Religious Freedom in America

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Editorial note: I have edited cases for length and clarity and generally omitted footnotes and citations. When a footnote or citation is particularly relevant, I have included it in the text of the opinion. I have also omitted some concurrences and dissents.

United States v. Kuch

288 F. Supp. 439 (D.D.C. 1968)

Gesell, District Judge.

Judith H. Kuch, who avers she is an "ordained minister of the Neo-American Church", stands indicted in a seven-count indictment for unlawfully obtaining and transferring marijuana and for the unlawful sale, delivery and possession of LSD. . . .

Defendant . . . contends that the criminal penalties provided for violation of these Acts may not be applied as to her for several reasons relating in various ways to her basic contention that the laws impinge on her constitutional right in the free exercise of her alleged religion. A hearing was held and testimony and exhibits received in support of Kuch's religious claims. She presented no subjective evidence as to her individual beliefs but chose to rely on her office in the Church and proof as to the requirements and attitudes of the Church as constituted. The Court has concluded that the facts and authorities discussed below do not support her contentions for several separate and independent reasons.

The Neo-American Church was incorporated in California in 1965 as a nonprofit corporation. It claims a nationwide membership of about 20,000. At its head is a Chief Boo Hoo. Defendant Kuch is the primate of the Potomac, a position analogized to bishop. She supervises the Boo Hoos in her area. There are some 300 Boo Hoos throughout the country. In order to join the church a member must subscribe to the following principles:

(1) Everyone has the right to expand his consciousness and stimulate visionary experience by whatever means he considers desirable and proper without interference from anyone;

(2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the Self, and therefore belong to everyone;

(3) We do not encourage the ingestion of psychedelics by those who are unprepared.

Building on the central thesis of the group that psychedelic substances, particularly marijuana and LSD, are the true Host, the Church specifies that "it is the Religious duty of all members to partake of the sacraments on regular occasions."

A Boo Hoo is "ordained" without any formal training. He guides members on psychedelic trips, acts as a counselor for individuals having a "spiritual crisis," administers drugs and interprets the Church to those interested. The Boo Hoo of the Georgetown area of Washington, D.C., testified that the Church was pantheistic and lacked a formal theology. Indeed, the church officially states in its so-called "Catechism and Handbook" that "it has never been our objective to add one more institutional substitute for individual virtue to the already crowded lists." In the same vein, this literature asserts "we have the right to practice our religion, even if we are a bunch of filthy, drunken bums." The members are instructed that anyone should be taken as a member "no matter what you suspect his motives to be."

The dividing line between what is, and what is not, a religion is difficult to draw. The Supreme Court has given little guidance. Indeed, the Court appears to have avoided the problem with studied frequency in recent years. Obviously this question is a matter of delicacy and courts must be ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.

Subtle and difficult though the inquiry may be, it should not be avoided for reasons of convenience. There is need to develop a sharper line of demarcation between religious activities and personal codes of conduct that lack spiritual import. Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms

this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. In a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must at the very least demonstrate adherence to ethical standards and a spiritual discipline.

The defendant has sought to have the Church designated a religion primarily by emphasizing that ingestion of psychedelic drugs brings about a religious awareness and sharpens religious instincts. There was proof offered that the use of psychedelic drugs may, among other things, have religious implications. Various writings on the subject were received in evidence and testimony was taken from two professors, not members of the Church but having theological interest in the subject, who had themselves taken drugs experimentally and had studied religious manifestations of psychedelic drug ingestion.

Just as sacred mushrooms have for 2,000 years or more triggered religious experiences among members of Mexican faiths that use this vegetable, so there is reliable evidence that some but not all persons using LSD or marijuana under controlled conditions may have what some users report to be religious or mystical experiences. Experiments at Harvard and at a mental institution appear to support this view and there are specific case histories available, including the accounts of the professors who testified as to their personal experience under the influence of psychedelic drugs. Researchers have found that religious reactions are present in varying degrees in the case of from 25 percent to 90 percent of those partaking. A religious reaction appears most frequently among users already religiously oriented by training and faith. While experiences under the influence have no single pattern, a religious reaction includes the following effects. Sometimes senses are sharpened and apparently a mixed feeling of awe and fear results. There may be mystery, peace, and a sharpening of impressions as to all natural objects, perhaps even something akin to the vision Moses had of a burning bush as described in Exodus. That there may be wholly different effects upon given individuals is equally clear. Psychotic episodes may be initiated, leading to panic, delusions, hospitalization, self-destruction and various forms of antisocial and criminal behavior, as will be later indicated in more detail.

While there may well be and probably are some members of the Neo-American Church who have had mystical and even religious experiences from the use of psychedelic drugs, there is little evidence in this record to support the view that the Church and its members as a body are motivated by or associated because of any common religious concern. The fact that the use of drugs is found in some ancient and some modern recognized religions is an obvious point that misses the mark. What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence. It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence.

Reading the so-called "Catechism and Handbook" of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a "martyrdom record" to reflect his arrests. The Church symbol is a three-eyed toad. Its bulletin is the "Divine Toad Sweat." The Church key is, of course, the bottle opener. The official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." In short, the "Catechism and Handbook" is full of goofy nonsense, contradictions, and irreverent expressions. There is a conscious effort to assert in passing the attributes of religion but obviously only for tactical purposes. Constitutional principles are embraced wherever helpful to the cause but the effect of the "Catechism and Handbook" and other evidence as a whole is agnostic, showing no regard for a supreme being, law or civic responsibility.

The official seal of the Church is available on flags, pillow cases, shoulder patches, pill boxes, sweat shirts, rings, portable "communion sets" with chalice and cup, pipes for "sacramental use," and the like. The seal has the three-eyed toad in the center. The name of the Church is at the top of the seal and across the bottom is the Church motto: "Victory over Horseshit!". The Court finds this helpful in declining to rule that the Church is a religion within the meaning of the First Amendment. Obviously the structure of this so-called Church is such that mere membership in it or participation in its affairs does not constitute

proof of the beliefs of any member, including Kuch. In short, she has totally failed in her burden to establish her alleged religious beliefs, an essential premise to any serious consideration of her motions to dismiss.

Assuming, however, that the Neo-American Church is a genuine religion and that Kuch subscribes fully to its doctrines and thus may invoke the full constitutional guarantees for free religious expression, her contentions are still without merit. The Constitution protects the right to have and to express beliefs. It does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion.

The practices of the Neo-American Church involving the use, possession, transfer and sale of marijuana and LSD are contrary to the criminal law. Starting with an acceptance of Kuch's religious claim, it is necessary to determine whether the legislation under which defendant stands indicted unduly infringes her freedom to practice what she asserts are religious beliefs. As the Court has instructed in the flag salute cases, freedom of worship is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

Defendant misconceives the Constitution and the decisions when she claims in effect an unbridled right to practice her beliefs. The public interest is paramount and if properly determined the Congress may inhibit or prevent acts as opposed to beliefs even where those acts are in accord with religious convictions or beliefs. If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting breakdown of society. There is abroad among some in the land today a view that the individual is free to do anything he wishes. A nihilistic, agnostic and antiestablishment attitude exists. These beliefs may be held. They may be expressed but where they are antithetical to the interests of others who are not of the same persuasion and contravene criminal statutes legitimately designed to protect society as a whole, such conduct should not find any constitutional sanctuary in the name of religion or otherwise.

Mormons were not permitted to practice polygamy. Nor would the Constitution protect the practice of religions requiring infanticide, the killing of widows, or temple prostitution, as some religions have done in the past. The vital significance of the constitutional protection of religion will be diluted by a degree of tolerance that accepts the practice of acts which leave society helpless to protect itself.

Unfortunately we have been gradually drifting away from this pristine view taken by our founding fathers that religious beliefs were to be upheld at all cost but that acts induced by religious beliefs could be prohibited where Congress spoke in the interests of society as a whole. Recent decisions of the Supreme Court suggest that there must be a balancing of the legislative end to be achieved against the effect of the legislation on practices and hence the acts of the members of a particular religion. This is but a way of saying that each case will depend on its own facts and a balancing of factors as the members of the court may see them at any given point in time. No United States District Judge who must act within the confines of a record and available judicial time has the wisdom or means of doing adequately what the cases appears to require. It is to be hoped that there will develop a constitutional doctrine in this field that more closely approximates that contemplated by the framers of the Constitution and that leaves the balancing function in all but obvious cases of clear abuse in the hands of the Congress, where it belongs. Be that as it may, the Court has carefully sought to apply prevailing doctrine in this field. The Court concludes that under any common sense view of undisputed facts the full enforcement of the statute here involved is necessary in the public interest and the unintended but obvious restrictions on the practices of defendant's church are wholly permissible.

There is substantial evidence that the use of marijuana creates a health hazard, is often the first step toward serious drug addiction in the progression to heroin, and is frequently associated with the commission of non-drug crimes, often crimes of violence. While all its effects are still unknown and the reactions of users differ, depending on emotional, psychological and frequency-of-use factors, the drug marijuana may often predispose to antisocial behavior and precipitate psychotic episodes. Among other reactions, hallucinations and delusions, impairment of judgment and memory, and confusion and delirium are common. Among chronic users, extremely violent aggressive conduct is manifested. Medical experts,

narcotic experts, law enforcement officials, psychologists and proponents of freer marijuana use are not in accord but there is a very substantial body of opinion among individuals in each of these categories which supports the implications of marijuana use summarized above. . . .

As part of her motion to dismiss the indictment on religious grounds, defendant has also made what may be broadly described as the "peyote" argument. The claim is that she is denied equal protection in the constitutional sense because members of another religion are permitted under the narcotic laws to use peyote, a similar and at least as harmful an hallucinatory drug.

In People v. Woody, the California Supreme Court . . . held that a state statute prohibiting the unauthorized use of peyote could not constitutionally be applied to a member of the Native American Church. The Native American Church, made up of from 30,000 to 250,000 American Indians, had a "long history" of the use of peyote. The court found that:

Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. . . .

Against the "virtual inhibition of the practice of defendants' religion" imposed by the state statute, the California court balanced the state's interest in enforcing the statute in order to determine whether that interest was so "compelling" as to necessitate "an abridgement of defendants' First Amendment right." The court found that the record did not support "the state's chronicle of harmful consequences of the use of peyote" and held in favor of an exemption for the defendant members of the Native American Church. . . .

Defendant asserts that marijuana is less harmful, or no more harmful, than peyote and that under the reasoning in Woody, she is entitled to an exemption from the Marijuana Tax Act. This Court, however, is not bound by decisions of the California Supreme Court. While it may appear incongruous that the court found, on the one hand, that the state had not shown that peyote had harmful consequences and yet found, on the other hand, that peyote "engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia" - that problem is not before the Court. . . .

The Neo-American Church is not an establishment of religion and defendant Kuch has not sustained her burden of demonstrating that her religious beliefs require her to ingest psychedelic drugs. Accepting her contrary contentions on these issues, however, she still cannot prevail for the statutes under which she stands indicted are in aid of a substantial government interest and have a rational and constitutional basis. These laws, enacted to preserve public safety, health and order, will be enforced. On the proofs before the Court the statutes are unrelated to the suppression of religion or religious beliefs and there is no denial of defendant's rights under the Constitution of the United States.

The Essential Rights and Liberties of Religion in the American Constitutional Experiment

John Witte, Jr.

71 Notre Dame L. Rev. 371 (1996)

Thomas Jefferson once described the religion clauses of the First Amendment to the United States Constitution as a "fair" and "novel experiment" in religious rights and liberties. The religion clauses, declared Jefferson, defied the millennium-old assumptions inherited from Western Europe -- that one form of Christianity must be established in a community, and that the state must protect and support it against other religions. The religion clauses, Jefferson argued, suffer neither prescriptions nor proscriptions of religion. All forms of Christianity must stand on their own feet and on an equal footing with all other religions. Their survival and growth must turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.

This bold constitutional experiment in religious liberty, though neither as fair nor as novel as Jefferson believed, remains intact and in progress in the United States. The First Amendment religion clauses, drafted in 1789 and ratified in 1791, remain the predominant federal constitutional text to govern religious rights and liberties in America. Principal governance of this experiment -- initially left to state legislatures and state courts -- has since the 1940s fallen largely to the United States Supreme Court and lower federal courts.

The American experiment in religious liberty initially inspired exuberant rhetoric throughout the young republic and beyond. Elhanan Winchester, a Baptist preacher turned Universalist, declared proudly to a London audience in 1789:

There is but one country in the world where liberty, and especially religious liberty, is so much enjoyed as in these kingdoms, and that is the United States of America: there religious liberty is in the highest perfection. All stand there on equal ground. ... A man may be chosen there to the highest civil offices, without being obliged to give any account of his faith, subscribe [to] any religious test, or go to the communion table of any church.

Dozens of such confident endorsements of the American experiment in religious rights and liberties can be found in the sermons, pamphlets, and monographs of the young American republic.

Today, the American experiment inspires far more criticism than praise. The United States does "embosom" all religious sects and denominations, as [Yale] President [Erza] Stiles predicted, not only from Christendom, but from around the world. American citizens do enjoy remarkable freedom of thought, conscience, and belief -- too much freedom, according to some commentators. But the laboratory of the United States Supreme Court, which has directed the American experiment for the past fifty years, no longer inspires confidence. Not only have the Court's recent decisions on the rights of religious minorities in America -- particularly Jews, native American Indians, and Muslims -- evoked withering attacks in the popular and professional media. The Court's entire record on religious liberty has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors. "Religion Clause jurisprudence," Mary Ann Glendon [writes,]

Religion clause jurisprudence has been described on all sides, and even by Justices themselves, as unprincipled, incoherent, and unworkable. . . . [T]he Court must now grapple seriously with the formidable interpretive problems that were overlooked or given short shrift in the past. The task is an urgent one, for it concerns nothing less than the cultural foundations of our experiment in ordered liberty.

The United States Supreme Court is not the only body that is now "grappling" with the experiment. In the past few years, the testing ground seems to be shifting away from the courts to the legislatures, and away from the federal government to the states -- a trend encouraged by several recent Supreme Court opinions.

Congress has issued a number of acts to defend the free exercise rights of various religious individuals and groups, and in the Religious Freedom Restoration Act [RFRA] to define the appropriate free exercise test to be used in future cases. At the same time, state legislatures and courts have become bolder in conducting their own experiments in religious liberty that seem calculated to revisit, if not rechallenge, prevailing Supreme Court interpretations of the establishment and free exercise clauses. These recent trends have served to exacerbate the indeterminacy of the American experiment.

When an experiment becomes a "kind of wandering inquiry, without any regular system of operations," wrote Francis Bacon, the "father" of the experimental method, "prudence commends three correctives." First, said Bacon, we must "return to first principles and axioms," reassess them in light of our experience, and "if necessary refine them." Second, we must assess "our experience with the experiment" in light of these first principles, to determine where "the experiment should be adjusted." Third, we must "compare our experiments" and experiences with those of fellow scientists, and where we see in that comparison "superior techniques," we must "amend our experiments" and even our first principles accordingly. Though Bacon offered these prudential instructions principally to correct scientific experiments that had gone awry, his instructions commend themselves to legal and political experiments as well -- as he himself sought to demonstrate in seventeenth century English law and politics.

This Article applies Bacon's prudential instructions to the American constitutional experiment in religious rights and liberties -- an experiment that today is, indeed, "wandering, without any regular system of operations." Applying Bacon's first instruction, Part I distills from the diverse theological and political traditions and experiences of the eighteenth century the most widely embraced "first principles" of the American constitutional experiment -- the " essential rights and liberties of religion," to use eighteenth century parlance. These principles included liberty of conscience, free exercise of religion, confessional and structural pluralism, equality of religions before the law, separation of the institutions of church and state, and disestablishment of religion. . . .

This Article is more expansionist than revisionist in inspiration and methodology. The essential rights and liberties of religion analyzed and advocated herein are not new creations. But I ground these principles in several eighteenth century sources and twentieth century international prototypes that have not been part of the conventional discussion. I also strip them of the thick accretions of recent casuistry that have obscured their essential value, vigor, and validity. The call for an integrated framework of religious liberty in America is also not new. But I warn against efforts to reduce the religion clause guarantees to one or two principles alone -- even the vaunted principles in vogue today, such as neutrality, separation, equality, or accommodation. Religion is simply too vital and valuable a source of individual flourishing and social cohesion to be left to such primitive legal defenses. As both eighteenth century American writers and twentieth century international jurists have repeatedly argued, a variety of principles must be integrated into an interlocking and interdependent shield of religious liberties and rights for all. The principles of liberty of conscience, free exercise, pluralism, equality, separation, and disestablishment form the essential amalgam of any such shield.

I. The "Genesis" of the American Constitutional Experiment

The religion clauses of the state constitutions and of the First Amendment, forged between 1776 and 1791, express both theological and political sentiments. They reflect both the convictions of the religious believers of the young American republic and the calculations of their political leaders. They manifest both the certitude of leading eighteenth century theologians such as Isaac Backus and John Witherspoon, and the skepticism of such contemporaneous philosophers as Thomas Jefferson and Thomas Paine.

The American experiment in religious rights and liberties cannot, in my view, be reduced to the First Amendment religion clauses alone, nor can the intent of the framers be determined simply by studying the cryptic record of the debates on these clauses in the First Session of Congress -- however valuable that source is still today. Not only are these Congressional records incomplete, but the First Amendment religion clauses, by design, reflect only a small part of the early constitutional experiment and experience. The religion clauses, on their face, define only the outer boundaries of appropriate government action

respecting religion -- government may not prescribe ("establish") religion nor proscribe ("prohibit") its exercise. Precisely what governmental conduct short of outright prescription or proscription of religion is constitutionally permissible is left open for debate and development. Moreover, the religion clauses on their face bind only the federal government ("Congress"), rendering prevailing state constitutional provisions, and the sentiments of their drafters, equally vital sources of original intent. Finally, the drafters of the religion clauses urged interpreters to look not to the drafters' intentions, but, in James Madison's words, "to the text itself [and] the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses." The understanding of the state conventional delegates was derived from their own state constitutional experiments and experiences, which are reflected in contemporaneous pamphlets, sermons, letters, and speeches. A wide range of eighteenth century materials must thus be consulted to come to terms with the prevailing sentiments on religious rights and liberties in the young American republic.

