also frequently used to signal identity amongst politicians. In a study of religious framing in politics, Christopher Weber and Matthew Thornton found that religious appeals are becoming increasingly common in campaigns and speeches by those in office. They noted that "American presidents have invoked God far more since the 1980s, for example, than in decades prior."[157] They also found that religious coded messages, which are often hard to detect among those not of that religious group, have an effect of "activating traditionalism" in the political views of less informed voters.[158] Religious language is, therefore, being increasingly infused into secular issues.

Explicitly, religious institutions continue to have massive sway over politics. Legal groups like the Alliance Defending Freedom (ADF) were explicitly established by religious people to protect the rights of those religious groups. While the ADF represents people of many faiths, they work primarily with conservative Christians who want to challenge state and national laws that violate their religious beliefs. This includes work in current cases like *Chiles v. Salazar*, where the ADF is working to challenge a Colorado state law that bans any conversion therapy for people under 18,[159] and *Union Gospel Mission of Yakima v. Ferguson*, where there is a challenge to a Washington state law banning all religious discrimination in the hiring process for religious organizations.[160]

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[156] Samuel L. Perry, "Hoping for a God (White) Fary: How Desire for Religious Heritage Affects Whites' Attitudes Toward Interracial Marriage," *Journal for the Scientific Study of Religion* 53 (2014), 202-216.

[157] Christopher Weber and Matthew Thornton, "Courting Christians: How Political Candidates Prime Religious Considerations in Campaign Ads," *The Journal of Politics* 74, no. 2 (2012), 400-413.

[158] Ibid.

[159] "*Chiles v. Salazar*," *Alliance Defending Freedom*, March 24, 2023.

[160] "*Union Gospel Mission of Yakima v. Ferguson*," *Alliance Defending Freedom*, March 2, 2023.

The ADF currently boasts an 80% win rate, including 15 victories at the level of the Supreme Court.[161] Writing for Religion and Politics, Daniel Bennett argued that these conservative Christian legal advocacy groups "rose to prominence in the 1980s and 1990s"[162] and were inspired partly by the previous successes of progressive legal advocacy work by groups like the ACLU and NAACP. Financially, these groups are noted by Bennett to be highly successful, noting that some groups bring in over $40 million annually to support their work.[163] These well-funded, successful advocacy groups are supported by a judiciary that some note is becoming more institutionally connected to Christian conservatism. The Federalist Society, a national network of conservative law students, lawyers, and judges, dramatically influences the nominations of judges in Republican administrations.

Under President Trump, the Society "recommended and screened judicial nominees."[164] This is likely why 90% of President Trump's appointees to the bench were members of the Federalist Society.[165] While the Federalist Society is not explicitly religious, nor does it have an explicitly religious mission, it does have a markedly similar legal mission to those more explicitly religious legal advocacy groups. Therefore, it appears that between explicitly religious lawyers and conservative judges, there has been great success in the last four decades of religious groups arguing for expanded protection within the judiciary. At the same time, some religious groups explicitly campaign for particular political change.

"While the Federalist Society is not explicitly religious, nor does it have an explicitly religious mission, it does have a markedly similar legal mission to those more explicitly religious legal advocacy groups."

[161] "ADF at the Supreme Court," Alliance Defending Freedom, October 26, 2023.

[162] Daniel Bennett, "The Rise of Christian Conservative Legal Organizations," *Religion & Politics*, June 10, 2015.

[163] Kelsey Dallas, "Serving God by suing others: Inside the Christian conservative legal movement," *National Catholic Reporter*, August 5, 2017.

[164] Richard L. Hasen, "Polarization and the Judiciary," *Annual Review of Political Science* 22, (May 2019), 261-276.

[165] Sheldon Whitehouse, "5: The Federalist Society", *The Scheme*, July 27, 2021.

Melissa V. Harris Lacewell, in a paper on the role of the Black church in American politics, found that Black churches act as political vehicles in many ways. They are frequently visited by Democrats seeking office, act as a way for black communities to stay in communication with those politicians, are sites where community members learn skills of political mobilization, and help Black Americans develop the confidence to engage in historically racist government institutions.[166] Within the Black church, most congregants have been found to welcome the political messages delivered by their leaders and view those leaders as politically significant.[167] This is potentially due to the historical role of the Black church as a pillar of political advocacy, particularly during the civil rights era. Importantly, this demonstrates that explicitly religious groups play a role in mobilization, legislation, and judicial decision-making across the political spectrum.