A. Four Views of Religious Rights and Liberties in the Late Eighteenth Century

Within the eighteenth century sources at hand, two pairs of theological perspectives on religious liberties and rights were critical to constitutional formation: those of congregational Puritans and of free church evangelicals. Two pairs of contemporaneous political perspectives were equally influential: those of enlightenment thinkers and civic republicans. Exponents of these four perspectives often found common cause and used common language, particularly during the Constitutional Convention and ratification debates. Yet each group cast its views in a distinctive ensemble, with its own emphases and its own applications.

It must be emphasized that this is a heuristic classification, not a wooden taxonomy, of the multiple opinions on religious rights and liberties in the early republic. Other views besides these circulated, and other labels besides these were (and can be) used to describe these four views. Moreover, individual writers of the eighteenth century often straddled two or more perspectives, shifted their allegiances or alliances over time, or changed their tones as they moved from formal writing to the pulpit or to the political platform. John Adams, for example, expounded both Puritan and civic republican views. John Witherspoon moved freely between evangelical and civic republican camps. Jonathan Edwards, at least in his political and ethical writings, toed (and moved) the line between old light Puritan and new light evangelical perspectives. James Madison's early writings on religious liberty had a strong evangelical flavor; his political speeches in the early sessions of Congress often pulsed with civic republican sentiments; his later writings, particularly after his Presidency, were of increasingly firm enlightenment stock.

Nonetheless, exponents of these four views offered distinctive and distinguishable teachings on religious rights and liberties, and collectively had the most influence on constitutional formation. The so-called original intent of the American constitutional framers respecting government and religion cannot be reduced to any one of these views. It must be sought in the tensions among them and in the general principles that emerge from their interaction.

1. Puritan Views

The New England Puritans were the direct heirs of the theology of religious liberty taught by European Calvinists. They had revised and refined this European legacy through the efforts of John Winthrop, John Cotton, Cotton Mather, Jonathan Edwards, Charles Chauncy, Jonathan Mayhew, and a host of other eminent writers. Since the 1630s, the Puritans had dominated the New England colonies.

The Puritans who wrote on religious liberties and rights were concerned principally with the nature of the church, of the state, and of the relationship between them. They conceived of the church and the state as two separate associations, two seats of Godly authority in the community. Each institution, they believed, was vested with a distinct polity and calling. The church was to be governed by pastoral, pedagogical, and diaconal authorities who were called to preach the word, administer the sacraments,

teach the young, care for the poor and the needy. The state was to be governed by executive, legislative, and judicial authorities who were called to enforce law, punish crime, cultivate virtue, and protect peace and order.

In the New England communities where their views prevailed, the Puritans adopted a variety of safeguards to ensure the basic separation of the institutions of church and state. Church officials were prohibited from holding political office, serving on juries, interfering in governmental affairs, endorsing political candidates, or censuring the official conduct of a statesman. Political officials, in turn, were prohibited from holding ministerial office, interfering in internal ecclesiastical government, performing sacerdotal functions of clergy, or censuring the official conduct of a cleric. To permit any such officiousness on the part of church or state officials, Governor John Winthrop averred, "would confound[ ] those Jurisdictions, which Christ hath made distinct."

Although church and state were not to be confounded, however, they were still to be "close and compact." For, to the Puritans, these two institutions were inextricably linked in nature and in function. Each was an instrument of Godly authority. Each did its part to establish and maintain the community. The Puritans, therefore, readily countenanced the coordination and cooperation of church and state.

State officials provided various forms of material aid to churches and their officials. Public properties were donated to church groups for meeting houses, parsonages, day schools, and orphanages. Tax collectors collected tithes and special assessments to support the ministers and ministry of the congregational church. Tax exemptions and immunities were accorded to some of the religious, educational, and charitable organizations that they operated. Sabbath day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days, and required faithful attendance at worship services.

Church officials, in turn, provided various forms of material aid and accommodation to the state. Church meetinghouses and chapels were used not only to conduct religious services, but also to host town assemblies, political rallies, and public auctions, to hold educational and vocational classes, to house the community library, to maintain census rolls and birth, marriage, and death certificates. Church officials ... preached obedience to the authorities and imposed spiritual discipline on parishioners found guilty of crime. They encouraged their parishioners to be active in political affairs and each year offered "election day sermons" on Christian political principles. They offered learned expositions on the requirements of Godly law, and occasionally offered advice to legislatures and courts.

Puritan leaders of colonial New England left little room for individual religious experimentation. Despite their adherence to a basic separation of the institutions of church and state, the New England authorities insisted on general adherence to the creeds and canons of Puritan Calvinism. Already in the 1630s, dissidents from this faith ... were summarily dismissed from the colony. Although in the eighteenth century, religious dissidents of many kinds came to be tolerated in the New England colonies, they enjoyed only limited political rights and social opportunities and were subject to a variety of special governmental restrictions, taxes, and other encumbrances.

2. Evangelical Views

Though the evangelical tradition of religious liberty is sometimes traced to the seventeenth century -- particularly to Roger Williams, the founder of colonial Rhode Island and William Penn, the founder of Pennsylvania -- it did not emerge as a strong political force until after the Great Awakening of circa 1720-1780. Numerous spokesmen for the evangelical cause rose up in the course of the later eighteenth century all along the Atlantic seaboard -- Isaac Backus, John Leland, John Wesley, and a host of other pastors and pamphleteers. Though the evangelicals had enjoyed fewer opportunities than the Puritans to institutionalize their views, they nonetheless had a formidable influence on the early American constitutional experiment.

Like the Puritans, the evangelicals advanced a theological theory of religious rights and liberties. They likewise advocated the institutional separation of church and state -- the construction of a "wall of Separation between the Garden of the Church and the Wilderness of the world," to quote Roger Williams.

The evangelicals went beyond the Puritans, however, both in their definition of individual and institutional religious rights and in their agitation for a fuller separation of the institutions of church and state. The evangelicals sought to protect the liberty of conscience of every individual and the freedom of association of every religious group. Their solution was thus to prohibit all legal establishments of religion, and, indeed, all admixtures of religion and politics. As John Leland, the fiery Baptist preacher, put it in a proposed amendment to the Massachusetts Constitution:

To prevent the evils that have heretofore been occasioned in the world by religious establishments, and to keep up the proper distinction between religion and politics, no religious test shall ever be requested as a qualification of any officer, in any department of this government; neither shall the legislature, under this constitution, ever establish any religion by law, give any one sect a preference to another, or force any man in the commonwealth to part with his property for the support of religious worship, or the maintenance of ministers of the gospel.

Later, Leland put the matter even more bluntly: "The notion of a Christian commonwealth should be exploded forever."

Religious voluntarism lay at the heart of the evangelical view. Every individual, they argued, must be given the liberty of conscience to choose or to change his or her faith. "[N]othing can be true religion but a voluntary obedience unto [God's] revealed will," declared the Baptist Isaac Backus. State coercion or control of this choice -- either directly through persecution and forced collection of tithes and services, or indirectly through withholding civil rights and benefits from religious minorities -- was an offense both to the individual and to God. A plurality of religions should coexist in the community, and it was for God, not the state, to decide which of these religions should flourish and which should fade. "Religious liberty is a divine right," wrote the evangelical preacher Israel Evans.

Every religious body was likewise to be free from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government. Every religious body was also to be free from state emoluments like tax exemptions, civil immunities, property donations, and other forms of state support for the church, that were readily countenanced by Puritan and other leaders. The evangelicals feared state benevolence towards religion and religious bodies almost as much as they feared state repression. For those religious bodies that received state benefits would invariably become beholden to the state, and distracted from their divine mandates. "[I]f civil Rulers go so far out of their Sphere as to take the Care and Management of religious affairs upon them," reads a 1776 Baptist Declaration, "Yea . . . Farewel to 'the free exercise of Religion'."

The chief concern of the evangelicals was theological, not political. Having suffered for more than a century as a religious minority in colonial America, and even longer in Europe, they sought a constitutional means to free all religion from the fetters of the law, to relieve the church from the restrictions of the state. In so doing, they developed only the rudiments of a political theory. They were content with a state that created a climate conducive to the cultivation of a plurality of religions and accommodated all religious believers and religious bodies without conditions or controls.

3. Enlightenment Views

Exponents of the enlightenment tradition in America provided a political theory that complemented the religious rights theology of the evangelicals. Though American exponents of the enlightenment claimed early European visionaries such as John Locke and David Hume, they did not emerge as a significant political voice until the mid-eighteenth century. The American Revolution served to transform the American enlightenment tradition from scattered groups of elite philosophers into a sizeable company of intellectual and political lights. Members of this company, though widely divergent in theological perspective and social position, were united in their efforts to convert enlightenment ideals into constitutional imperatives and in their adherence to the political views of such spokesmen as Thomas

Jefferson, Benjamin Franklin, and others.

The primary purpose of enlightenment writers was political, not theological. They sought not only to free religion and the church from the interference of politics and the state, as did the evangelicals, but, more importantly, to free politics and the state from the intrusion of religion and the church. Exponents of the enlightenment movement taught that the state should give no special aid, support, privilege, or protection to organized religion in the form of tax exemptions, special criminal protections, administrative subsidies, or the incorporation of religious bodies. Nor should the state predicate its laws or policies on explicitly religious grounds or religious arguments, or draw on the services of religious officials or bodies to discharge state functions. As Madison put it in 1822: "[A] perfect separation between ecclesiastical and civil matters" is the best course, for "religion & Gov. will both exist in greater purity, the less they are mixed together." In an 1832 letter to Rev. Jasper Adams, he wrote:

[I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Gov. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect ag. trespasses on its legal rights by others.

Such views were based on a profound skepticism about organized religion and a profound fear of an autocratic state. To allow church and state to be unrestricted, it was thought, would be to invite arbitrariness and abuse. To allow them to combine would be to their mutual disadvantage -- to produce, in Thomas Paine's words, "a sort of mule-animal, capable only of destroying, and not of breeding up." Such views were also based on the belief that a person is fundamentally an individual being and that religion is primarily a matter of private reason and conscience and only secondarily a matter of communal association and corporate confession. Every person, James Madison wrote, has the right to form a rational opinion about the duty he owes the Creator and the manner in which that duty is to be discharged.

Post-revolutionary Virginia proved to be fertile ground for political exponents of the enlightenment tradition to cultivate these views. Article 16 of the 1776 Virginia Bill of Rights, influenced in part by James Madison, provided:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

The famous Virginia Statute on Religious Freedom, drafted by Thomas Jefferson in 1777 and ultimately passed in 1786, provided even stronger enlightenment language. The statute begins by celebrating that "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion." It then guarantees: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."

These lofty protections of individual religious rights went hand-in-hand with the close restrictions on corporate religious rights that were also advocated by enlightenment exponents. For example, before the turn of the nineteenth century, the Virginia legislature outlawed religious corporations (a prohibition still in place in Virginia and West Virginia).

4. Civic Republican Views

The "civic republicans," as they have come to be called in recent histories, were an eclectic group of politicians, preachers, and pamphleteers who strove to cultivate a set of common values and beliefs for the new nation. Their principal spokesmen were John Adams, Samuel Adams, Oliver Ellsworth, George Washington, James Wilson, and other leaders -- though the movement attracted considerable support among the spiritual and intellectual laity of the young republic as well. Just as the enlightenment leaders found their theological allies among the evangelicals, so the republican leaders found their theological allies among the Puritans.

To be sure, the civic republicans shared much common ground with evangelical and enlightenment exponents. They, too, advocated liberty of conscience for all and state support for a plurality of religions in the community. They, too, opposed religious intrusions on politics that rose to the level of political theocracy and political intrusions on religion that rose to the level of religious establishment. But, contrary to evangelical and enlightenment views and consistent with Puritan views, civic republicans sought to imbue the public square with a common religious ethic and ethos -- albeit one less denominationally specific and rigorous than that countenanced by the Puritans.

"Religion and Morality are the essential pillars of Civil society," George Washington declared. "[W]e have no government," John Adams echoed, "armed with power capable of contending with human passions unbridled by morality and religion." "Religion and liberty are the meat and the drink of the body politic," wrote Yale President Timothy Dwight. According to the civic republicans, society needs a fund of religious values and beliefs, a body of civic ideas and ideals that are enforceable both through the common law and through communal suasion. This was what Benjamin Franklin had called the "Publick Religion" (and what is now called the "civil religion") of America, which undergirded the plurality of sectarian religions. This "Publick Religion" taught a creed of honesty, diligence, devotion, public spiritedness, patriotism, obedience, love of God, neighbor, and self, and other ethical commonplaces taught by various religious traditions at the time of the founding. Its icons were the Bible, the Declaration of Independence, the bells of liberty, and the Constitution. Its clergy were public-spirited Christian ministers and religiously devout politicians. Its liturgy was the proclamations of prayers, songs, sermons, and Thanksgiving Day offerings by statesmen and churchmen. Its policy was government appointment of legislative and military chaplains, government sponsorship of general religious education and organization, and government enforcement of a religiously based morality through positive law.

Civic republicans countenanced state support and accommodation for religious institutions, for they were regarded as allies and agents of good government. "[R]eligion and its institutions are the best aid of government," declared Nathan Strong, "by strengthening the ruler's hand, and making the subject faithful in his place, and obedient to the general laws." Civic republicans, therefore, endorsed tax exemptions for church properties and tax support for religious schools, charities, and missionaries; donations of public lands to religious organizations; and criminal protections against blasphemy, sacrilege, and interruption of religious services. In theory, such state emoluments were to be given indiscriminately to all religious groups. In reality, certain Protestant groups received the preponderance of such support, while Quakers, Catholics, and the few Jewish groups about were routinely excluded.

Post-revolutionary Massachusetts proved to be fertile ground for the cultivation of these civic republican views. The 1780 Constitution of Massachusetts, for example, proclaimed that "[i]t is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the SUPREME BEING, the great Creator and preserver of the universe." For "the public worship of God and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government."

These civic republican views also found favor in the Continental Congress, which authorized the appointment of tax-supported chaplains to the military, tax appropriations for religious schools and missionaries, diplomatic ties to the Vatican, and recitations of prayer at its opening sessions and during the day of Thanksgiving. The Continental Congress also passed the Northwest Ordinance in 1787, which provided, in part: "Religion, morality, and knowledge, being necessary to good government and the

happiness of mankind, schools and the means of education shall forever be encouraged."

These four views -- Puritan, evangelical, enlightenment, and republican -- helped to inform the early American experiment in religious rights and liberties. Each view was liberally espoused by federal and state leaders in the early American republic, informally in their letters and pamphlets, and formally in the Constitutional Convention and ratification debates. Each left indelible marks in the documents and developments of early American constitutionalism.

B. The Essential Rights and Liberties of Religion

Despite the tensions among them, exponents of these four groups generally agreed upon what New England Puritan jurist and theologian Elisha Williams called "the essential rights and liberties of [religion]." To be sure, these "essential rights and liberties" never won uniform articulation or universal assent in the young republic. But a number of enduring and interlocking principles found widespread support; many of which were included in state and federal constitutional discussions. These principles included liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion. Such principles remain at the heart of the American experiment today.

The common goal of these principles was to replace the inherited tradition of religious establishment with a new experiment that rendered religious rights and liberties the "first freedom" of the constitutional order. To be sure, a number of writers were reluctant to extend religious liberty to Catholics and Jews, let alone to Muslims and Indians -- and these prejudices are sometimes betrayed in the earliest drafts of the state constitutions. For many eighteenth century writers, the term "religion" was synonymous with Christianity (or even Protestantism), and the discussion of "religious liberty" was often in terms of the "liberty or rights of Christians." And, to be sure, some Puritans and civic republicans continued to support what John Adams called a "slender" form of congregationalist establishment in some of the New England states -- consisting principally of tax collections and preferences for the congregational churches and schools. But such "compromises" do not deprive the early American experiment, and the sentiments that inspired it, of their validity or ongoing utility. By eighteenth century European standards, this experiment was remarkably advanced, and calculated to benefit the vast majority of the population.

Virtually all eighteenth century writers embraced religious liberty as the "first liberty" and the "first freedom." It is "the most inalienable and sacred of all human rights," wrote Thomas Jefferson. "Christian liberty, both civil and ecclesiastical, is the greatest blessing of the kind, that we can enjoy," wrote the congregationalist preacher Jonathan Parsons, "and therefore to be deprived of either, is the greatest injury that we can suffer." At the same time, virtually all writers denounced the bloody religious establishments of previous eras. James Madison reflected commonplaces of the day when he wrote:

[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution. . . . Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.

1. Liberty of Conscience

Liberty of conscience was the general solvent used in the early American experiment in religious liberty. It was universally embraced in the young republic -- even by the most churlish of establishmentarians. The phrase "liberty of conscience" was often conflated with the phrase "free exercise of religion," "religious freedom," "religious liberty," "religious privileges," or "religious rights." James Madison, for example, simply rolled into one linguistic heap "religious freedom" or "the free exercise of religion according to the dictates of conscience." In another passage, he spoke of "religious liberty" as the "religious rights . . . of a multiplicity of sects." Such patterns of interwoven language appear regularly in

later eighteenth century writings; one term often implicated and connoted several others. To read the guarantee of liberty of conscience too dogmatically is to ignore the fluidity of the term in the eighteenth century.

Nonetheless, many eighteenth century writers ascribed distinctive content to the phrase. First, liberty of conscience protected voluntarism -- "the right of private judgment in matters of religion," the unencumbered ability to choose and to change one's religious beliefs and adherences. The Puritan jurist Elisha Williams put this matter very strongly for Christians in 1744 (directly contradicting the rigid opinions of his great grandfather John Cotton, a century before):

Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the Scriptures for himself . . . and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity.

James Madison wrote more generically in 1785: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." The evangelical leader John Leland echoed these sentiments in 1791. Puritan, enlightenment philosophe, and evangelical alike could agree on this core meaning of liberty of conscience.

Second, and closely related, liberty of conscience prohibited religiously based discrimination against individuals. Persons could not be penalized for the religious choices they made, nor swayed to make certain choices because of the civil advantages attached to them. Liberty of conscience, Ezra Stiles opined, permits "no bloody tribunals, no cardinals inquisitors-general, to bend the human mind, forceably to control the understanding, and put out the light of reason, the candle of the Lord in man." Liberty of conscience also prohibits more subtle forms of discrimination, prejudice, and cajolery by state, church, or even other citizens. "[N]o part of the community shall be permitted to perplex or harass the other for any supposed heresy," wrote a Massachusetts pamphleteer, ". . . each individual shall be allowed to have and enjoy, profess and maintain his own system of religion."

Third, in the view of some eighteenth century writers, liberty of conscience guaranteed "a freedom and exemption from human impositions, and legal restraints, in matters of religion and conscience." Persons of faith were to be "exempt[ ] from all those penal, sanguinary laws, that generate vice instead of virtue." Such laws not only included the onerous criminal rules that traditionally encumbered and discriminated against religious nonconformists, and led to fines, whippings, banishments, and occasional executions of dissenting colonists. They also included more facially benign laws that worked injustice to certain religious believers -- conscription laws that required religious pacificists to participate in the military, oath-swearing laws that ran afoul of the religious scruples of certain believers, tithing and taxing laws that forced believers to support churches, schools, and other causes that they found religiously odious. Liberty of conscience required that persons be exempt or immune from civil duties and restrictions that they could not, in good conscience, accept or obey.

It was commonly assumed in the eighteenth century that the laws of conscientious magistrates would not tread on the religious scruples of their subjects. As George Washington put it in a letter to a group of Quakers:

[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Where general laws and policies did intrude on the religious scruples of an individual or group, liberty of conscience demanded protection of religious minorities and exemption. Whether such exemptions should be accorded by the legislature or by the judiciary, and whether they were per se a constitutional right or simply a rule of equity -- the principal bones of contention among recent commentators -- the eighteenth century sources at my disposal simply do not clearly say.

All the early state constitutions include a guarantee of liberty of conscience for all. The Delaware

Constitution provides typical language:

That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any religious ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul [sic] the right of conscience and free exercise of religious worship.

The Pennsylvania Constitution adds a protection against religious discrimination: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship." It also provides an exemption for conscientious objectors: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent." The Constitution of New York addressed both state and church intrusions on conscience, and endeavored

not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind [and thus] declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.

The Constitution of New Jersey provided exemptions from religious taxes, using typical language: "nor shall any person . . . ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church . . . or ministry, contrary to what he believes to be right."

The principle of liberty of conscience also informed some of the federal constitutional debates on religion. Article VI of the Constitution explicitly provides: "[N]o religious Test [oath] shall ever be required as a Qualification" for public office, thereby, inter alia, protecting the religiously scrupulous against oath-swearing. Early versions of the First Amendment religion clauses included such phrases as: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead"; "The civil rights of none shall be abridged on account of religious belief or worship . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed"; "Congress shall make no law . . . to infringe the rights of conscience." Such phrases were ultimately abandoned (though not argued against in the extant records) for the more pregnant language: "Congress shall make no law . . . prohibiting the free exercise [of religion]." This language does not leave conscience unprotected, but more protected. Since Congress cannot "prohibit" the free exercise, the public manifestation, of religion, a fortiori Congress cannot "prohibit" a person's private liberty of conscience, and the precepts embraced therein.

Liberty of conscience was the cardinal principle for the new experiment in religious liberty. Several other "essential rights and liberties of religion" built directly on this core principle.

2. Free Exercise

Liberty of conscience was inextricably linked to free exercise of religion. Liberty of conscience was a guarantee to be left alone to choose, to entertain, and to change one's religious beliefs. Free exercise of religion was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community. Already in 1670, the Quaker leader William Penn had linked these two guarantees, insisting that religious liberty entails "not only a mere liberty of the mind, in believing or disbelieving . . . but [also] the exercise of ourselves in a visible way of worship." By the next century, this organic linkage was commonly accepted. Religion, Madison wrote, "must be left to the convictions and conscience of every man; and it is the right of every man to exercise it as these may dictate." For most eighteenth century writers, religious belief and religious action went

hand-in-hand, and each deserved legal protection.

Though eighteenth century writers, or dictionaries, offered no universal definition of "free exercise," the phrase generally connoted various forms of free public religious action -- religious speech, religious worship, religious assembly, religious publication, religious education, among others. Free exercise of religion also embraced the right of the individual to join with like-minded believers in religious societies, which religious societies were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual. Eighteenth century writers did not speak unequivocally of what we now call group rights, or corporate free exercise rights, but they did regularly call for "ecclesiastical liberty," "the equal liberty of one sect . . . with another," and the right "to have the full enjoyment and free exercise of those spiritual powers . . . which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society."

Virtually all of the early state constitutions guaranteed "free exercise" rights -- adding the familiar caveat that such exercise not violate the public peace or the private rights of others. Most states limited their guarantee to "the free exercise of religious worship" or the "free exercise of religious profession" -- thereby leaving the protection of other noncultic forms of religious expression and action to other constitutional guarantees. A few states provided more generic free exercise guarantees. Virginia, for example, guaranteed "the free exercise of religion, according to the dictates of conscience" -- expanding constitutional protection to cultic and noncultic religious expression and action, provided it was mandated by conscience. The Georgia constitution provided even more flatly: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." The First Amendment drafters chose equally embracive language of "the free exercise" of religion. Rather than using the categorical language preferred by state drafters, however, the First Amendment drafters guaranteed protection only against Congressional laws "prohibiting" the free exercise of religion. Whether Congress could make laws "infringing" or "abridging" the free exercise of religion -- as earlier drafts sought to outlaw -- was left open to subsequent interpretation.

3. Pluralism

Eighteenth century writers regarded "multiplicity," "diversity," or "plurality," as an equally essential dimension of religious rights and liberties. Two kinds of pluralism were distinguished.

Evangelical and enlightenment writers urged the protection of confessional pluralism -- the maintenance and accommodation of a plurality of forms of religious expression and organization in the community. Evangelical writers advanced a theological argument for this principle, emphasizing that it was for God, not the state, to decide which forms of religion should flourish and which should fade. "God always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported," Isaac Backus wrote. Enlightenment writers advanced a rational argument. "Difference of opinion is advantageous in religion," Thomas Jefferson wrote:

The several sects perform the office of a Censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. . . . Reason and persuasion are the only practicable instruments.

Madison wrote similarly that "the utmost freedom . . . arises from that multiplicity of sects which pervades America, . . . for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest." Other writers added that the maintenance of multiple faiths is the best protection of the core guarantee of liberty of conscience.

Puritan and civic republican writers insisted as well on the protection of social pluralism -- the maintenance and accommodation of a plurality of associations to foster religion. Churches and

synagogues were not the only "religious societies" that deserved constitutional protection. Families, schools, charities, and other learned and civic societies were equally vital bastions of religion and equally deserving of the special protections of religious rights and liberties. These diverse social institutions had several redeeming qualities. They provided multiple forums for religious expressions and actions, important bulwarks against state encroachment on natural liberties, particularly religious liberties, and vital sources of theology, morality, charity, and discipline in the state and broader community.

Pluralism was thus not just a sociological fact for several eighteenth century writers; it was a constitutional condition for the guarantee of true religious rights and liberties. This was a species and application of Madison's argument about pluralism in Federalist Paper No. 10 -- that the best protection against political tyranny is the guarantee of a multiplicity of interests, each contending for public endorsement and political expression in a federalist republic.

4. Equality

The efficacy of liberty of conscience, free exercise of religion, and confessional pluralism depended on a guarantee of equality of all peaceable religions before the law. For the state to single out one pious person or one form of faith for either preferential benefits or discriminatory burdens would skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths. Many eighteenth century writers therefore inveighed against the state's unequal treatment of religion. Madison captured the prevailing sentiment: "A just Government . . . will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."

This principle of equality of all peaceable religious persons and bodies before the law found its way into a number of early state constitutions. The Constitution of New Jersey insisted that "there shall be no establishment of any one religious sect in . . . preference to another." Delaware guaranteed Christians "equal rights and privileges" -- a guarantee soon extended to all religions. Maryland insisted that Christians "are equally entitled to protection in their religious liberty." Virginia guaranteed that "all men are equally entitled to the free exercise of religion." New York guaranteed all persons "free exercise and enjoyment of religious profession and worship, without discrimination or preference." Even Massachusetts, which maintained a "slender" establishment, nonetheless guaranteed that "all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

The principle of equality also found its place in early drafts of the First Amendment religion clauses, yielding such phrases as: "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed"; "Congress shall make no law establishing one religious sect or society in preference to others. . . ."; and "Congress shall make no law establishing any particular denomination of religion in preference to another. . . ." Madison, in fact, regarded protection of the "equal rights of conscience" as the "most valuable" guarantee for religious liberty, and he argued that it should be universally guaranteed at both the federal and state levels. These provisions and arguments were abandoned for the more generic guarantees of disestablishment and free exercise at the federal level -- guarantees which presumably are to apply equally to all religions.

5. Separationism

The principle of separationism was designed primarily to protect religious bodies and religious believers in their inherent rights.

On the one hand, separationism guaranteed the independence and integrity of the internal processes of religious bodies. Elisha Williams spoke for many churchmen when he wrote: " [E]very church has [the] Right to judge in what manner God is to be worshipped by them, and what Form of Discipline ought to be observed by them, and the Right also of electing their own Officers." In the mind of most eighteenth

century writers, the principle of separation of church and state mandated neither the separation of religion and politics nor the secularization of civil society. No eighteenth century writer would countenance the preclusion of religion altogether from the public square or the political process. The principle of separationism was directed to the institutions of church and state, not to religion and culture.

On the other hand, the principle of separationism also protected the liberty of conscience of the religious believer. President Thomas Jefferson, for example, in his famous 1802 Letter to the Danbury Baptist Association, tied the principle of separationism directly to the principle of liberty of conscience:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Separationism thus assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking social duties. Jefferson is not talking here of separating politics and religion. Indeed, in the very next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man. . . ."

The principles of pluralism, equality, and separationism -- separately and together -- served to protect religious bodies, both from each other and from the state. It was an open question, however, whether such principles precluded governmental financial and other forms of support of religion altogether. Evangelical and enlightenment writers sometimes viewed such principles as a firm bar on state support, particularly financial support, of religious beliefs, believers, and bodies.

Puritan and republican writers often viewed such principles only as a prohibition against direct financial support for the religious worship or exercise of one particular religious group. General governmental support for religion -- in the form of tax exemptions to religious properties, land grants and tax subsidies to religious schools and charities, tax appropriations for missionaries and military chaplains, and similar general causes -- were considered not only licit, but necessary for good governance.

6. Disestablishment

For some eighteenth century writers, particularly the New England Puritans who defended their "slender establishments," the roll of "essential rights and liberties" ended here. For other writers, however, the best protection of all these principles was through the explicit disestablishment of religion. The term "establishment of religion" was a decidedly ambiguous phrase -- in the eighteenth century, as much as today. The phrase was variously used to describe compromises of the principles of separationism, pluralism, equality, free exercise, and/or liberty of conscience. The guarantee of "disestablishment of religion" could signify protection against any such compromise.

According to some eighteenth century writers, the guarantee of disestablishment protected separationism. In Jefferson's words, it prohibited government

from intermeddling with religious institutions, their doctrines, discipline, or exercises. . . . [and from] the power of effecting any uniformity of time or matter among them. Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own peculiar tenets. . . .

This view of disestablishment of religion was posed in the penultimate draft of the establishment clause: "Congress shall make no law establishing articles of faith or a mode of worship . . . ." -- a provision rejected for a mere generic guarantee.

For other eighteenth century writers, the guarantee of disestablishment protected the principles of equality and pluralism by preventing government from singling out certain religious beliefs and bodies for preferential treatment. This concept of disestablishment came through repeatedly in both state and federal constitutional debates.

For still others, disestablishment of religion meant foreclosing government from coercively prescribing mandatory forms of religious belief, doctrine, and practice -- in violation of the core guarantee of liberty of conscience. Such coercion of religion inflates the competence of government.

Such coercion of religion also compromises the pacific ideals of most religions. Thomas Paine, who is usually branded as a religious skeptic, put this well:

All religions are in their nature mild and benign, and united with principles of morality. They could not have made proselytes at first, by professing anything that was vicious, cruel, persecuting, or immoral. . . . Persecution is not an original feature in any religion; but it is always the strongly marked feature of all law-religions, or religions established by law. Take away the law-establishment, and every religion reassumes its original benignity.

Such coercion of religion also compromises the individual's liberty of conscience. As the Pennsylvania Constitution put it: "[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul [sic], the right of conscience in the free exercise of religious worship."

The vague language of the First Amendment -- "Congress shall make no law respecting an establishment" -- could readily accommodate these separationist, equality, or noncoercion readings of "disestablishment." Congress may not "establish religion" outright. Nor may Congress make laws that "respect" an establishment of religion -- that is anticipate, "look towards," or "regard with deference," such an establishment, to use common eighteenth century definitions of "respecting." The best way to assess whether a Congressional law violates this prohibition is to see whether it compromises any one of the cardinal principles of separationism, equality, and noncoercion protected by the disestablishment guarantee.

7. Interdependence and Incorporation of Principles

For all the diversity of opinion one finds in the Constitutional Convention debates, pamphlets, sermons, editorials, and broadsides of the eighteenth century, most influential writers embraced this roll of "essential rights and liberties of religion" -- liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion. To be sure, many of these terms carried multiple meanings in the later eighteenth century. And to be sure, numerous other terms and norms were under discussion. But in the range of official and unofficial sources at my disposal, these principles were the most commonly discussed and embraced.

On the one hand, eighteenth century writers designed these principles to provide an interwoven shield against repressive religious establishments. Liberty of conscience protected the individual from coercion and discriminatory treatment by church or state officials and guaranteed unencumbered, voluntary choices of faith. Free exercise of religion protected the individual's ability to discharge the duties of conscience through religious worship, speech, publication, assembly, and other actions without necessary reference to a prescribed creed, cult, or code of conduct. Pluralism protected multiple forms and forums of religious belief and action, in place of a uniformly mandated religious doctrine, liturgy, and polity. Equality protected religious individuals and bodies from special benefits and from special burdens administered by the state, or by other religious bodies. Separationism protected individual believers, as well as religious and political officials, from undue interference or intrusion on each other's processes and practices. Disestablishment precluded governmental prescriptions of the doctrine, liturgy, or morality of one faith,

or compromises of the principles of liberty of conscience, free exercise, equality, pluralism, or separationism.

On the other hand, eighteenth century writers designed these principles to be mutually supportive and mutually subservient to the highest goal of guaranteeing "the essential rights and liberties of religion" for all. No single principle could by itself guarantee such religious liberty. Eighteenth century writers, therefore, arranged these multiple principles into an interlocking and interdependent shield of religious liberties and rights for all. Religion was simply too vital and too valuable a source of individual flourishing and social cohesion to be left unguarded on any side.

It is in the context of this plurality of opinions and panoply of principles that the First Amendment religion clauses should, in my view, be understood. The religion clauses were a vital, but only a small, part of this initial constitutional protection of essential rights and liberties of religion. They bound only the national government, and (on their face) set only the outer boundaries to its conduct vis-'a-vis religion -- forbidding either prescriptions or proscriptions of religion. The religion clauses, together, were designed to legitimate, and to live off, the state constitutional guarantees of religious rights and liberties. The guarantees of disestablishment and free exercise depended for their efficacy both on each other and on other religious rights and liberties that eighteenth century writers regarded as "essential." The guarantees of disestablishment and free exercise standing alone -- as they came to be during the 1940s when the Supreme Court "incorporated" these two guarantees into the due process clause of the Fourteenth Amendment -- could legitimately be read to have multiple principles incorporated within them.

Indeed, it might not be too strong to say that the "first incorporation" of religious rights and liberties was engineered not by the Supreme Court in the 1940s when it incorporated the religion clauses into the due process clause, but by the First Congress in 1789 when it drafted the First Amendment religion clauses. This "first incorporation" -- if it can be so called -- had two dimensions. First, the pregnant language that "Congress shall make no law respecting an establishment of religion" can be read as a confirmation and incorporation of prevailing state constitutional precepts and practices. Such state practices included "the slender establishments" of religion in the New England states, which nonetheless included ample guarantees of liberty of conscience, free exercise, equality, plurality, and institutional separation of church and state. Such practices also included the "establishments of religious freedom" (in Jefferson's phrase of 1779) that prevailed in Virginia and other southern and middle states. The First Amendment drafters seem to have contemplated and confirmed a plurality of constitutional constructions "respecting" religion and its establishment. Second, the embracive terms "free exercise" and "establishment" can be read to incorporate the full range of "essential rights and liberties" discussed in the eighteenth century. Eighteenth century writers often used the term "free exercise" synonymously with liberty of conscience, equality, separationism, and pluralism. They similarly regarded "non" or "disestablishment" as a generic guarantee of separationism, pluralism, equality, free exercise, and liberty of conscience. Read in context, therefore, the cryptic religion clauses of the First Amendment can be seen to embody -- to incorporate -- multiple expressions of the "essential rights and liberties of religion."

A Letter Concerning Toleration

John Locke (1689)

Translated by William Popple

Honoured Sir,

Since you are pleased to inquire what are my thoughts about the mutual toleration of Christians in their different professions of religion, I must needs answer you freely that I esteem that toleration to be the chief characteristic mark of the true Church. . . .

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light. I will not here tax the pride and ambition of some, the passion and uncharitable zeal of others. These are faults from which human affairs can perhaps scarce ever be perfectly freed; but yet such as nobody will bear the plain imputation of, without covering them with some specious colour; and so pretend to commendation, whilst they are carried away by their own irregular passions. But, however, that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal and observation of the laws; and that others, under pretence of religion, may not seek impunity for their libertinism and licentiousness; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth. The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.

It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general and to every one of his subjects in particular the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the preservation of those things, his presumption is to be checked by the fear of punishment, consisting of the deprivation or diminution of those civil interests, or goods, which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore, is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights.

Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.

First, because the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true and the other well pleasing unto God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our

salvation. For in this manner, instead of expiating other sins by the exercise of religion, I say, in offering thus unto God Almighty such a worship as we esteem to be displeasing unto Him, we add unto the number of our other sins those also of hypocrisy and contempt of His Divine Majesty.

In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgement that they have framed of things.

It may indeed be alleged that the magistrate may make use of arguments, and, thereby; draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. Magistracy does not oblige him to put off either humanity or Christianity; but it is one thing to persuade, another to command; one thing to press with arguments, another with penalties. This civil power alone has a right to do; to the other, goodwill is authority enough. Every man has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth; but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And, upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind. Neither the profession of any articles of faith, nor the conformity to any outward form of worship (as has been already said), can be available to the salvation of souls, unless the truth of the one and the acceptableness of the other unto God be thoroughly believed by those that so profess and practise. But penalties are no way capable to produce such belief. It is only light and evidence that can work a change in men's opinions; which light can in no manner proceed from corporal sufferings, or any other outward penalties.