3.5 Christian Nationalism

Perhaps the most intense manifestation of religion in modern American politics is a phenomenon today called Christian nationalism. In her testimony before the House Oversight Committee's Subcommittee on Civil Rights and Civil Liberties on December 13, 2022, Amanda Tyler, on behalf of the BJC (Baptist Joint Committee for Religious Liberty), argued that Christian Nationalism "suggests that "real" Americans are Christians and that "true" Christians hold a particular set of political beliefs."[168]

It is an ideology with deep political ambitions, seeking to create a society where those with particular Christian beliefs are legally privileged. It is a movement that is supported by far-right politicians like Majorie Taylor Greene, who, in an interview with Next News Network, said that the Republican Party "should be Christian nationalists."[169]

[166] Melissa V Harris-Lacewell, "Righteous Politics: The Role of the Black Church in Contemporary Politics," *CrossCurrents* 57, no. 2 (2007), 180-196.

[167] Misty Noel Johnson, "The black church and political mobilization of African Americans," *LSU Master's Theses* 2463, (2007).

[168] U.S. Congress, House, House Oversight Committee's Subcommittee on Civil Rights and Civil Liberties, *Testimony of Amanda Tyler*; On behalf of BJC.

[169] Nina Golgowski, "Rep. Margorie Taylor Greene Says GOP 'Should Be Christian Nationalists' Party." *Huffington Post*, July 24, 2022.

Further, Pew Research found that 4-in-10 Americans think America should be a Christian nation.[170] Measuring these political ambitions of Christian nationalism is complicated. For one, surveys of the beliefs of adherents to a new political movement need to be clearer on what people believe in. During the rise of the Tea Party in 2009, scholars Theda Skocpol and Vanessa Williamson argued that as more conservative media pushed broadly pro-Tea Party messages, more moderate conservatives supported the movement in early surveys.

“...surveys of the beliefs of adherents to a new political movement need to be clearer on what people believe in”.

This meant polling organizations listed these more moderate conservatives as Tea Partyers, as it was challenging to differentiate someone sympathetic to the cause and went to Tea Party meetings but was not an active member from someone who broadly supported any conservative group but had no knowledge of the specifics of what the Tea Party stood for.[171]

Importantly, these effects are likely to present for Christian nationalists. Americans who express a desire for the country to be more Christian to pollsters could encompass anyone from people who want more people to come to their church barbecues to those who want the country to embrace the Bible as the basis of law explicitly. Skocpol and Williamson argue that this effect means that politicians are likely to embrace the extreme beliefs of a fringe minority who fashion themselves as the leaders of these more extreme political forces. While the average church attendee wanting more friends to hang out with on Sunday may not care for mandatory school prayer, cautious politicians may listen to the cries of the most extreme, thinking they speak for a far larger swath of the population than they do.

This is to say that while more extreme Christian nationalists likely are a smaller proportion of the population than reported, to understand their legislative priorities, the most public, loud voices are a reasonable indication of the policy direction of the movement. Philip S. Gorski points to three theological drivers of those most loudly identifying with Christian nationalism.

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[170] Gregory A. Smith, Michael Rotolo and Patricia Tevington, “Views of the U.S. as a ‘Christian nation’ and opinions about ‘Christian nationalism’,” *Pew Research Center*, October 27, 2022.

[171] Theda Skocpol and Vanessa Williamson, *The Tea Party and the Remaking of Republican Conservatism* (Oxford: Oxford University Press, 2016).

The first is that America was a promised land to Christians, and the second is a "contemporary cosmic battle between good and evil."[172] The third is the story of the *Curse of Ham*, where the sons of Noah were cursed, which is often used as justification for the subjugation of people of color. The policy priorities that flow from these theological drivers focus primarily on removing and disenfranchising non-Christians within America and promoting Christian values. Edward Lempinen, writing about the work academics at UC Berkeley have done studying Christian nationalists, wrote that along with being some of the most vital voices on the front lines of typical Christian-right culture war issues, Christian nationalists fiercely support policies that suppress the votes of people of color, ban books, reject climate change and are skeptical of COVID-19 vaccines.[173]