In the third place, the care of the salvation of men's souls cannot belong to the magistrate; because, though the rigour of laws and the force of penalties were capable to convince and change men's minds, yet would not that help at all to the salvation of their souls. For there being but one truth, one way to heaven, what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion which either ignorance, ambition, or superstition had chanced to establish in the countries where they were born? In the variety and contradiction of opinions in religion, wherein the princes of the world are as much divided as in their secular interests, the narrow way would be much straitened; one country alone would be in the right, and all the rest of the world put under an obligation of following their princes in the ways that lead to destruction; and that which heightens the absurdity, and very ill suits the notion of a Deity, men would owe their eternal happiness or misery to the places of their nativity.

These considerations, to omit many others that might have been urged to the same purpose, seem unto me sufficient to conclude that all the power of civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come.

Let us now consider what a church is. A church, then, I take to be a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God in such manner as they judge acceptable to Him, and effectual to the salvation of their souls.

I say it is a free and voluntary society. Nobody is born a member of any church; otherwise the religion of parents would descend unto children by the same right of inheritance as their temporal estates, and everyone would hold his faith by the same tenure he does his lands, than which nothing can be imagined more absurd. Thus, therefore, that matter stands. No man by nature is bound unto any particular church or sect, but everyone joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God. The hope of salvation, as it was the only cause of his entrance into that communion, so it can be the only reason of his stay there. For if afterwards he

discover anything either erroneous in the doctrine or incongruous in the worship of that society to which he has joined himself, why should it not be as free for him to go out as it was to enter? No member of a religious society can be tied with any other bonds but what proceed from the certain expectation of eternal life. A church, then, is a society of members voluntarily uniting to that end.

It follows now that we consider what is the power of this church and unto what laws it is subject. Forasmuch as no society, how free soever, or upon whatsoever slight occasion instituted, whether of philosophers for learning, of merchants for commerce, or of men of leisure for mutual conversation and discourse, no church or company, I say, can in the least subsist and hold together, but will presently dissolve and break in pieces, unless it be regulated by some laws, and the members all consent to observe some order. Place and time of meeting must be agreed on; rules for admitting and excluding members must be established; distinction of officers, and putting things into a regular course, and suchlike, cannot be omitted. But since the joining together of several members into this church-society, as has already been demonstrated, is absolutely free and spontaneous, it necessarily follows that the right of making its laws can belong to none but the society itself; or, at least (which is the same thing), to those whom the society by common consent has authorised thereunto. . . .

The end of a religious society (as has already been said) is the public worship of God and, by means thereof, the acquisition of eternal life. All discipline ought, therefore, to tend to that end, and all ecclesiastical laws to be thereunto confined. Nothing ought nor can be transacted in this society relating to the possession of civil and worldly goods. No force is here to be made use of upon any occasion whatsoever. For force belongs wholly to the civil magistrate, and the possession of all outward goods is subject to his jurisdiction.

But, it may be asked, by what means then shall ecclesiastical laws be established, if they must be thus destitute of all compulsive power? I answer: They must be established by means suitable to the nature of such things, whereof the external profession and observation — if not proceeding from a thorough conviction and approbation of the mind — is altogether useless and unprofitable. The arms by which the members of this society are to be kept within their duty are exhortations, admonitions, and advices. If by these means the offenders will not be reclaimed, and the erroneous convinced, there remains nothing further to be done but that such stubborn and obstinate persons, who give no ground to hope for their reformation, should be cast out and separated from the society. This is the last and utmost force of ecclesiastical authority. No other punishment can thereby be inflicted than that, the relation ceasing between the body and the member which is cut off. The person so condemned ceases to be a part of that church.

These things being thus determined, let us inquire, in the next place: How far the duty of toleration extends, and what is required from everyone by it?

And, first, I hold that no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of the society. For, these being the condition of communion and the bond of the society, if the breach of them were permitted without any animadversion the society would immediately be thereby dissolved. But, nevertheless, in all such cases care is to be taken that the sentence of excommunication, and the execution thereof, carry with it no rough usage of word or action whereby the ejected person may any wise be damnified in body or estate. For all force (as has often been said) belongs only to the magistrate, nor ought any private persons at any time to use force, unless it be in self-defence against unjust violence. Excommunication neither does, nor can, deprive the excommunicated person of any of those civil goods that he formerly possessed. All those things belong to the civil government and are under the magistrate's protection. The whole force of excommunication consists only in this: that, the resolution of the society in that respect being declared, the union that was between the body and some member comes thereby to be dissolved; and, that relation ceasing, the participation of some certain things which the society communicated to its members, and unto which no man has any civil right, comes also to cease. For there is no civil injury done unto the excommunicated person by the church minister's refusing him that bread and wine, in the celebration of the Lord's Supper, which was not bought with his but other men's money.

Secondly, no private person has any right in any manner to prejudice another person in his civil

enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be preserved to him. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or Pagan. Nay, we must not content ourselves with the narrow measures of bare justice; charity, bounty, and liberality must be added to it. This the Gospel enjoins, this reason directs, and this that natural fellowship we are born into requires of us. If any man err from the right way, it is his own misfortune, no injury to thee; nor therefore art thou to punish him in the things of this life because thou supposest he will be miserable in that which is to come.

What I say concerning the mutual toleration of private persons differing from one another in religion, I understand also of particular churches which stand, as it were, in the same relation to each other as private persons among themselves: nor has any one of them any manner of jurisdiction over any other; no, not even when the civil magistrate (as it sometimes happens) comes to be of this or the other communion. For the civil government can give no new right to the church, nor the church to the civil government. So that, whether the magistrate join himself to any church, or separate from it, the church remains always as it was before — a free and voluntary society. It neither requires the power of the sword by the magistrate's coming to it, nor does it lose the right of instruction and excommunication by his going from it. This is the fundamental and immutable right of a spontaneous society — that it has power to remove any of its members who transgress the rules of its institution; but it cannot, by the accession of any new members, acquire any right of jurisdiction over those that are not joined with it. And therefore peace, equity, and friendship are always mutually to be observed by particular churches, in the same manner as by private persons, without any pretence of superiority or jurisdiction over one another.

. . . It is in vain for an unbeliever to take up the outward show of another man's profession. Faith only and inward sincerity are the things that procure acceptance with God. The most likely and most approved remedy can have no effect upon the patient, if his stomach reject it as soon as taken; and you will in vain cram a medicine down a sick man's throat, which his particular constitution will be sure to turn into poison. In a word, whatsoever may be doubtful in religion, yet this at least is certain, that no religion which I believe not to be true can be either true or profitable unto me. In vain, therefore, do princes compel their subjects to come into their Church communion, under pretence of saving their souls. If they believe, they will come of their own accord, if they believe not, their coming will nothing avail them. How great soever, in fine, may be the pretence of good-will and charity, and concern for the salvation of men's souls, men cannot be forced to be saved whether they will or no. And therefore, when all is done, they must be left to their own consciences.

Having thus at length freed men from all dominion over one another in matters of religion, let us now consider what they are to do. All men know and acknowledge that God ought to be publicly worshipped; why otherwise do they compel one another unto the public assemblies? Men, therefore, constituted in this liberty are to enter into some religious society, that they meet together, not only for mutual edification, but to own to the world that they worship God and offer unto His Divine Majesty such service as they themselves are not ashamed of and such as they think not unworthy of Him, nor unacceptable to Him; and, finally, that by the purity of doctrine, holiness of life, and decent form of worship, they may draw others unto the love of the true religion, and perform such other things in religion as cannot be done by each private man apart.

These religious societies I call Churches; and these, I say, the magistrate ought to tolerate, for the business of these assemblies of the people is nothing but what is lawful for every man in particular to take care of — I mean the salvation of their souls; nor in this case is there any difference between the National Church and other separated congregations.

But as in every Church there are two things especially to be considered — the outward form and rites of worship, and the doctrines and articles of things must be handled each distinctly that so the whole matter of toleration may the more clearly be understood.

Concerning outward worship, I say, in the first place, that the magistrate has no power to enforce by law, either in his own Church, or much less in another, the use of any rites or ceremonies whatsoever in the worship of God. And this, not only because these Churches are free societies, but because whatsoever is practised in the worship of God is only so far justifiable as it is believed by those that practise it to be

acceptable unto Him. Whatsoever is not done with that assurance of faith is neither well in itself, nor can it be acceptable to God. To impose such things, therefore, upon any people, contrary to their own judgment, is in effect to command them to offend God, which, considering that the end of all religion is to please Him, and that liberty is essentially necessary to that end, appears to be absurd beyond expression.

But perhaps it may be concluded from hence that I deny unto the magistrate all manner of power about indifferent things, which, if it be not granted, the whole subject-matter of law-making is taken away. No, I readily grant that indifferent things, and perhaps none but such, are subjected to the legislative power. But it does not therefore follow that the magistrate may ordain whatsoever he pleases concerning anything that is indifferent. The public good is the rule and measure of all law-making. If a thing be not useful to the commonwealth, though it be never so indifferent, it may not presently be established by law.

And further, things never so indifferent in their own nature, when they are brought into the Church and worship of God, are removed out of the reach of the magistrate's jurisdiction, because in that use they have no connection at all with civil affairs. The only business of the Church is the salvation of souls, and it no way concerns the commonwealth, or any member of it, that this or the other ceremony be there made use of. Neither the use nor the omission of any ceremonies in those religious assemblies does either advantage or prejudice the life, liberty, or estate of any man. For example, let it be granted that the washing of an infant with water is in itself an indifferent thing, let it be granted also that the magistrate understand such washing to be profitable to the curing or preventing of any disease the children are subject unto, and esteem the matter weighty enough to be taken care of by a law. In that case he may order it to be done. But will any one therefore say that a magistrate has the same right to ordain by law that all children shall be baptised by priests in the sacred font in order to the purification of their souls? The extreme difference of these two cases is visible to every one at first sight. Or let us apply the last case to the child of a Jew, and the thing speaks itself. For what hinders but a Christian magistrate may have subjects that are Jews? Now, if we acknowledge that such an injury may not be done unto a Jew as to compel him, against his own opinion, to practise in his religion a thing that is in its nature indifferent, how can we maintain that anything of this kind may be done to a Christian? . . .

But it will be here asked: "If nothing belonging to divine worship be left to human discretion, how is it then that Churches themselves have the power of ordering anything about the time and place of worship and the like?" To this I answer that in religious worship we must distinguish between what is part of the worship itself and what is but a circumstance. That is a part of the worship which is believed to be appointed by God and to be well-pleasing to Him, and therefore that is necessary. Circumstances are such things which, though in general they cannot be separated from worship, yet the particular instances or modifications of them are not determined, and therefore they are indifferent. Of this sort are the time and place of worship, habit and posture of him that worships. These are circumstances, and perfectly indifferent, where God has not given any express command about them. For example: amongst the Jews the time and place of their worship and the habits of those that officiated in it were not mere circumstances, but a part of the worship itself, in which, if anything were defective, or different from the institution, they could not hope that it would be accepted by God. But these, to Christians under the liberty of the Gospel, are mere circumstances of worship, which the prudence of every Church may bring into such use as shall be judged most subservient to the end of order, decency, and edification. But, even under the Gospel, those who believe the first or the seventh day to be set apart by God, and consecrated still to His worship, to them that portion of time is not a simple circumstance, but a real part of Divine worship, which can neither be changed nor neglected.

In the next place: As the magistrate has no power to impose by his laws the use of any rites and ceremonies in any Church, so neither has he any power to forbid the use of such rites and ceremonies as are already received, approved, and practised by any Church; because, if he did so, he would destroy the Church itself: the end of whose institution is only to worship God with freedom after its own manner.

You will say, by this rule, if some congregations should have a mind to sacrifice infants, or (as the primitive Christians were falsely accused) lustfully pollute themselves in promiscuous uncleanness, or practise any other such heinous enormities, is the magistrate obliged to tolerate them, because they are committed in a religious assembly? I answer: No. These things are not lawful in the ordinary course of

life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting. But, indeed, if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. Meliboeus, whose calf it is, may lawfully kill his calf at home, and burn any part of it that he thinks fit. For no injury is thereby done to any one, no prejudice to another man's goods. And for the same reason he may kill his calf also in a religious meeting. Whether the doing so be well-pleasing to God or no, it is their part to consider that do it. The part of the magistrate is only to take care that the commonwealth receive no prejudice, and that there be no injury done to any man, either in life or estate. And thus what may be spent on a feast may be spent on a sacrifice. But if peradventure such were the state of things that the interest of the commonwealth required all slaughter of beasts should be forborne for some while, in order to the increasing of the stock of cattle that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only it is to be observed that, in this case, the law is not made about a religious, but a political matter; nor is the sacrifice, but the slaughter of calves, thereby prohibited.

By this we see what difference there is between the Church and the Commonwealth. Whatsoever is lawful in the Commonwealth cannot be prohibited by the magistrate in the Church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses. If any man may lawfully take bread or wine, either sitting or kneeling in his own house, the law ought not to abridge him of the same liberty in his religious worship; though in the Church the use of bread and wine be very different and be there applied to the mysteries of faith and rites of Divine worship. But those things that are prejudicial to the commonweal of a people in their ordinary use and are, therefore, forbidden by laws, those things ought not to be permitted to Churches in their sacred rites. Only the magistrate ought always to be very careful that he do not misuse his authority to the oppression of any Church, under pretence of public good.

It may be said: "What if a Church be idolatrous, is that also to be tolerated by the magistrate?" I answer: What power can be given to the magistrate for the suppression of an idolatrous Church, which may not in time and place be made use of to the ruin of an orthodox one? For it must be remembered that the civil power is the same everywhere, and the religion of every prince is orthodox to himself. . . .

But idolatry, say some, is a sin and therefore not to be tolerated. If they said it were therefore to be avoided, the inference were good. But it does not follow that because it is a sin it ought therefore to be punished by the magistrate. For it does not belong unto the magistrate to make use of his sword in punishing everything, indifferently, that he takes to be a sin against God. Covetousness, uncharitableness, idleness, and many other things are sins by the consent of men, which yet no man ever said were to be punished by the magistrate. The reason is because they are not prejudicial to other men's rights, nor do they break the public peace of societies. Nay, even the sins of lying and perjury are nowhere punishable by laws; unless, in certain cases, in which the real turpitude of the thing and the offence against God are not considered, but only the injury done unto men's neighbours and to the commonwealth. And what if in another country, to a Mahometan or a Pagan prince, the Christian religion seem false and offensive to God; may not the Christians for the same reason, and after the same manner, be extirpated there? . . .

Further, the magistrate ought not to forbid the preaching or professing of any speculative opinions in any Church because they have no manner of relation to the civil rights of the subjects. If a Roman Catholic believe that to be really the body of Christ which another man calls bread, he does no injury thereby to his neighbour. If a Jew do not believe the New Testament to be the Word of God, he does not thereby alter anything in men's civil rights. If a heathen doubt of both Testaments, he is not therefore to be punished as a pernicious citizen. The power of the magistrate and the estates of the people may be equally secure whether any man believe these things or no. I readily grant that these opinions are false and absurd. But the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person. And so it ought to be. For the truth certainly would do well enough if she were once left to shift for herself. She seldom has received and, I fear, never will receive much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance

into the minds of men. Errors, indeed, prevail by the assistance of foreign and borrowed succours. But if Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her. Thus much for speculative opinions. Let us now proceed to practical ones.

A good life, in which consist not the least part of religion and true piety, concerns also the civil government; and in it lies the safety both of men's souls and of the commonwealth. Moral actions belong, therefore, to the jurisdiction both of the outward and inward court; both of the civil and domestic governor; I mean both of the magistrate and conscience. Here, therefore, is great danger, lest one of these jurisdictions intrench upon the other, and discord arise between the keeper of the public peace and the overseers of souls. But if what has been already said concerning the limits of both these governments be rightly considered, it will easily remove all difficulty in this matter.

Every man has an immortal soul, capable of eternal happiness or misery; whose happiness depending upon his believing and doing those things in this life which are necessary to the obtaining of God's favour, and are prescribed by God to that end. It follows from thence, first, that the observance of these things is the highest obligation that lies upon mankind and that our utmost care, application, and diligence ought to be exercised in the search and performance of them; because there is nothing in this world that is of any consideration in comparison with eternity. Secondly, that seeing one man does not violate the right of another by his erroneous opinions and undue manner of worship, nor is his perdition any prejudice to another man's affairs, therefore, the care of each man's salvation belongs only to himself. But I would not have this understood as if I meant hereby to condemn all charitable admonitions and affectionate endeavours to reduce men from errors, which are indeed the greatest duty of a Christian. Any one may employ as many exhortations and arguments as he pleases, towards the promoting of another man's salvation. But all force and compulsion are to be forborne. Nothing is to be done imperiously. Nobody is obliged in that matter to yield obedience unto the admonitions or injunctions of another, further than he himself is persuaded. Every man in that has the supreme and absolute authority of judging for himself. And the reason is because nobody else is concerned in it, nor can receive any prejudice from his conduct therein.

But besides their souls, which are immortal, men have also their temporal lives here upon earth; the state whereof being frail and fleeting, and the duration uncertain, they have need of several outward conveniences to the support thereof, which are to be procured or preserved by pains and industry. For those things that are necessary to the comfortable support of our lives are not the spontaneous products of nature, nor do offer themselves fit and prepared for our use. This part, therefore, draws on another care and necessarily gives another employment. But the pravity of mankind being such that they had rather injuriously prey upon the fruits of other men's labours than take pains to provide for themselves, the necessity of preserving men in the possession of what honest industry has already acquired and also of preserving their liberty and strength, whereby they may acquire what they farther want, obliges men to enter into society with one another, that by mutual assistance and joint force they may secure unto each other their properties, in the things that contribute to the comfort and happiness of this life, leaving in the meanwhile to every man the care of his own eternal happiness, the attainment whereof can neither be facilitated by another man's industry, nor can the loss of it turn to another man's prejudice, nor the hope of it be forced from him by any external violence. But, forasmuch as men thus entering into societies, grounded upon their mutual compacts of assistance for the defence of their temporal goods, may, nevertheless, be deprived of them, either by the rapine and fraud of their fellow citizens, or by the hostile violence of foreigners, the remedy of this evil consists in arms, riches, and multitude of citizens; the remedy of the other in laws; and the care of all things relating both to one and the other is committed by the society to the civil magistrate. This is the original, this is the use, and these are the bounds of the legislative (which is the supreme) power in every commonwealth. I mean that provision may be made for the security of each man's private possessions; for the peace, riches, and public commodities of the whole people; and, as much as possible, for the increase of their inward strength against foreign invasions.

These things being thus explained, it is easy to understand to what end the legislative power ought to be directed and by what measures regulated; and that is the temporal good and outward prosperity of the

society; which is the sole reason of men's entering into society, and the only thing they seek and aim at in it. And it is also evident what liberty remains to men in reference to their eternal salvation, and that is that every one should do what he in his conscience is persuaded to be acceptable to the Almighty, on whose good pleasure and acceptance depends their eternal happiness. For obedience is due, in the first place, to God and, afterwards to the laws.

But some may ask: "What if the magistrate should enjoin anything by his authority that appears unlawful to the conscience of a private person?" I answer that, if government be faithfully administered and the counsels of the magistrates be indeed directed to the public good, this will seldom happen. But if, perhaps, it do so fall out, I say, that such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment which it is not unlawful for him to bear. For the private judgement of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation. But if the law, indeed, be concerning things that lie not within the verge of the magistrate's authority (as, for example, that the people, or any party amongst them, should be compelled to embrace a strange religion, and join in the worship and ceremonies of another Church), men are not in these cases obliged by that law, against their consciences. For the political society is instituted for no other end, but only to secure every man's possession of the things of this life. The care of each man's soul and of the things of heaven, which neither does belong to the commonwealth nor can be subjected to it, is left entirely to every man's self. Thus the safeguard of men's lives and of the things that belong unto this life is the business of the commonwealth; and the preserving of those things unto their owners is the duty of the magistrate. And therefore the magistrate cannot take away these worldly things from this man or party and give them to that; nor change propriety amongst fellow subjects (no not even by a law), for a cause that has no relation to the end of civil government, I mean for their religion, which whether it be true or false does no prejudice to the worldly concerns of their fellow subjects, which are the things that only belong unto the care of the commonwealth.

But what if the magistrate believe such a law as this to be for the public good? I answer: As the private judgement of any particular person, if erroneous, does not exempt him from the obligation of law, so the private judgement (as I may call it) of the magistrate does not give him any new right of imposing laws upon his subjects, which neither was in the constitution of the government granted him, nor ever was in the power of the people to grant, much less if he make it his business to enrich and advance his followers and fellow-sectaries with the spoils of others. But what if the magistrate believe that he has a right to make such laws and that they are for the public good, and his subjects believe the contrary? Who shall be judge between them? I answer: God alone. For there is no judge upon earth between the supreme magistrate and the people. God, I say, is the only judge in this case, who will retribute unto every one at the last day according to his deserts; that is, according to his sincerity and uprightness in endeavouring to promote piety, and the public weal, and peace of mankind. But What shall be done in the meanwhile? I answer: The principal and chief care of every one ought to be of his own soul first, and, in the next place, of the public peace; though yet there are very few will think it is peace there, where they see all laid waste. . . .

Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration. As for other practical opinions, though not absolutely free from all error, if they do not tend to establish domination over others, or civil impunity to the Church in which they are taught, there can be no reason why they should not be tolerated. . . .

It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted), that has produced all the bustles and wars that have been in the Christian world upon account of religion. The heads and leaders of the Church, moved by avarice and insatiable desire of dominion, making use of the immoderate ambition of magistrates and the credulous superstition of the giddy multitude, have incensed and animated them against those that dissent from themselves, by preaching unto them, contrary to the laws of the Gospel and to the precepts of

charity, that schismatics and heretics are to be outed of their possessions and destroyed. And thus have they mixed together and confounded two things that are in themselves most different, the Church and the commonwealth. . . .

A Bill for Establishing Religious Freedom

Thomas Jefferson

June 18, 1779

Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the naturalrights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Memorial and Remonstrance against Religious Assessments

James Madison

June 20, 1785

To the Honorable the General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Virginia Declaration of Rights, art. 16] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.

3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the

same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because the Bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," [Virginia Declaration of Rights, art. 1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." [Virginia Declaration of Rights, art. 16] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to believe that they either covet pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the measure.

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended on the voluntary rewards of their flocks, many of them predict its downfall. On which Side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government?

What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.

10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed "that Christian forbearance, love and charity," [Virginia Declaration of Rights, art. 16] which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

12. Because the policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to

execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens, and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration. We the Subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.

McGowan v. Maryland

366 U.S. 420 (1961)

Mr. Chief Justice WARREN delivered the opinion of the Court.

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.

Appellants are seven employees of a large discount department store located on a highway in Anne Arundel County, Maryland. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md.Ann.Code, Art. 27, s 521. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday.

. . . Several sections of the Maryland statutes are particularly relevant to evaluation of the issues presented. Section 492 of Md.Ann.Code, Art. 27, forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 of Md.Ann.Code, Art. 27, disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, Md.Ann.Code, Art. 27, s 509, exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md.Ann.Code, Art. 2B, makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State—particularly in Anne Arundel County.

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday. . . .

III.

The final questions for decision are whether the Maryland Sunday Closing Laws conflict with the Federal Constitution's provisions for religious liberty. First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities,' we hold that appellants have no standing to raise this contention. Furthermore, since appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question of Pierce v. Society of Sisters. Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Appellants present no weighty countervailing policies here to cause an exception to our general principles.

Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment. If the purpose of the 'establishment' clause was only to insure protection for the 'free exercise' of religion, then what we have said above concerning appellants' standing to raise the 'free exercise' contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority. . . . Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion. We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion.

The essence of appellants' 'establishment' argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their 'establishment' argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals. Although only the constitutionality of s 521, the section under which appellants have been convicted, is immediately before us in this litigation, inquiry into the history of Sunday Closing Laws in our country, in addition to an examination of the Maryland Sunday closing statutes in their entirety and of their history, is relevant to the decision of whether the Maryland Sunday law in question is one respecting an establishment of religion. There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive chances from the earliest forms, still retains its religious character.

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. . . .

The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary travelling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the

Connecticut and New Haven Colonies enacted similar prohibitions, some even earlier in the seventeenth century. The religious orientation of the colonial statutes was equally apparent. For example, a 1629 Massachusetts Bay instruction began, 'And to the end the Sabbath may be celebrated in a religious manner.' A 1653 enactment spoke of Sunday activities 'which things tend much to the dishonor of God, the reproach of religion, and the profanation of his holy Sabbath, the sanctification whereof is sometimes put for all duties immediately respecting the service of God.' These laws persevered after the Revolution and, at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor.

But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. In the middle 1700's, Blackstone wrote, '(T)he keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness.' A 1788 English statute dealing with chimney sweeps, in addition to providing for their Sunday religious affairs, also regulated their hours of work. The preamble to a 1679 Rhode Island enactment stated that the reason for the ban on Sunday employment was that 'persons being evill minded, have presumed to employ in servile labor, more than necessity requireth, their servants. The New York law of 1788 omitted the term 'Lord's day' and substituted 'the first day of the week commonly called Sunday.' Similar changes marked the Maryland statutes, discussed below. With the advent of the First Amendment, the colonial provisions requiring church attendance were soon repealed.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that 'if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. On economic and social grounds alike this weekly period of rest is best provided on Sunday.'

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations; modern English Sunday legislation was promoted by the National Federation of Grocers and supported by the National Chamber of Trade, the Drapers' Chamber of Trade, and the National Union of Shop Assistants.

Throughout the years, state legislatures have modified, deleted from and added to their Sunday statutes. As evidenced by the New Jersey laws mentioned above, current changes are commonplace. Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system. Some of our States now enforce their Sunday legislation through Departments of Labor. Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted. . . .

This Court has considered the happenings surrounding the Virginia General Assembly's enactment of 'An act for establishing religious freedom,' written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the First Amendment's meaning. In 1776, nine years before the bill's passage, Madison co-authored Virginia's Declaration of Rights which provided, inter alia, that 'all men are equally entitled to the free exercise of religion, according to the dictates of conscience.' Virginia had had Sunday legislation since early in the seventeenth century; in 1776, the laws penalizing 'maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever' were repealed, and all dissenters were freed from the taxes levied for the support of the established church. The Sunday labor prohibitions remained; apparently, they were not believed to be inconsistent with the newly enacted Declaration of Rights. Madison had sought also to have the Declaration expressly condemn the existing Virginia establishment. This hope was finally realized when

‘A Bill for Establishing Religious Freedom’ was passed in 1785. In this same year, Madison presented to Virginia legislators ‘A Bill for Punishing Sabbath Breakers' which provided, in part:

If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence.

This became law the following year and remained during the time that Madison fought for the First Amendment in the Congress. It was the law of Virginia, and similar laws were in force in other States, when Madison stated at the Virginia ratification convention:

Happily for the states, they enjoy the utmost freedom of religion. Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom.

In 1799, Virginia pronounced ‘An act for establishing religious freedom’ as ‘a true exposition of the principles of the bill of rights and constitution,’ and repealed all subsequently enacted legislation deemed inconsistent with it. Virginia's statute banning Sunday labor stood. . . .

In the case at bar, we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive.

But in order to dispose of the case before us, we must consider the standards by which the Maryland statutes are to be measured. Here, a brief review of the First Amendment's background proves helpful. The First Amendment states that ‘Congress shall make no law respecting an establishment of religion.’ The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. It then read, in part:

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.

We are told that Madison added the word ‘national’ to meet the scruples of States which then had an established church. After being referred to committee, it was considered by the House, on August 15, 1789, acting as a Committee of the Whole. . . .

An early commentator opined that the ‘real object of the amendment was to prevent any national ecclesiastical establishment, which shold give to an hierarchy the exclusive patronage of the national government.’ But, the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a ‘broad interpretation in the light of its history and the evils it was designed forever to suppress.’ It has found that the First and Fourteenth Amendments afford protection against religious establishment for more extensive than merely to forbid a national or state church. . . .

However, it is equally true that the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue. . . .

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing—Art. 27, ss 492—534C—is 'Sabbath Breaking'; s 492 proscribes work or bodily labor on the 'Lord's day,' and forbids persons to 'profane the Lord's day' by gaming, fishing et cetera; s 522 refers to Sunday as the 'Sabbath day.' As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin. The first Maryland statute dealing with Sunday activities, enacted in 1649, was entitled 'An Act concerning Religion.' It made it criminal to 'profane the Sabbath or Lords day called Sunday by frequent swearing, drunkennes or by any uncivill or disorderly recreation, or by working on that day when absolute necessity doth not require it.' A 1692 statute entitled 'An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province,' after first stating the importance of keeping the Lord's Day holy and sanctified and expressing concern with the breach of its observance throughout the State, then enacted a Sunday labor prohibition which was the obvious precursor of the present s 492.19 There was a re-enactment in 1696 entitled 'An Act for Sanctifying & keeping holy the Lord's Day Commonly called Sunday.' By 1723, the Sabbath-breaking section of the statute assumed the present form of s 492, omitting the specific prohibition against Sunday swearing and the patently religiously motivated title.

There are judicial statements in early Maryland decisions which tend to support appellants' position. In an 1834 case involving a contract calling for delivery on Sunday, the Maryland Court of Appeals remarked that 'Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours nect ensuing the midnight of Saturday.' . . .

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition against Sunday work or bodily labor. To the contrary, we find that s 521 of Art. 27, the section which appellants violated, permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that s 509 of Art. 27 permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that Art. 2B, s 28, permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines,

activities generally condemned by prior Maryland Sunday legislation. Certainly, these are not works of charity or necessity. Section 521's current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only s 492 retains the appellation of 'Lord's day' and even that section no longer makes recitation of religious purpose. It does talk in terms of 'profan(ing) the Lord's day,' but other sections permit the activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions.

Finally, the relevant pronouncements of the Maryland Court of Appeals dispel any argument that the statutes' announced purpose is religious. In Hiller v. State of Maryland, the court had before it a Baltimore ordinance prohibiting Sunday baseball. The court said:

What the eminent Chief Judge said with respect to police enactments which deal with the protection of the public health, morals, and safety apply with equal force to those which are concerned with the peace, order, and quiet of the community on Sunday, for these social conditions are well recognized heads of the police power. Can the court say that this ordinance has no real and substantial relation to the peace and order and quiet of Sunday as a day of rest in the city of Baltimore?

And the Maryland court declared in its decision in the instant case: 'The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational.' After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

But this does not answer all of appellants' contentions. We are told that the State has other means at its disposal to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to religion. On this basis, we are asked to hold these statutes invalid on the ground that the State's power to regulate conduct in the public interest may only be executed in a way that does not unduly or unnecessarily infringe upon the religious provisions of the First Amendment. However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and

active entertainments, for dining out, and the like. 'Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion. . . .

Accordingly, the decision is affirmed.

Separate opinion of Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins.

So deeply do the issues raised by these cases cut that it is not surprising that no one opinion can wholly express the views even of all the members of the Court who join in its result. Individual opinions in constitutional controversies have been the practice throughout the Court's history. Such expression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process.

For me considerations are determinative here which call for separate statement. The long history of Sunday legislation, so decisive if we are to view the statutes now attacked in a perspective wider than that which is furnished by our own necessarily limited outlook, cannot be conveyed by a partial recital of isolated instances or events. The importance of that history derives from its continuity and fullness—from the massive testimony which it bears to the evolution of statutes controlling Sunday labor and to the forces which have, during three hundred years of Anglo-American history at the least, changed those laws, transmuted them, made them the vehicle of mixed and complicated aspirations. Since I find in the history of these statutes insights controllingly relevant to the constitutional issues before us, I am constrained to set that history forth in detail. . . . [Frankfurter's historical account omitted].

It is urged, however, that if a day of rest were the legislative purpose, statutes to secure it would take some other form than the prohibition of activity on Sunday. Such statutes, it is argued, would provide for one day's labor stoppage in seven, leaving the choice of the day to the individual; or, alternatively, would fix a common day of rest on some other day—Monday or Tuesday. But, in all fairness, certainly, it would be impossible to call unreasonable a legislative finding that these suggested alternatives were unsatisfactory. A provision for one day's closing per week, at the option of every particular enterpriser, might be disruptive of families whose members are employed by different enterprises. Enforcement might be more difficult, both because violation would be less easily discovered and because such a law would not be seconded, as is Sunday legislation, by the community's moral temper. More important, one-day-a-week laws do not accomplish all that is accomplished by Sunday laws. They provide only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought and which, a legislature might reasonably believe, is necessary to the welfare of those who for many generations have been accustomed to its recuperative effects.

The same considerations might also be deemed to justify the choice of Sunday as the single common day when labor ceases. For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven that no other day could provide. The will of a majority of the community, reflected in the legislative process during scores of years, presumably prefers to take its leisure on Sunday. The spirit of any people expresses in goodly measure the heritage which links it to its past. Disruption of this heritage by a regulations which, like the unnatural labors of Claudius' shipwrights, does not divide the Sunday from the week, might prove a measure ill-designed to secure the desirable community repose for which Sunday legislation is designed. At all events, Maryland, Massachusetts and Pennsylvania, like thirty-one other States with similar regulations, could reasonably so find. Certainly, from failure to make a substitution for Sunday in securing a socially desirable day of surcease from subjection to labor and routine a purpose cannot be derived to establish or promote religion. . . .

Mr. Justice DOUGLAS, dissenting.

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority. . . .

I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the state is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

The Declaration of Independence stated the now familiar theme: 'We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.' And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The Puritan influence helped shape our constitutional law and our common law as Dean Pound has said: The Puritan 'put individual conscience and individual judgment in the first place.' The Spirit of the Common Law (1921), p. 42. For these reasons we stated in Zorach v. Clauson, 343 U.S. 306, 313, 'We are a religious people whose institutions presuppose a Supreme Being.'

But those who fashioned the First Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'—such is the command of the First Amendment made applicable to the State by reason of the Due Process Clause of the Fourteenth. This means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; second, that no one shall be interfered with by government for practicing the religion of his choice; third, that the State may not require anyone to practice a religion or even any religion; and fourth, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics. . . .

The issue of those cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays. Would the rest of us have to submit under the fear of criminal sanctions? . . .

The conduct held constitutionally criminal today embraces the selling of pure, not impure, food; wholesome, not noxious, articles. Adults, not minors, are involved. The innocent acts, now constitutionally classified as criminal, emphasize the drastic break we make with tradition.

These laws are sustained because, it is said, the First Amendment is concerned with religious convictions or opinion, not with conduct. But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs. Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the First Amendment. Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir?

The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A

legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause. Any other reading imports, I fear, an element common in other societies but foreign to us. Thus Nigeria in Article 23 of her Constitution, after guaranteeing religious freedom, adds, 'Nothing in this section shall invalidate any law that is reasonably justified in a democratic society in the interest of defence, public safety, public order, public morality, or public health.' That may be a desirable provision. But when the Court adds it to our First Amendment, as it does today, we make a sharp break with the American ideal of religious liberty as enshrined in the First Amendment.

The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the 'day of rest' becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the 'weaker brethren,' to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the 'free exercise' of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday. . . .

Braunfeld v. Brown

366 U.S. 599 (1961)

Mr. Chief Justice WARREN announced the judgment of the Court and an opinion in which Mr. Justice BLACK, Mr. Justice CLARK, and Mr. Justice WHITTAKER concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities. . . . [T]he only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above. . . .

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is being subjected to discriminatory treatment by the State.

In McGowan v. Maryland, we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that when Virginia passed its Declaration of Rights in 1776, providing that ‘all men are equally entitled to the free exercise of religion,’ Virginia repealed its laws which in any way penalized ‘maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever.’ But Virginia retained its laws prohibiting Sunday labor.

We also took cognizance, in McGowan, of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week. We reviewed the still growing state preoccupation with improving the health, safety, morals and general well-being of our citizens.

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. . . . . But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. . . . [L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

. . . [T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

As we pointed out in McGowan v. Maryland, we cannot find a State without power to provide 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 tranquillity—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.