Their desire to reject those they do not see fitting in with visions of white, Protestant Christianity has also led to Christian nationalists typically not believing in anti-Black discrimination in American life, instead seeing the country as anti-White. They thus tend to reject a policy that promotes racial equity in areas like policing.[174] This rejection of "otherness" tends to strongly spillover into discrimination towards immigrants, LGBTQ+ people, and religious minorities. Importantly, even if Christian nationalists and other conservative Christians may have similar policy preferences, Christian nationalists are often explicitly motivated by a desire to see a purely "Christian" nation. Beyond pushing laws that are potentially discriminatory towards religious minorities or would potentially infringe on the practice rights of other religious groups, Christian nationalists pose a threat to American religious freedom in their ability to mobilize rapidly.

"Their desire to reject those they do not see fitting in with visions of white, Protestant Christianity has also led to Christian nationalists typically not believing in anti-Black discrimination in American life, instead seeing the country as anti-White."

[172] John Rivera, "Confronting Christian Nationalism," *Institute for Islamic, Christian & Jewish Studies*, November 28, 2022.

[173] Edward Lempinen, "Crisis of Faith: Christian Nationalism and the Threat to U.S. Democracy," *Berkley Research*, September 20, 2022.

[174] Samuel L Perry, Ryon J Cobb, Andrew L Whitehead, and Joshua B Grubbs, "Divided by Faith (in Christian America): Christian Nationalism, Race, and Divergent Perceptions of Racial Injustice," *Social Forces* 101, Issue 2, (December 2022), 913-942.

Because most believe they are fighting for the will of God, Christian nationalists are incredibly engaged political activists. In some cases, this leads Christian nationalists to be at the front of more secular political movements, providing significant momentum. Protestant scholar Matthew D. Taylor argued that much of the fury that drove the January 6th attacks was concentrated in the thinking of members of Christian groups associated with what is called the New Apostolic Reformation, who were repeatedly told by pastors that Donald Trump was chosen to be President by God to bring forth a more Christian nation. These Christian groups could quickly mobilize large groups of believers who honestly thought God's will had been undermined.[175] Religious iconography was found all through the crowds at the Capital, and pastors like Donald Lynch from Florida could be heard rallying crowds with calls to, "Let there be the roar from the army of God!"[176] Additionally, those connected with Christian nationalist groups have been associated with violent extremism. The Southern Poverty Law Centre has noted that Christian nationalists have been involved in shootings in black churches, synagogues, and mosques.[177]

The American Psychological Association has found that 1-in-3 Americans have decided not to go certain places because of a fear of a mass shooting. When minority religions are targeted, this likely means that some faithful would avoid attending their houses of worship to avoid the attack. As a result, people's perceived capacity to safely engage in their faith communities is harmed. Notably, while Christian nationalists remain a broadly under-studied group, they both continue to push for legislation allowing more influence of the White Christian church in public life and organize in a way that threatens the safety of minorities and democratic institutions more broadly.

"...while Christian nationalists remain a broadly under-studied group, they both continue to push for legislation allowing more influence of the White Christian church in public life and organize in a way that threatens the safety of minorities and democratic institutions more broadly."

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[175] Matthew D Taylor, host, "NAR Apostles Collaborated with the White House before January 6th," *Christian Revival Fury* (podcast), 2 January, 2023.

[176] Jon Ward, "Radical beliefs in 'spiritual warfare' played a major role in Jan. 6, an expert argues," Y*ahoo! News*, February 17, 2023.

[177] Joseph Wiinikka-Lydon, "Dangerous Devotion: Congressional Hearing Examines Threat of White Christian Nationalism," *Southern Poverty Law Center,* December 28, 2022.

4. Modern Challenges to Religious Freedom

With varying interpretations of the First Amendment and politically empowered religious actors, the same questions of the limits of government power that were first litigated in *Reynolds v. United States* (1879) continue to be fought over today. However, the specifics of the issues have changed. America is more religiously diverse than it has ever been. Whereas landmark religious freedom cases were fought between small minority sects of Christianity, modern cases often involve large denominations. While religious liberty was once an issue seen as a concern for minority groups, it is today a cause most associated with Christian conservatives. This section deals with current issues discussing religious freedom, which are divided into debates about religious accommodations in school, the workplace, and the public sphere.