Also, in McGowan, we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again here.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.

A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring. For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.

Mr. Justice HARLAN concurs in the judgment. Mr. Justice BRENNAN and Mr. Justice STEWART concur in our disposition of appellants' claims under the Establishment Clause and the Equal Protection Clause. Mr. Justice FRANKFURTER and Mr. Justice HARLAN have rejected appellants' claim under the Free Exercise Clause in a separate opinion [in McGowan v. Maryland]. For dissenting opinion of Mr. Justice DOUGLAS [in this case], see [McGowan v. Maryland].

Mr. Justice BRENNAN, concurring and dissenting.

I agree with THE CHIEF JUSTICE that there is no merit in appellants' establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion.

The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the Commonwealth of Pennsylvania to fix Sunday as the time for that respite. I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment, as

embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

The appellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith. They allege—and the allegation must be taken as true, since the case comes to us on a motion to dismiss the complaint—that one who does not observe the Sabbath (by refraining from labor) cannot be an Orthodox Jew.' In appellants' business area Friday night and Saturday are busy times; yet appellants, true to their faith, close during the Jewish Sabbath, and make up some, but not all, of the business thus lost by opening on Sunday 'Each of the plaintiffs,' the complaint continues, 'does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.' Consequences even more drastic are alleged: 'Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.' In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

The first question to be resolved, however, is somewhat broader than the facts of this case. That question concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment, whether that limitation applies of its own force, or as absorbed through the less definite words of the Fourteenth Amendment. The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. . . .

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society. . . . Or at least so it appeared until today. For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, nor do they prohibit outright any of appellants' religious practices. That is, the laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in [other cases]. All this the Court, as I read its opinion, concedes.

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States

which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. Even England, not under the compulsion of a written constitution, but simply influenced by considerations of fairness, has such an exemption for some activities. . . .

Mr. Justice STEWART, dissenting.

I agree with substantially all that Mr. Justice BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

Hosanna-Tabor v. EEOC

132 S.Ct. 694 (2012)

Chief Justice ROBERTS delivered the opinion of the Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers.

I

A

Hosanna–Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church–Missouri Synod, the second largest Lutheran denomination in America. Hosanna–Tabor operated a small school in Redford, Michigan, offering a "Christ-centered education" to students in kindergarten through eighth grade.

The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a "colloquy" program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." A commissioned minister serves for an open-ended term; at Hosanna–Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.

"Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran.

Cheryl Perich was first employed by Hosanna–Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna–Tabor asked her to become a called teacher. Perich accepted the call and received a "diploma of vocation" designating her a commissioned minister.

Perich taught kindergarten and fourth grade. . . .. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Because of her illness, Perich began the 2004–2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna–Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22—the first day she was medically cleared to return to work—Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told

her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

[T]hat evening, board chairman Scott Salo sent Perich a letter stating that Hosanna–Tabor was reviewing the process for rescinding her call in light of her "regrettable" actions. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior" on February 22, as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call on April 10, and Hosanna–Tabor sent her a letter of termination the next day.

B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act (1990). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. It also prohibits an employer from retaliating "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."

The EEOC brought suit against Hosanna–Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act (1979). The EEOC and Perich sought Perich's reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney's fees, and other injunctive relief.

[Hosanna-Tabor argued that Perich's suit was barred under what is known as the 'ministerial exception' because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally. The Church prevailed at trial but lost on appeal. The Church then appealed to the Supreme Court"].

II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have said that these two Clauses "often exert conflicting pressures," and that there can be "internal tension ... between the Establishment Clause and the Free Exercise Clause." Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.

A

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church."

That freedom in many cases may have been more theoretical than real. In any event, it did not survive the reign of Henry VIII, even in theory. The Act of Supremacy of 1534 made the English monarch the supreme head of the Church, and the Act in Restraint of Annates passed that same year, gave him the authority to appoint the Church's high officials.

Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship. . . . William Penn, the Quaker proprietor of what would eventually become Pennsylvania and Delaware, also sought independence from the Church of England. The charter creating the province of Pennsylvania contained no clause establishing a religion. . . .

Colonists in the South, in contrast, brought the Church of England with them. But even they

sometimes chafed at the control exercised by the Crown and its representatives over religious offices. In Virginia, for example, the law vested the governor with the power to induct ministers presented to him by parish vestries . . . but the vestries often refused to make such presentations and instead chose ministers on their own. . . . Controversies over the selection of ministers also arose in other Colonies with Anglican establishments, including North Carolina. . . . There, the royal governor insisted that the right of presentation lay with the Bishop of London, but the colonial assembly enacted laws placing that right in the vestries. Authorities in England intervened, repealing those laws as inconsistent with the rights of the Crown.

It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

This understanding of the Religion Clauses was reflected in two events involving James Madison, "'the leading architect of the religion clauses of the First Amendment.'" . . . The first occurred in 1806, when John Carroll, the first Catholic bishop in the United States, solicited the Executive's opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church "functionaries" was an "entirely ecclesiastical" matter left to the Church's own judgment. . . . The "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," Madison explained, prevented the Government from rendering an opinion on the "selection of ecclesiastical individuals."

B

Given this understanding of the Religion Clauses—and the absence of government employment regulation generally—it was some time before questions about government interference with a church's ability to select its own ministers came before the courts. This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers.

In Watson v. Jones [in 1872] . . .the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court—applying not the Constitution but a "broad and sound view of the relations of church and state under our system of laws"—declined to question that determination. We explained that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." As we would put it later, our opinion in Watson "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

Confronting the issue under the Constitution for the first time in Kedroff, the Court recognized that the "[f]reedom to select the clergy, where no improper methods of choice are proven," is "part of the free exercise of religion" protected by the First Amendment against government interference.

This Court reaffirmed these First Amendment principles in Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, a case involving a dispute over control of the American–Canadian Diocese of the Serbian Orthodox Church, including its property and assets. The Church had removed Dionisije Milivojevich as bishop of the American–Canadian Diocese because of his defiance of the church hierarchy. . . .

[T]his Court explained that the First Amendment "permit[s] hierarchical religious organizations to

establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." When ecclesiastical tribunals decide such disputes, we further explained, "the Constitution requires that civil courts accept their decisions as binding upon them." . . .

C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, . . . have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right "implicit" in the First Amendment. The EEOC and Perich thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, Hosanna–Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna–Tabor extended her a call, it issued her a "diploma of vocation" according her the title "Minister of Religion, Commissioned." She was tasked with performing that office "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures." The congregation prayed that God "bless [her] ministrations to the glory of His holy name, [and] the building of His church." In a supplement to the diploma, the congregation undertook to periodically review Perich's "skills of ministry" and "ministerial responsibilities," and to provide for her "continuing education as a professional person in the ministry of the Gospel."

Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry-related questions. Finally, she had to pass an oral examination by a faculty committee at a Lutheran college. It took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach. At that point, her call could be rescinded only upon a supermajority vote of the congregation—a protection designed to allow her to "preach the Word of God boldly."

Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation "'in the exercise of the ministry.'"

Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna–Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.

The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," Kedroff—is the church's alone.

IV

The EEOC and Perich foresee a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers "unfettered discretion" to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise. . . .

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that

her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Justice ALITO, with whom Justice KAGAN joins, concurring.

I join the Court's opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a "minister" in determining whether an "employee" of a religious group falls within the so-called "ministerial" exception. The term "minister" is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.

The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions.

The "ministerial" exception should be tailored to this purpose. It should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.

I

Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have "act[ed] as critical buffers between the individual and the power of the State." In a case like the one now before us—where the goal of the civil law in question, the elimination of discrimination against persons with disabilities, is so worthy—it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. The Constitution guarantees religious bodies "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance. Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.

Applying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs. As we have recognized in a similar context [in Boy Scouts of America v. Dale], "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." That principle applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals. See Employment Div., Dept. of Human Resources of Ore. v. Smith (noting that the constitutional interest in freedom of association may be "reinforced by Free Exercise Clause concerns"). As the Court

notes, the First Amendment "gives special solicitude to the rights of religious organizations," but our expressive-association cases are nevertheless useful in pointing out what those essential rights are. Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.

When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

The connection between church governance and the free dissemination of religious doctrine has deep roots in our legal tradition [as we noted in Watson v. Jones]:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

The "ministerial" exception gives concrete protection to the free "expression and dissemination of any religious doctrine." The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith.

II

A

The Court's opinion today holds that the "ministerial" exception applies to Cheryl Perich (hereinafter respondent), who is regarded by the Lutheran Church—Missouri Synod as a commissioned minister. But while a ministerial title is undoubtedly relevant in applying the First Amendment rule at issue, such a title is neither necessary nor sufficient. As previously noted, most faiths do not employ the term "minister," and some eschew the concept of formal ordination. And at the opposite end of the spectrum, some faiths consider the ministry to consist of all or a very large percentage of their members. Perhaps this explains why, although every circuit to consider the issue has recognized the "ministerial" exception, no circuit has made ordination status or formal title determinative of the exception's applicability.

The Fourth Circuit was the first to use the term "ministerial exception," but in doing so it took pains to clarify that the label was a mere shorthand. The Fourth Circuit traced the exception back to McClure v. Salvation Army, which invoked the Religion Clauses to bar a Title VII sex-discrimination suit brought by a woman who was described by the court as a Salvation Army "minister," although her actual title was "officer." A decade after McClure, the Fifth Circuit made clear that formal ordination was not necessary for the "ministerial" exception to apply. The court held that the members of the faculty at a Baptist seminary were covered by the exception because of their religious function in conveying church doctrine, even though some of them were not ordained ministers.

The functional consensus has held up over time, with the D. C. Circuit recognizing that "[t]he ministerial exception has not been limited to members of the clergy." The court in that case rejected a Title VII suit brought by a Catholic nun who claimed that the Catholic University of America had denied her tenure for a canon-law teaching position because of her gender. The court noted that "members of the Canon Law Faculty perform the vital function of instructing those who will in turn interpret, implement,

and teach the law governing the Roman Catholic Church and the administration of its sacraments. Although Sister McDonough is not a priest, she is a member of a religious order who sought a tenured professorship in a field that is of fundamental importance to the spiritual mission of her Church."

The Ninth Circuit too has taken a functional approach, just recently reaffirming that "the ministerial exception encompasses more than a church's ordained ministers." The Court's opinion today should not be read to upset this consensus.

B

The ministerial exception applies to respondent because, as the Court notes, she played a substantial role in "conveying the Church's message and carrying out its mission." She taught religion to her students four days a week and took them to chapel on the fifth day. She led them in daily devotional exercises, and led them in prayer three times a day. She also alternated with the other teachers in planning and leading worship services at the school chapel, choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.

It makes no difference that respondent also taught secular subjects. While a purely secular teacher would not qualify for the "ministerial" exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones. What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities. Because of these important religious functions, Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office.

Hosanna-Tabor discharged respondent because she threatened to file suit against the church in a civil court. This threat contravened the Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system and all the legal wrangling it entails. In Hosanna-Tabor's view, respondent's disregard for this doctrine compromised her religious function, disqualifying her from serving effectively as a voice for the church's faith. Respondent does not dispute that the Lutheran Church subscribes to a doctrine of internal dispute resolution, but she argues that this was a mere pretext for her firing, which was really done for nonreligious reasons.

For civil courts to engage in the pretext inquiry that respondent and the Solicitor General urge us to sanction would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades. In order to probe the real reason for respondent's firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine. The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.

At oral argument, both respondent and the United States acknowledged that a pretext inquiry would sometimes be prohibited by principles of religious autonomy, and both conceded that a Roman Catholic priest who is dismissed for getting married could not sue the church and claim that his dismissal was actually based on a ground forbidden by the federal antidiscrimination laws. But there is no principled basis for proscribing a pretext inquiry in such a case while permitting it in a case like the one now before us. The Roman Catholic Church's insistence on clerical celibacy may be much better known than the Lutheran Church's doctrine of internal dispute resolution, but popular familiarity with a religious doctrine cannot be the determinative factor.

What matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment. This conclusion rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.

Our Lady of Guadalupe School v. Morrissey-Berru

140 S. Ct. 2049 (2020)

Justice ALITO delivered the opinion of the Court.

These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith. The First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Applying this principle, we held in Hosanna-Tabor that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. We did not announce "a rigid formula" for determining whether an employee falls within this exception, but we identified circumstances that we found relevant in that case, including Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities.

In the cases now before us, we consider employment discrimination claims brought by two elementary school teachers at Catholic schools whose teaching responsibilities are similar to Perich's. Although these teachers were not given the title of "minister" and have less religious training than Perich, we hold that their cases fall within the same rule that dictated our decision in Hosanna-Tabor. The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

I

A

1

The first of the two cases we now decide involves Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles. For many years, Morrissey-Berru was employed at OLG as a lay fifth or sixth grade teacher. Like most elementary school teachers, she taught all subjects, and since OLG is a Catholic school, the curriculum included religion. As a result, she was her students' religion teacher.

Morrissey-Berru earned a B. A. in English Language Arts, with a minor in secondary education, and she holds a California teaching credential. While on the faculty at OLG, she took religious education courses at the school's request and was expected to attend faculty prayer services.

Each year, Morrissey-Berru and OLG entered into an employment agreement that set out the school's "mission" and Morrissey-Berru's duties. The agreement stated that the school's mission was "to develop and promote a Catholic School Faith Community" and it informed Morrissey-Berru that "[a]ll [her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment." The agreement explained that the school's hiring and retention decisions would be guided by its Catholic mission, and the agreement made clear that teachers were expected to "model and promote" Catholic "faith and morals." Under the agreement, Morrissey-Berru was required to participate in "[s]chool liturgical activities, as requested" and the agreement specified that she could be terminated "for 'cause'" for failing to carry out these duties or for "conduct that brings discredit upon the School or the Roman Catholic Church." The agreement required compliance with the faculty handbook, which sets out similar expectations. The pastor of the parish, a Catholic priest, had to approve Morrissey-Berru's hiring each

year.

Like all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was "considered a catechist," *i.e.*, "a teacher of religio[n]." Catechists are "responsible for the faith formation of the students in their charge each day." Morrissey-Berru provided religious instruction every day using a textbook designed for use in teaching religion to young Catholic students. Under the prescribed curriculum, she was expected to teach students, among other things, "to learn and express belief that Jesus is the son of God and the Word made flesh"; to "identify the ways" the church "carries on the mission of Jesus"; to "locate, read and understand stories from the Bible"; to "know the names, meanings, signs and symbols of each of the seven sacraments"; and to be able to "explain the communion of saints." She tested her students on that curriculum in a yearly exam. She also directed and produced an annual passion play.

Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. She also occasionally selected and prepared students to read at Mass. And she was expected to take her students to Mass once a week and on certain feast days (such as the Feast Day of St. Juan Diego, All Saints Day, and the Feast of Our Lady), and to take them to confession and to pray the Stations of the Cross. Each year, she brought them to the Catholic Cathedral in Los Angeles, where they participated as altar servers. This visit, she explained, was "an important experience" because "[i]t is a big honor" for children to "serve the altar" at the cathedral.

Morrissey-Berru also prayed with her students. Her class began or ended every day with a Hail Mary. She led the students in prayer at other times, such as when a family member was ill. And she taught them to recite the Apostle's Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession.

The school reviewed Morrissey-Berru's performance under religious standards. The "Classroom Observation Report" evaluated whether Catholic values were "infused through all subject areas" and whether there were religious signs and displays in the classroom. Morrissey-Berru testified that she tried to instruct her students "in a manner consistent with the teachings of the Church," and she said that she was "committed to teaching children Catholic values" and providing a "faith-based education." And the school principal confirmed that Morrissey-Berru was expected to do these things.

2

In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and then filed suit under the Age Discrimination in Employment Act of 1967, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher. The school maintains that it based its decisions on classroom performance—specifically, Morrissey-Berru's difficulty in administering a new reading and writing program, which had been introduced by the school's new principal as part of an effort to maintain accreditation and improve the school's academic program.

Invoking the "ministerial exception" that we recognized in Hosanna-Tabor, OLG successfully moved for summary judgment, but the Ninth Circuit reversed in a brief opinion. The court acknowledged that Morrissey-Berru had "significant religious responsibilities" but reasoned that "an employee's duties alone are not dispositive under Hosanna-Tabor's framework." Unlike Perich, the court noted, Morrissey-Berru did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister." In the court's view, these "factors" outweighed the fact that she was invested with significant religious responsibilities. The court therefore held that Morrissey-Berru did not fall within the "ministerial exception." OLG filed a petition for certiorari, and we granted review.

B

The second case concerns the late Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, another Catholic primary school in Los Angeles. [Justice Alito recounted the facts surrounding Biel and the procedural history of that case. He noted substantial similarities between

the two cases. The Supreme Court consolidated Biel's case with Morrissey-Berru's.]

II

A

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters "of faith and doctrine" without government intrusion. State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.

The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what we have termed "matters of church government." This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

The "ministerial exception" was based on this insight. Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label "ministerial exception" because the individuals involved in pioneering cases were described as "ministers." Not all pre-Hosanna-Tabor decisions applying the exception involved "ministers" or even members of the clergy. But it is instructive to consider why a church's independence on matters "of faith and doctrine" requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.

B

When the so-called ministerial exception finally reached this Court in Hosanna-Tabor, we unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations. The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government. The three prior decisions on which we primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy.

In addition to these precedents, we looked to the "background" against which "the First Amendment was adopted." We noted that 16th-century British statutes had given the Crown the power to fill high "religious offices" and to control the exercise of religion in other ways, and we explained that the founding generation sought to prevent a repetition of these practices in our country. Because Cheryl Perich, the teacher in Hosanna-Tabor, had a title that included the word "minister," we naturally concentrated on historical events involving clerical offices, but the abuses we identified were not limited to the control of appointments.

We pointed to the various Acts of Uniformity, which dictated what ministers could preach and imposed penalties for non-compliance. Under the 1549 Act, a minister who "preach[ed,] declare[d,] or [spoke] any thing" in derogation of any part of the Book of Common Prayer could be sentenced to six months in jail for a first offense and life imprisonment for a third violation. In addition, all other English subjects were forbidden to say anything against the Book of Common Prayer in "[i]nterludes[,] play[s,] song[s,] r[h]ymes, or by other open [w]ord[s]." A 1559 law contained similar prohibitions.

After the Restoration, Parliament enacted a new law with a similar aim. Ministers and "Lecturer[s]" were required to pledge "unfeigned assent and consent" to the Book of Common Prayer, and all schoolmasters, private tutors, and university professors were required to "conforme to the Liturgy of the Church of England" and not "to endeavour any change or alteration" of the church.

British law continued to impose religious restrictions on education in the 18th century and past the time of the adoption of the First Amendment. The Schism or Established Church Act of 1714 required that schoolmasters and tutors be licensed by a bishop. Non-conforming Protestants, as well as Catholics and Jews, could not teach at or attend the two universities, and as Blackstone wrote, "[p]ersons professing the popish religion [could] not keep or teach any school under pain of perpetual imprisonment." The law also imposed penalties on "any person [who] sen[t] another abroad to be educated in the popish religion ... or [who] contribute[d] to their maintenance when there."

British colonies in North America similarly controlled both the appointment of clergy and the teaching of students. A Maryland law "prohibited any Catholic priest or lay person from keeping school, or taking upon himself the education of youth." In 1771, the Governor of New York was instructed to require that all schoolmasters arriving from England obtain a license from the Bishop of London. New York law also required an oath and license for any "vagrant Preacher, Moravian, or disguised Papist" to "Preach or Teach, Either in Public or Private."

C

In Hosanna-Tabor, Cheryl Perich, a kindergarten and fourth grade teacher at an Evangelical Lutheran school, filed suit in federal court, claiming that she had been discharged because of a disability, in violation of the Americans with Disabilities Act of 1990 (ADA). The school responded that the real reason for her dismissal was her violation of the Lutheran doctrine that disputes should be resolved internally and not by going to outside authorities. We held that her suit was barred by the "ministerial exception" and noted that it "concern[ed] government interference with an internal church decision that affects the faith and mission of the church." We declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," and we added that it was "enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment." We identified four relevant circumstances but did not highlight any as essential.

First, we noted that her church had given Perich the title of "minister, with a role distinct from that of most of its members." Although she was not a minister in the usual sense of the term—she was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services—she was classified as a "called" teacher, as opposed to a lay teacher, and after completing certain academic requirements, was given the formal title "Minister of Religion, Commissioned."

Second, Perich's position "reflected a significant degree of religious training followed by a formal process of commissioning."

Third, "Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms," and by claiming certain tax benefits.

Fourth, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." The church charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." Although Perich also provided instruction in secular subjects, she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in the liturgy twice a year. "As a source of religious instruction," we explained, "Perich performed an important role in transmitting the Lutheran faith to the next generation."

The case featured two concurrences. In the first, Justice Thomas stressed that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." That is so, Justice Thomas explained, because "[a] religious organization's right to choose its ministers would be hollow ... if secular courts could second-guess" the group's sincere application of its religious tenets.

The second concurrence argued that application of the "ministerial exception" should "focus on the function performed by persons who work for religious bodies" rather than labels or designations that may vary across faiths. This opinion viewed the title of "minister" as "relevant" but "neither necessary nor sufficient." It noted that "most faiths do not employ the term 'minister'" and that some "consider the ministry to consist of all or a very large percentage of their members." The opinion concluded that the

"'ministerial' exception" "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."

D

1

In determining whether a particular position falls within the Hosanna-Tabor exception, a variety of factors may be important. [Footnote 10: "In considering the circumstances of any case, courts must take care to avoid 'resolving underlying controversies over religious doctrine.'"] The circumstances that informed our decision in Hosanna-Tabor were relevant because of their relationship to Perich's "role in conveying the Church's message and carrying out its mission," but the other noted circumstances also shed light on that connection. In a denomination that uses the term "minister," conferring that title naturally suggests that the recipient has been given an important position of trust. In Perich's case, the title that she was awarded and used demanded satisfaction of significant academic requirements and was conferred only after a formal approval process, and those circumstances also evidenced the importance attached to her role. But our recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases.

Take the question of the title "minister." Simply giving an employee the title of "minister" is not enough to justify the exception. And by the same token, since many religious traditions do not use the title "minister," it cannot be a necessary requirement. Requiring the use of the title would constitute impermissible discrimination, and this problem cannot be solved simply by including positions that are thought to be the counterparts of a "minister," such as priests, nuns, rabbis, and imams. Nuns are not the same as Protestant ministers. A brief submitted by Jewish organizations makes the point that "Judaism has many 'ministers,'" that is, "the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism." For Muslims, "an inquiry into whether imams or other leaders bear a title equivalent to 'minister' can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections."

If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.

For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. In short, these circumstances, while instructive in Hosanna-Tabor, are not inflexible requirements and may have far less significance in some cases.

What matters, at bottom, is what an employee does. And implicit in our decision in Hosanna-Tabor was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. As we put it, Perich had been entrusted with the responsibility of "transmitting the Lutheran faith to the next generation." One of the concurrences made the same point, concluding that the exception should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*."

Religious education is vital to many faiths practiced in the United States. [Justice Alito then surveyed the importance of religious education to Catholics, Protestants, Jews, Muslims, Mormons, and Seventh-day Adventists.] This brief survey does not do justice to the rich diversity of religious education

in this country, but it shows the close connection that religious institutions draw between their central purpose and educating the young in the faith.

2

When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in Hosanna-Tabor. There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

III

In holding that Morrissey-Berru and Biel did not fall within the Hosanna-Tabor exception, the Ninth Circuit misunderstood our decision. Both panels treated the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same. That approach is contrary to our admonition that we were not imposing any "rigid formula." Instead, we called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception.

The Ninth Circuit's rigid test produced a distorted analysis. First, it invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles. It is true that Perich's title included the term "minister," but we never said that her title (or her reference to herself as a "minister") was necessary to trigger the Hosanna-Tabor exception. Instead, "those considerations ... merely made Perich's case an especially easy one." Moreover, both Morrissey-Berru and Biel had titles. They were Catholic elementary school *teachers*, which meant that they were their students' primary teachers of religion. The concept of a teacher of religion is loaded with religious significance. The term "rabbi" means teacher, and Jesus was frequently called rabbi. And if a more esoteric title is needed, they were both regarded as "catechists."

Second, the Ninth Circuit assigned too much weight to the fact that Morrissey-Berru and Biel had less formal religious schooling than Perich. The significance of formal training must be evaluated in light of the age of the students taught and the judgment of a religious institution regarding the need for formal training. The schools in question here thought that Morrissey-Berru and Biel had a sufficient understanding of Catholicism to teach their students, and judges have no warrant to second-guess that judgment or to impose their own credentialing requirements.

Third, the St. James panel inappropriately diminished the significance of Biel's duties because they did not evince "close guidance and involvement" in "students' spiritual lives." Specifically, the panel majority suggested that Biel merely taught "religion from a book required by the school," "joined" students in prayer, and accompanied students to Mass in order to keep them "quiet and in their seats." This misrepresents the record and its significance. For better or worse, many primary school teachers tie

their instruction closely to textbooks, and many faith traditions prioritize teaching from authoritative texts. As for prayer, Biel prayed with her students, taught them prayers, and supervised the prayers led by students. She prepared them for Mass, accompanied them to Mass, and prayed with them there.

In Biel's appeal, the Ninth Circuit suggested that the Hosanna-Tabor exception should be interpreted narrowly because the ADA and Title VII contain provisions allowing religious employers to give preference to members of a particular faith in employing individuals to do work connected with their activities. But the Hosanna-Tabor exception serves an entirely different purpose. Think of the quintessential case where a church wants to dismiss its minister for poor performance. The church's objection in that situation is not that the minister has gone over to some other faith but simply that the minister is failing to perform essential functions in a satisfactory manner.

While the Ninth Circuit treated the circumstances that we cited in Hosanna-Tabor as factors to be assessed and weighed in every case, respondents would make the governing test even more rigid. In their view, courts should begin by deciding whether the first three circumstances—a ministerial title, formal religious education, and the employee's self-description as a minister—are met and then, in order to check the conclusion suggested by those factors, ask whether the employee performed a religious function. For reasons already explained, there is no basis for treating the circumstances we found relevant in Hosanna-Tabor in such a rigid manner.

Respondents go further astray in suggesting that an employee can never come within the Hosanna-Tabor exception unless the employee is a "practicing" member of the religion with which the employer is associated. In hiring a teacher to provide religious instruction, a religious school is very likely to try to select a person who meets this requirement, but insisting on this as a necessary condition would create a host of problems. As pointed out by petitioners, determining whether a person is a "co-religionist" will not always be easy. Deciding such questions would risk judicial entanglement in religious issues.

Expanding the "co-religionist" requirement to exclude those who no longer practice the faith would be even worse. Would the test depend on whether the person in question no longer considered himself or herself to be a member of a particular faith? Or would the test turn on whether the faith tradition in question still regarded the person as a member in some sense?

Respondents argue that Morrissey-Berru cannot fall within the Hosanna-Tabor exception because she said in connection with her lawsuit that she was not "a practicing Catholic," but acceptance of that argument would require courts to delve into the sensitive question of what it means to be a "practicing" member of a faith, and religious employers would be put in an impossible position. Morrissey-Berru's employment agreements required her to attest to "good standing" with the church. Beyond insisting on such an attestation, it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job. Was OLG supposed to interrogate Morrissey-Berru to confirm that she attended Mass every Sunday?

Respondents argue that the Hosanna-Tabor exception is not workable unless it is given a rigid structure, but we declined to adopt a "rigid formula" in Hosanna-Tabor, and the lower courts have been applying the exception for many years without such a formula. Here, as in Hosanna-Tabor, it is sufficient to decide the cases before us. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.

* * *

For these reasons, the judgment of the Court of Appeals in each case is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

I agree with the Court that Morrissey-Berru's and Biel's positions fall within the "ministerial exception," because, as Catholic school teachers, they are charged with "carry[ing] out [the religious] mission" of the parish schools. The Court properly notes that "judges have no warrant to second-guess [the schools'] judgment" of who should hold such a position "or to impose their own credentialing requirements." Accordingly, I join the Court's opinion in full. I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is "ministerial."

This deference is necessary because, as the Court rightly observes, judges lack the requisite "understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." What qualifies as "ministerial" is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis. Contrary to the dissent's claim, judges do not shirk their judicial duty or provide a mere "rubber stamp" when they defer to a religious organization's sincere beliefs. Rather, they heed the First Amendment, which "commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine."

Moreover, because the application of the exception turns on religious beliefs, the duties that a given religious organization will deem "ministerial" are sure to vary. Although the functions recognized as ministerial by the Lutheran school in Hosanna-Tabor are similar to those considered ministerial by the Catholic schools here, such overlap will not necessarily exist with other religious organizations, particularly those "outside of the 'mainstream.'" To avoid disadvantaging these minority faiths and interfering in "a religious group's right to shape its own faith and mission," courts should defer to a religious organization's sincere determination that a position is "ministerial."

The Court's decision today is a step in the right direction. The Court properly declines to consider whether an employee shares the religious organization's beliefs when determining whether that employee's position falls within the "ministerial exception," explaining that to "determin[e] whether a person is a 'co-religionist' ... would risk judicial entanglement in religious issues." But the same can be said about the broader inquiry whether an employee's position is "ministerial." This Court usually goes to great lengths to avoid governmental "entanglement" with religion, particularly in its Establishment Clause cases. For example, the Court [in Santa Fe v. Doe] has held that a public school became impermissibly "entangle[d]" with religion by simply *permitting* students to say a prayer before football games and overseeing a class election for whom would deliver the prayer. And, in Locke v. Davey, the Court concluded that it would violate States' "antiestablishment interests" if tax dollars even indirectly supported the education of ministers. But, when it comes to the autonomy of religious organizations in our ministerial-exception cases, these concerns of entanglement have not prevented the Court from weighing in on the theological questions of which positions qualify as "ministerial."

As this Court has explained, the Religion Clauses do not permit governmental "interfere[nce] with ... a religious group's right to shape its own faith and mission through its appointments. To avoid such interference, we should defer to these groups' good-faith understandings of which individuals are charged with carrying out the organizations' religious missions.

Here, the record confirms the sincerity of petitioners' claims that, as lay teachers, Morrissey-Berru and Biel held ministerial roles in these parish schools. For example, the Our Lady of Guadalupe Faculty Handbook states that lay teachers serve "special *pastoral* administrative roles ... in the service of the people of God." Moreover, their "essential job duties" include "[m]odeling, teaching of and commitment to Catholic religious and moral values." And both Morrissey-Berru's and Biel's teaching contracts required that their "duties and responsibilities ... be performed [with an] overriding commitment" to "develop[ing] ... a Catholic School Faith Community" in accordance with "the doctrines, laws and norms of the Catholic Church." Finally, *amicus curiae* United States Conference of Catholic Bishops confirms that petitioners' understanding is consistent with the Church's view that "Catholic teachers play a critical role" in the Church's ministry.

The foregoing is more than enough to sustain the sincerity of petitioners' claims that Morrissey-Berru and Biel held ministerial roles in the parish schools. Their claims thus warrant this Court's

deference and serve as a sufficient basis for applying the ministerial exception.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

Two employers fired their employees allegedly because one had breast cancer and the other was elderly. Purporting to rely on this Court's decision in Hosanna-Tabor, the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were "ministers" of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable standard of review, and collapses Hosanna-Tabor's careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

I

A

Our pluralistic society requires religious entities to abide by generally applicable laws. Consistent with the First Amendment (and over sincerely held religious objections), the Government may compel religious institutions to pay Social Security taxes for their employees, deny nonprofit status to entities that discriminate because of race, require applicants for certain public benefits to register with Social Security numbers, enforce child-labor protections, and impose minimum-wage laws.

Congress, however, has crafted exceptions to protect religious autonomy. Some antidiscrimination laws, like the Americans with Disabilities Act, permit a religious institution to consider religion when making employment decisions. Under that Act, a religious organization may also "require that all applicants and employees conform" to the entity's "religious tenets." Title VII further permits a school to prefer "hir[ing] and employ[ing]" people "of a particular religion" if its curriculum "propagat[es]" that religion. These statutory exceptions protect a religious entity's ability to make employment decisions—hiring or firing—for religious reasons.

The "ministerial exception," by contrast, is a judge-made doctrine. This Court first recognized it eight years ago in Hosanna-Tabor, concluding that the First Amendment categorically bars certain antidiscrimination suits by religious leaders against their religious employers. When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.

When this Court adopted the ministerial exception, it affirmed the holdings of virtually every federal appellate court that had embraced the doctrine. Those courts had long understood that the exception's stark departure from antidiscrimination law is narrow. Wary of the exception's "potential for abuse," federal courts treaded "case-by-case" in determining which employees are ministers exposed to discrimination without recourse. Thus, their analysis typically trained on whether the putative minister was a "spiritual leade[r]" within a congregation such that "he or she should be considered clergy." That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees.

This focus on leadership led to a consistent conclusion: Lay faculty, even those who teach religion at church-affiliated schools, are not "ministers." In Geary, for instance, the Third Circuit rejected a Catholic school's view that "[t]he unique and important role of the elementary school teacher in the Catholic education system" barred a teacher's discrimination claim under the First Amendment. In Dole,

the Fourth Circuit found a materially similar statutory ministerial exception inapplicable to teachers who taught "all classes" "from a pervasively religious perspective," "le[d]" their "students in prayer," and were "required to subscribe to [a church] statement of faith as a condition of employment." Similar examples abound.

Hosanna-Tabor did not upset this consensus. Instead, it recognized the ministerial exception's roots in protecting religious "elections" for "ecclesiastical offices" and guarding the freedom to "select" titled "clergy" and churchwide leaders. To be sure, the Court stated that the "ministerial exception is not limited to the head of a religious congregation." Nevertheless, this Court explained that the exception applies to someone with a leadership role "distinct from that of most of [the organization's] members," someone in whom "[t]he members of a religious group put their faith," or someone who "personif[ies]" the organization's "beliefs" and "guide[s] it on its way."

This analysis is context-specific. It necessarily turns on, among other things, the structure of the religious organization at issue. Put another way (and as the Court repeats throughout today's opinion), Hosanna-Tabor declined to adopt a "rigid formula for deciding when an employee qualifies as a minister." Rather, Hosanna-Tabor focused on four "circumstances" to determine whether a fourth-grade teacher, Cheryl Perich, was employed at a Lutheran school as a "minister": (1) "the formal title given [her] by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church." Confirming that the ministerial exception applies to a circumscribed sub-category of faith leaders, the Court analyzed those four "factors" to situate Perich as a minister within the Lutheran Church's structure.

B

[Justice Sotomayor then summarized the Court's analysis in Hosanna-Tabor. Importantly, b]ecause this inquiry is holistic, the Court warned [in Hosanna-Tabor] that it is "wrong" to "say that an employee's title does not matter." The Court was careful not to give religious functions undue weight in identifying church leaders. And the "amount of time an employee spends on particular activities," the Court added, "is relevant in assessing that employee's status" when measured against "the nature of the religious functions performed and the other considerations," like titles, training, and how the employee held herself out to the public.

Hosanna-Tabor's well-rounded approach ensured that a church could not categorically disregard generally applicable antidiscrimination laws for nonreligious reasons. By analyzing objective and easily discernable markers like titles, training, and public-facing conduct, Hosanna-Tabor charted a way to separate leaders who "personify" a church's "beliefs" or who "minister to the faithful" from individuals who may simply relay religious tenets. This balanced First Amendment concerns of state-church entanglement while avoiding an overbroad carve-out from employment protections.

II

Until today, no court had held that the ministerial exception applies with disputed facts like these and lay teachers like respondents, let alone at the summary-judgment stage.

Only by rewriting Hosanna-Tabor does the Court reach a different result. The Court starts with an unremarkable view: that Hosanna-Tabor's "recognition of the significance of " the first three "factors" in that case "did not mean that they must be met—or even that they are necessarily important—in all other cases." True enough. One can easily imagine religions incomparable to those at issue in Hosanna-Tabor and here. But then the Court recasts Hosanna-Tabor itself: Apparently, the touchstone all along was a two-Justice concurrence. To that concurrence, "[w]hat matter[ed]" was "the religious function that [Perich] performed" and her "functional status." Today's Court yields to the concurrence's view with identical rhetoric. "What matters," the Court echoes, "is what an employee does."

But this vague statement is no easier to comprehend today than it was when the Court declined to adopt it eight years ago. It certainly does not sound like a legal framework. Rather, the Court insists that a "religious institution's explanation of the role of [its] employees in the life of the religion in question is important." But because the Court's new standard prizes a functional importance that it appears to deem

churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.