4.1 Religious Accommodation in Schools

As seen in earlier parts of this essay, First Amendment religious freedom cases have long centered on schools since they are some of the most important institutions for teaching young children about social institutions. Importantly, this means the treatment of religious private schools and the role of prayer, religious doctrine, and religious texts in public schools has long been debated.

“... the treatment of religious private schools and the role of prayer, religious doctrine, and religious texts in public schools has long been debated.”

In 2022, with *Carson v. Makin*, the Supreme Court decided in a 6-3 decision that any aid to private schools had to also go toward religious schools. The case surrounded a Maine tuition assistance program. Maine residents who wanted to attend private schools and fell below an income threshold applied for state assistance, assuming that that school was non-sectarian. The Court struck down the non-sectarian requirement, opening up parents of students in religious schools to apply for this funding.

In delivering the majority, Chief Justice Roberts wrote that the Court "applied these principles [of providing funds equally to religious and non-religious organizations] in the context of two state efforts to withhold otherwise available public benefits from religious organizations."[178] Maine quickly responded with a law banning state aid from schools that discriminate based on gender identity or sexual orientation.[179] The challenge to this law was filed in March 2023 by Crosspoint Church, represented by First Liberty Institute, who argued that it would "substantially burden"[180] religious exercise at their school. The Court has not yet taken this up. The status of prayer in school is also changing. In *Kennedy v. Bremerton School District* (2022), the Court ruled 6-3 that a public school football coach, Joseph Kennedy, could pray with his students after games. Justice Gorsuch, delivering the majority opinion, argued that religious speech is protected strongly by the Constitution, and resultantly, the school district was obligated to prove that the restrictions on speech "were nonetheless justified and tailored consistent with the demands of our case law."[181] He argued that school employees are not a particular class of citizen, so their right to speak does not change in their professional role. Crucially, the prayer was conducted in a lull of work activity. This was important to the Court as the ruling did not go so far as to allow teachers, during their duties, to lead a class in prayer. Therefore, precisely, Coach Kennedy's prayer, something he did only with students who wanted to be a part of, was protected, and the School District was not justified in restricting him. In dissent, Justice Sotomayor argued that due to "twin Establishment Clause concerns of endorsement and coercion,"[182] any kind of integration of prayer into public school is constitutionally problematic. She argued that because Coach Kennedy was representing the school, even in a lull of work activity, he could endorse a religion while the face of a school.

"*[Justice Sotomayor]* argued that because Coach Kennedy was representing the school, even in a lull of work activity, he could endorse a religion while the face of a school."

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[178] *Carson v. Makin*, 596 U.S. ___ (2022).

[179] Aaron Tang, "There's a Way to Outmaneuver the Supreme Court, and Maine has Found It," *New York Times*, June 23, 2022.

[180] Robbie Fenning, "Bangor church sues over law requiring its school to accept LGBTQ students, staff to get public funds," *Maine Public*, March 28, 2018.

[181] *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022).

[182] Ibid.

Following the decision, the Department of Education updated its guidelines for schools on prayer and religious observance. Introduced in May of 2023, the guidelines now recommend that schools not "prohibit [staff] from engaging in prayer merely because it is religious or because some observers, including students, might misperceive the school as endorsing that expression" in times where the school would allow staff to speak "personally."[183] The guidelines recommended that students be allowed to pray during a non-instructional time and did not discourage schools from instituting "moments of silence." However, during these periods, the guidelines established that students could not be compelled or discouraged from praying during these periods. In short, the guidelines allow all to pray at school but cannot compel others to. The guidelines also continued to recommend against speakers at graduations who would favor speaking religiously, rules against students distributing religious literature, or policies that targeted particular religious dress.

While the case provides only a small number of situations where a school official can pray, questions can easily be raised about potential future changes to the law surrounding school prayer. According to a Gallup poll in 2014, 61% of Americans support allowing schools to implement daily prayer, less than the 70% who supported it in 1990.[184] This is likely even further reduced from the levels of support enjoyed in 1964 when an amendment was proposed by Rep. Frank Becker (R-NY). The Becker Amendment was a proposed constitutional language driven by the backlash against the *Engel v. Vitale* (1962) decision that would allow school prayer. The relatively high support of prayer in schools does not indicate a high likelihood of an absolute rollback of the ban on school prayer.[185]

"The Becker Amendment was a proposed constitutional language driven by the backlash against the *Engel v. Vitale* (1962) decision that would allow school prayer."

[183] "Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools," *U.S. Department of Education*, May 15, 2023.

[184] Rebecca Rifkin, "In U.S. Support for Daily Prayer in Schools Dips Slightly," *Gallup*, September 25, 2014.

[185] Leo Pfeffer, "The Becker Amendment," *Journal of Church and State* 6, no. 3 (1964), 344-349.

However, the *Kennedy* decision could allow marginally more prayer in school settings. In August 2022, the Washington Post reported that "at least three states, Illinois, Alabama, and Oregon,"[186] were reviewing their prayer policies, with teachers perhaps being allowed to pray in their downtime less secretly. First Liberty Institute, the Christian conservative legal team supporting Coach Kennedy, has already attributed the case's success to the successful passage of Senate Bill (SB) 1515 in Texas, which would mandate the display of the Ten Commandments if a copy was sent to a school.[187] However, despite SB 1515's passage in the Senate, it failed to receive a vote in the House before the end of the legislative session.[188] Notably, the publicity generated by Christian groups' activism regarding faith in schools has generated substantial backlash from secular groups, meaning many of their efforts have stalled.

4.2 Religious Accommodations in the Workplace

In 1977, with *Trans World Airlines v. Hardison*, in line with the more separationist feelings of the era in a 7-2 decision, the Court limited the requirement that businesses seek reasonable accommodations to allow workers to observe their religion. Larry Hardison, a World Church of God member, observed the Sabbath on Saturdays. Trans World Airlines (TWA), under a collective bargaining agreement, determined that shifts were to be selected in order of seniority. After transferring locations, Harrison was no longer senior and thus could not select in a way that allowed him not to work Saturdays.

"In 1977... the Court limited the requirement that businesses seek reasonable accommodations to allow workers to observe their religion."

[186] Hannah Natanson, "After court ruling, activists push prayer into schools," *Washington Post*, July 26, 2022.

[187] Jorge Gomez, "Texas Bills Would Put History and Religious Freedom Where They Rightfully Belong," *First Liberty Institute,* April 28, 2023.

[188] Robert Downen, "Bill requiring Ten Commandments in Texas classrooms fails in House after missing crucial deadline," *The Texas Tribune*, May 24, 2023.

Justice White, delivering the majority opinion of the Supreme Court, pointed at the findings of the District Court, "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with the plaintiff at which it attempted to find a solution to the plaintiff's problems. It did accommodate the plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which was normal procedure."[189]

While the Court of Appeals found this insufficient, Justice White thought otherwise. Notably, the way that the Court of Appeals found helpful (allowing Hardison to usurp the seniority system) would require placing religion at a higher level of import to collective bargaining, which "lies at the core of our national labor policy."[190] Without a Congressional directive, it would make sense that union rights ought to take precedence over religious ones when some degree of accommodation had already been made. The Supreme Court thus required that employers not bear any more than "*de minimis*" cost.[191]

This *de minimis* standard has proven controversial in the years after the case. Years later, speaking with the Washington Times, Hardison said that under this standard, accommodation for a worker "could be a penny, and that would be too much."[192] Other religious groups have written that they feel that the standard has allowed broad discrimination against members of their community.

"Years later, speaking with the Washington Times, Hardison said that under this standard, accommodation for a worker "*could be a penny, and that would be too much*."

[189] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

[190] Ibid.

[191] Ibid.

[192] Mark A. Kellner, "Supreme Court to review 1977 decision on religious accommodation," *Washington Times*, March 14, 2023.

In 2023, the Supreme Court unanimously clarified this precedent through *Groff v. DeJoy*. The case going to the Court centered on Gerald Groff, an employee of USPS in rural Pennsylvania in rural Virginia. In 2013, USPS signed a contract with Amazon that, for the first time, required Sunday deliveries. Because of the chronic understaffing of USPS, Groff was required to show up to Sunday shifts. After he refused, "facing potential disciplinary action for refusal to report for Sunday work, quit and sued the Postal Service for failure to accommodate his religious views."[193] The decision, written by Justice Alito, argued that "Hardison cannot be reduced to one phrase [*de minimis* cost]."[194] Instead, he pointed to the rest of the opinion, which referenced substantial burdens on the employer.

Justice Alito argued, "We do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation."[195] However, similar to Equal Employment Opportunity Commission (EEOC) guidelines issued after the ruling in Hardison, employers should accommodate religious employees to a higher than *de minimis* standard.

"...similar to Equal Employment Opportunity Commission (EEOC) guidelines issued after the ruling in *Hardison*, employers should accommodate religious employees to a higher than *de minimis* standard."

In this decision, Justice Alito did not overturn Hardison but blamed the lower courts for interpreting it as only requiring the minimum standard of effort on the part of a company to accommodate religious employees. Notably, he argued that this would remain the same as the stated guidance in Title VII or the EEOC guidelines for treating religious workers. In her concurring opinion, Justice Sotomayor further argued that any revised standard Groff pursued should be through the legislative process. She also did away with Groff's claim that hardship felt by co-workers, rather than just to the business, was not a valid reason to limit his protections regarding practice.

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[193] Nina Totenberg, "Who bears the burden, and how much, when religious employees refuse Sabbath work?" *NPR*, April 18, 2023.

[194] *Groff v. DeJoy*, 600 U.S. ___ (2023).

[195] Ibid.

Some legislative solutions have been proposed to expand workplace religious protections. The *Workplace Religious Freedom Act* (WRFA), proposed first in 1994 and last introduced in 2013, would have required employers to bear any cost short of a "significant difficulty or expense"[196] to accommodate an employee's religion. James A. Sonne, writing for the Notre Dame Law Review, argued that this law effectively establishes the same protections that the *Americans with Disabilities Act* (ADA) does, but for a far broader group without as constrained a definition of what a religious person is.[197] This legislation did not pass nationally but did in California in 2012.

4.3 Religious Accommodations in the Public Sphere

In 2018, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the US Supreme Court upheld a Colorado anti-discrimination law that compelled businesses owned by those with religious objections to same-sex marriage to provide services to same-sex couples. The case, decided 7-2, surrounded Masterpiece Cakeshop owner Jack Philips, who turned away a same-sex couple ordering a wedding cake, citing his religious beliefs. The couple turned to the Colorado Civil Rights Commission, arguing that this refusal of service was unconstitutional under a law that banned businesses from discriminating based on sexual orientation. The Supreme Court argued that Colorado could compel businesses to serve same-sex couples. However, it overturned the Commission's decision based on reported "hostility"[198] towards Philips based on his religious beliefs. In his opinion, Justice Kennedy argued that when operating his business, Philips "might have his right to the free exercise of religion limited by generally applicable laws."[199] However, when operating as a business owner, people's right to free practice was less-absolute. While he argued that any person was allowed to object to same-sex marriage, the status of LGBTQ people as a protected group meant that their civil rights to access goods and services ought to be protected, usurping the right of religious people to deny them service.

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[196] U.S. Congress, House, Workplace Religious Freedom Act of 1994, H.R. 5233, 103rd Congress, 2nd session.

[197] James A Sonne, "The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls," *Notre Dame Law Review* 79, no. 3 (2004), 1023-1080.

[198] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

[199] Ibid.

“While *[Justice Kennedy]* argued that any person was allowed to object to same-sex marriage, the status of LGBTQ people as a protected group meant that their civil rights to access goods and services ought to be protected, usurping the right of religious people to deny them service.”

Justice Kennedy gave this exception to this for clergy, who he thought could not be “compelled to perform the ceremony.”[200] He did acknowledge that the nature of the custom cake, as a creative work, would require Philips to, through his speech, endorse a belief that he thought violated his religion. However, Justice Kennedy failed to pass judgment on this, claiming that the state would likely have had some response to this that would, at the very least, constrain the number of people who could claim this exemption on belief. His opinion would challenge the “hostility” that the Commission showed towards Philips’ religious beliefs, pointing to it as a clear example of discrimination based on religion. Most importantly, because of the disparity in the treatment of Philips, whom the Commission mocked, and others with different conscientious objection claims to the Colorado anti-discrimination laws.

In her concurring opinion, Justice Kagan wrote that the state ought to have argued that the difference between a request for a cake with anti-gay slogans and one for gay marriage, both challenged by the Commission, was the nature of LGBTQ identity as a protected class. To Justice Kagan, wedding cakes do not represent personal speech or art; instead, they are a somewhat standard service. Thus, as “the same-sex couple, in this case, requested a wedding cake that Philips would have made for an opposite-sex couple,”[201] the Commission was right to strike down Philips’ petition. However, the Commission did so in a profoundly discriminatory way. Comparatively, in his concurring opinion, Justice Gorsuch argued that the Commission would only be fairly applying the law if they did allow Philips the exception. Because Philips would have turned down any cake endorsing same-sex marriage, regardless of the sexual orientation of the person ordering, he was within his right to reject making the cake.

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[200] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2018.

[201] Ibid.

Justice Gorsuch argued that the Commission's response that sexual orientation was inextricably tied with same-sex marriage failed to counter this, as "cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths."[202] As Colorado allowed bakers to refuse anti-same-sex marriage cakes, Justice Gorsuch believed the Commission should extend this right to religious bakers. This difference between the opinions of Justice Kagan and Gorsuch meant that the question of whether these religious objections to anti-discrimination law could continue to be fought. This question would end up back in the Supreme Court just five years later in a similar case, *303 Creative LLC v. Elenis* (2023). Lorie Smith, the owner of the graphic design business 303 Creative, expressed a desire to begin making wedding websites; however, she did not want to extend these services to same-sex couples on account of her religious beliefs. She thus filed an injunction to prevent the State of Colorado from compelling her to accept same-sex couples as clients for this service. This time, in a 6-3 decision, the Court found that Smith had a right to reject the requests of same-sex couples.

Justice Gorsuch, writing the opinion of the Court, argued that websites constituted speech. Pointing to the decision of the Tenth Circuit Court of Appeals, he argued that Smith would have to produce images, symbols, and text that "celebrate and promote"[203] a wedding that she would feel uncomfortable with, meaning Colorado anti-discrimination laws would compel her to effectively speak in a way that violated her most fundamental religious beliefs. Justice Gorsuch argued that even though same-sex marriage implicated a protected class, not allowing objections based on another's protected class would potentially harm the rights of those with different traits. For instance, he pointed to business owners being compelled to make products endorsing religious views contrary to their own. While Justice Gorsuch believed that public accommodation laws were still constitutionally sound, they could only be extended to cases where the product did not require the business owner to "speak." Smith could be compelled to produce a business website for a gay man who wanted to advertise his law firm but not be compelled to make a website for him and his groom.

These recent accommodation cases point to a Supreme Court that accommodates religious practices that may conflict with existing laws and secular social institutions. However, this is being pushed back against by increasingly visible secular groups trying to minimize the role of public religion.

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[202] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2018.

[203] *303 Creative LLC v. Elenis*, 600 U.S. ___ (2023)

“These recent accommodation cases point to a Supreme Court that accommodates religious practices that may conflict with existing laws and secular social institutions.”

Conclusion

The status of religion in modern America is confusing and challenging. From the very founding of the country, there has been no agreement on where the line ought to be drawn on the question of the role of religion in government. Questions of whether the law should allow broad exemptions for religious people to practice as they please or encourage secular government remain in flux.

While recent history in the 1970s seems to point to a more separationist interpretation of religious freedom, where religious affiliation is not privileged among other personal affiliations, an increasingly conservative Supreme Court, with more religious legislators, has been interpreting the Constitution as more accommodationist. This is not the total picture, however. Religious conservatives may have succeeded in recent cases like *Dobbs v. Jackson Women’s Health Organization* (2022) but have also seen setbacks like in *Obergefell v. Hodges* (2015).

Significant literature explores the extent of religious freedom in America far more precisely and deeply than this. However, little discusses religion’s less visible influences on the country. In a place where most legislators are Protestant Christians, where until the 1960s Protestant Christianity was seen as the default, and where the leaders who created the ethics and Constitution of the country were uniformly Christian, it seems complicated to ignore how religion more subtly interacts with legal systems. The way that liberty, for instance, is understood is connected fundamentally to Christian natural rights.

This paper argues that while the explicit role of religious freedom in the law has been and will likely continue to be in flux, those historical Christian foundations are not. Notably, the dominance of Protestant Christianity over other sects in American public life is unlikely to change, so discussions about the nature of religious liberty should account for the fact that even secular-appearing laws and institutions exist with inherent bias.

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Ideas at their best when they interact.

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