Indeed, the Court reasons that "judges cannot be expected to have a complete understanding and appreciation" of the law and facts in ministerial-exception cases, and all but abandons judicial review. Although today's decision is limited to certain "teachers of religion," its reasoning risks rendering almost every Catholic parishioner and parent in the Archdiocese of Los Angeles a Catholic minister. That is, the Court's apparent deference here threatens to make nearly anyone whom the schools might hire "ministers" unprotected from discrimination in the hiring process. That cannot be right. Although certain religious functions may be important to a church, a person's performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws.

Today's decision thus invites the "potential for abuse" against which circuit courts have long warned. Nevermind that the Court renders almost all of the Court's opinion in Hosanna-Tabor irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable. Indeed, today's decision reframes the ministerial exception as broadly as it can, without regard to the statutory exceptions tailored to protect religious practice. As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in Hosanna-Tabor (or at least its majority opinion) condones such judicial abdication.

III

Faithfully applying Hosanna-Tabor's approach and common sense confirms that the teachers here are not Catholic "ministers" as a matter of law. This is especially so because the employers seek summary judgment, meaning the Court must "view the facts and draw reasonable inferences in the light most favorable to" the teachers. [Justice Sotomayor then recounted the facts relating to Biel and Morrissey-Berru, noting that "[a]t no point has [either school] suggested a religious reason" for the terminations at issue.]

B

On these records, the Ninth Circuit correctly concluded that neither school had shown that the ministerial exception barred the teachers' claims for disability and age discrimination. At the very least, these cases should have proceeded to trial. Viewed in the light most favorable to the teachers, the facts do not entitle the employers to summary judgment.

First, and as the Ninth Circuit explained, neither school publicly represented that either teacher was a Catholic spiritual leader or "minister." Neither conferred a title reflecting such a position. Rather, the schools referred to both Biel and Morrissey-Berru as "lay" teachers, which the circuit courts have long recognized as a mark of nonministerial, as opposed to "ministerial," status.

In response, the Court worries that "attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal." That may or may not be true, but it is irrelevant here. These cases are not about "less formal" religions; they are about the Catholic Church and its publicized and undisputedly "formal organizational structur[e]." After all, the right to free exercise has historically "allow[ed] churches and other religious institutions to define" their own "membership" and internal "organization." But that freedom of choice should carry consequences in litigation. And here, like the faith at issue in Hosanna-Tabor, the Catholic Church uses formal titles.

The Court then turns to irrelevant or disputed facts. The Court notes, for example, that a religiously significant term "rabbi" translates to "teacher," suggesting that Biel's and Morrissey-Berru's positions as lay teachers conferred religious titles after all. But that wordplay unravels when one imagines the Court's logic as applied to a math or gym or computer "teacher" at either school. The title "teacher" does not convey ministerial status. Nor does the Court gain purchase from the disputed fact that Biel and Morrissey-Berru were "regarded as 'catechists'" "responsible for the faith formation of the[ir] students." For one thing, the Court discusses evidence from only Morrissey-Berru's case (not Biel's). For another, the Court invokes the disputed deposition testimony of a school administrator while ignoring record

evidence refuting that characterization and suggesting that Morrissey-Berru never completed the full catechist training program. Although the Archdiocese does confer titles and holds a formal "Catechist Commissioning" every September, the record does not suggest that either teacher here was so commissioned. In relying on disputed factual assertions, the Court's blinkered approach completely disregards the summary-judgment standard.

Second (and further undermining the schools' claims), neither teacher had a "significant degree of religious training" or underwent a "formal process of commissioning." Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. In Biel's case, the record reflects that she attended a single conference that lasted "four or five hours," briefly discussed "how to incorporate God into ... lesson plans," and otherwise "showed [teachers] how to do art and make little pictures or things like that." Notably, all elementary school faculty attended the conference, including the computer teacher. In turn, Our Lady of Guadalupe did not ask Morrissey-Berru to undergo any religious training for her first 13 years of teaching, until it asked her to attend the uncompleted program described above. This consideration instructs that the teachers here did not fall within the ministerial exception.

Third, neither Biel nor Morrissey-Berru held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental, ceremonial, or administrative) available only to spiritual leaders. Nor does it matter that all teachers signed contracts agreeing to model and impart Catholic values. This component of the Hosanna-Tabor inquiry focuses on outward-facing behavior, and neither Biel nor Morrissey-Berru publicly represented herself as anything more than a fifth-grade teacher. The Court does not grapple with this third component of Hosanna-Tabor's inquiry, which seriously undermines the schools' cases.

That leaves only the fourth consideration in Hosanna-Tabor: the teachers' function. To be sure, Biel and Morrissey-Berru taught religion for a part of some days in the week. But that should not transform them automatically into ministers who "guide" the faith "on its way." Although the Court does not resolve this functional question with "a stopwatch," it still considers the "amount of time an employee spends on particular activities" in "assessing that employee's status." Here, the time Biel and Morrissey-Berru spent on secular instruction far surpassed their time teaching religion. For the vast majority of class, they taught subjects like reading, writing, spelling, grammar, vocabulary, math, science, social studies, and geography. In so doing, both were like any public school teacher in California, subject to the same statewide curriculum guidelines. In other words, both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination.

Nor is it dispositive that both teachers prayed with their students. Biel did not lead devotionals in her classroom, did not teach prayers, and had a minor role in monitoring student behavior during a once-a-month mass. Morrissey-Berru did lead classroom prayers, bring her students to a cathedral once a year, direct the school Easter play, and sign a contract directing her to "assist with Liturgy Planning." But these occasional tasks should not trigger as a matter of law the ministerial exception. Morrissey-Berru did not lead mass, deliver sermons, or select hymns. And unlike the teacher in Hosanna-Tabor, there is no evidence that Morrissey-Berru led devotional exercises. Her limited religious role does not fit Hosanna-Tabor's description of a "minister to the faithful."

Nevertheless, the Court insists that the teachers are ministers because "implicit in our decision in Hosanna-Tabor was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." But teaching religion in school alone cannot dictate ministerial status. If it did, then Hosanna-Tabor wasted precious pages discussing titles, training, and other objective indicia to examine whether Cheryl Perich was a minister. Not surprisingly, the Government made this same point earlier in Biel's case: "If teaching religion to elementary school students for a half-hour each day, praying with them daily, and accompanying them to weekly or monthly religious services were sufficient to establish a teacher as a minister of the church within the meaning of the ministerial exception, the Supreme Court would have had no need for most of its discussion in Hosanna-Tabor." Rather, "the Court made clear in Hosanna-Tabor that context matters." Indeed.

Were there any doubt left about the proper result here, recall that neither school has shown that it required its religion teachers to be Catholic. The Court does not explain how the schools here can show, or have shown, that a non-Catholic "personif[ies]" Catholicism or leads the faith. Instead, the Court remarks that a "rigid" coreligionist requirement might "not always be easy" to apply to faiths like Judaism or variations of Protestantism. Perhaps. But that has nothing to do with Catholicism.

Pause, for a moment, on the Court's conclusion: Even if the teachers were not Catholic, and even if they were forbidden to participate in the church's sacramental worship, they would nonetheless be "ministers" of the Catholic faith simply because of their supervisory role over students in a religious school. That stretches the law and logic past their breaking points. (Indeed, it is ironic that Our Lady of Guadalupe School seeks complete immunity for age discrimination when its teacher handbook promised not to discriminate on that basis.) As the Government once put it, even when a school has a "pervasively religious atmosphere," its faculty are unlikely ministers when "there is no requirement that its teachers even be members of [its] religious denomination." It is hard to imagine a more concrete example than these cases.

* * *

The Court's conclusion portends grave consequences. As the Government (arguing for Biel at the time) explained to the Ninth Circuit, "thousands of Catholic teachers" may lose employment-law protections because of today's outcome. Other sources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets.

In expanding the ministerial exception far beyond its historic narrowness, the Court overrides Congress' carefully tailored exceptions for religious employers. Little if nothing appears left of the statutory exemptions after today's constitutional broadside. So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.

This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived "discrimination against religion." Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. One must hope that a decision deft enough to remold Hosanna-Tabor to fit the result reached today reflects the Court's capacity to cabin the consequences tomorrow.

I respectfully dissent.

Larkin v. Grendel's Den, Inc.

459 U.S. 116 (1982)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a five hundred foot radius of the church or school, violates the Establishment Clause of the First Amendment.

I

A

Appellee operates a restaurant located in the Harvard Square area of Cambridge, Massachusetts. The Holy Cross Armenian Catholic Parish is located adjacent to the restaurant; the back walls of the two buildings are ten feet apart. In 1977, appellee applied to the Cambridge License Commission for approval of an alcoholic beverages license for the restaurant.

Section 16C of Chapter 138 of the Massachusetts General Laws provides: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto."

Holy Cross Church objected to appellee's application, expressing concern over "having so many licenses *so* near" (emphasis in original). The License Commission voted to deny the application, citing only the objection of Holy Cross Church and noting that the church "is within 10 feet of the proposed location."

Appellee then sued the License Commission and the Beverages Control Commission in United States District Court.

II

A

Appellants (the License Commission and the Beverages Control Commission) contend that the State may, without impinging on the Establishment Clause of the First Amendment, enforce what it describes as a "zoning" law in order to shield schools and places of divine worship from the presence nearby of liquor dispensing establishments. It is also contended that a zone of protection around churches and schools is essential to protect diverse centers of spiritual, educational and cultural enrichment. It is to that end that the State has vested in the governing bodies of all schools, public or private, and all churches, the power to prevent the issuance of liquor licenses for any premises within 500 feet of their institutions.

Plainly schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws.

We have upheld reasonable zoning ordinances regulating the location of so-called "adult" theaters, and we [have] recognized the legitimate governmental interest in protecting the environment around certain institutions when we sustained an ordinance prohibiting willfully making, on grounds adjacent to a school, noises which are disturbing to the good order of the school sessions.

However, § 16C is not simply a legislative exercise of zoning power. As the Massachusetts Supreme Judicial Court concluded, § 16C delegates to private, nongovernmental entities power to veto certain liquor license applications. This is a power ordinarily vested in agencies of government. We need not decide whether, or upon what conditions, such power may ever be delegated to nongovernmental entities; here, of two classes of institutions to which the legislature has delegated this important decisionmaking power, one is secular, but one is religious. Under these circumstances, the deference normally due a legislative zoning judgment is not merited.

B

The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall," see Reynolds v. United States, was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, see, e.g., Lemon v. Kurtzman; Walz v. Tax Commission, but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies.

This Court has consistently held that a statute must satisfy three criteria to pass muster under the Establishment Clause: "First, the statute 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.'" Independent of the first of those criteria, the statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause.

The purpose of § 16C, as described by the District Court, is to "protect spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." There can be little doubt that this embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means-either through an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals and like institutions, or by ensuring a hearing for the views of affected institutions at licensing proceedings.

The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith. We can assume that churches would act in good faith in their exercise of the statutory power, see Lemon v. Kurtzman, yet § 16C does not by its terms require that churches' power be used in a religiously neutral way. "[T]he potential for conflict inheres in the situation," Levitt v. Committee for Public Education, and appellants have not suggested any "effective means of guaranteeing" that the delegated power "will be used exclusively for secular, neutral, and nonideological purposes." Committee for Public Education v. Nyquist. In addition, the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a "primary" and "principal" effect of advancing religion.

Turning to the third phase of the inquiry called for by Lemon v. Kurtzman, we see that we have not previously had occasion to consider the entanglement implications of a statute vesting significant governmental authority in churches. This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." We went on in that case to state:

Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

[T]he core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions." The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant

economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness along religious lines." Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

The judgment of the Court of Appeals is affirmed.

State of Oregon v. City of Rajneeshpuram

598 F.Supp. 1208 (D. Or. 1984)

Frye, District Judge

Defendants have moved the court to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

In its complaint, the State of Oregon seeks a declaratory judgment

1. Declaring that the State of Oregon is not required by state law to recognize the municipal status of the City of Rajneeshpuram because to do so would violate the religion clauses of the Oregon and United States Constitutions.

2. Declaring that the State of Oregon is not required to pay public monies or provide public services to the City of Rajneeshpuram ... because to do so would violate the religion clauses of the Oregon and United States Constitutions.

The basis for the State of Oregon's request for such a declaration is stated in paragraph A.4. of its complaint:

The unique and pervasive interrelationship of the City of Rajneeshpuram with corporate entities created for and dedicated to the advancement of a particular religion, i.e., Rajneeshism, raises fundamental questions as to whether it would violate Article I, sections 2, 3, 4, and 5 of the Oregon Constitution and the Establishment Clause of the First Amendment to the United States Constitution, for the State of Oregon to recognize the City of Rajneeshpuram as a valid municipal corporation and to accord to it the various benefits and powers, including the payment of revenue sharing monies, as provided by state law.

The particular factual allegations supporting this assertion are as follows:

The City of Rajneeshpuram is a municipal corporation located in Wasco County, Oregon. The City was incorporated on May 26, 1982, following a unanimous vote of 154 electors. Later a city council was elected, a city government organized, and a city charter enacted. The City is comprised of three separate parcels of land and a county road connecting the parcels. An additional parcel was later added by annexation, which is being challenged in other litigation. The City is located entirely within the confines of Rancho Rajneesh, a 64,229 acre parcel controlled by Rajneesh Foundation International (RFI). The only public thoroughfare and the only publicly owned property within Rancho Rajneesh and the City is a county road. RFI is a nonprofit religious corporation organized to advance the teachings of the Bhagwan Shree Rajneesh. The followers of the Bhagwan assert that he is an enlightened religious master. RFI is a part of the organizational structure through which the followers of the Bhagwan practice their religion. The Rajneesh Neo-Sannyas International Commune ("the Commune") is a corporation organized under Oregon's Co-operative Corporations Act and does not issue stock. The Commune was incorporated in December, 1981. The purpose of the Commune, according to its articles of incorporation, is "to be a religious community where life is, in every respect, guided by the religious teachings of Bhagwan Shree Rajneesh and whose members live a communal life with a common treasury." The Commune is governed by a Board of Directors, of which the personal secretary to the Bhagwan, Ma Anand Sheela, is an *ex officio* member. All members of the Commune are followers of the Bhagwan. Applications for membership in the Commune are considered by the Board of Directors, but no one may be admitted as a member without the approval of Ma Anand Sheela. The Commune holds a long-term leasehold on Rancho Rajneesh, including all of the real property within the City of Rajneeshpuram, except the county road. All of the City of Rajneeshpuram's real property and offices are subleased or otherwise made available to the City by the Commune. Ma Anand Sheela is the President of RFI. She is a member of the

Board of Directors of RIC. She holds an unlimited general power of attorney from the Bhagwan Shree Rajneesh. She is married to Swami Prem Jayananda, who is the President and a member of the Board of Directors of RIC. He is "senior executive" of the Commune and has served as police commissioner for the City of Rajneeshpuram. Because of the interrelationship of the religious and for profit corporations that own and control all of the real property within the City of Rajneeshpuram, the sovereign power exercised by the City is subject to the actual, direct control of an organized religion and its leaders. The Commune, lessee of all real property in Rajneeshpuram, is dedicated to creating and maintaining a religious community guided by the teachings of the Bhagwan. Ma Anand Sheela has actual control over admission to and expulsion from the Commune, and by virtue of the Commune's dedication to the Bhagwan and the Bhagwan's delegation of power to Ma Anand Sheela, has the power to exercise actual control over the affairs of the Commune. Because of the Commune's control over all real property in and around the City, no person may reside in Rajneeshpuram without the consent of the Commune and Ma Anand Sheela. All residents of Rajneeshpuram are either members or invitees of the Commune. The Commune possesses and has exercised substantial and direct control over visitor access to Rajneeshpuram. Only a small portion of Rajneeshpuram is accessible by the county road. Most of the City, including City Hall, is accessible only by means of roads controlled by the Commune. Visitors to the City are asked to check in at a visitor's center and have been required to obtain a visitor's pass as a condition to access to facilities (other than City Hall) not located directly on the county road right-of-way. Some visitors have been searched as a condition of entry to the City. The followers of the Bhagwan assert that the development of Rajneeshpuram is the fulfillment of a religious vision. Work of every kind is considered a form of worship. Work stations are called "temples" and various City functions are designated as temples and supervised by the Commune. The primary purpose for establishing the City of Rajneeshpuram was to advance the religion of Rajneeshism. The City was founded to fulfill a religious vision. The City was designed and functions as a spiritual mecca for followers of the Bhagwan worldwide. It serves as a monument to and the residence of the Bhagwan, and as a gathering place for followers at institutions of religious training and at three annual religious festivals.

For purposes of the motion to dismiss, the court assumes that the above allegations are true.

DISCUSSION AND ANALYSIS

The first amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." These prohibitions are applicable to states as well as to Congress. The issue which this court will address is whether, assuming the allegations of the complaint are true, the Establishment Clause of the first amendment to the United States Constitution is violated by the operation and existence of the City of Rajneeshpuram as a sovereign municipal government, validated and supported by the State of Oregon as otherwise required by state law.

In Lemon v. Kurtzman, the Supreme Court laid down a three-part test for use in Establishment Clause cases. The Court explained the nature of the Establishment Clause and set out the test as follows:

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the

three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation omitted]; finally, the statute must not foster "an excessive government entanglement with religion."

Defendants' first argument in support of their motion to dismiss is that the State of Oregon cannot prevail because in the present case there is no governmental "act" to which the Lemon tests can be applied. Defendants contend that all of the allegations contained in the State's complaint involve merely private acts that, taken individually, are lawful and constitutionally protected, such as forming the defendant corporations and associating for the purpose of practicing a religion. The State of Oregon argues, however, that, taking all of the allegations of its complaint together, recognition of the municipal status of the City of Rajneeshpuram constitutes the establishment of a theocracy—that is, the granting of governmental power to a religion.

For the purpose of ruling upon this motion to dismiss, the court adopts the State of Oregon's characterization of its allegations. The court deems that the governmental acts alleged are those of the State of Oregon and Wasco County, through the operation of state law, in imparting sovereign municipal status to the City of Rajneeshpuram and the acts of the City of Rajneeshpuram itself in using those powers. The private defendants' individual corporate and religious activities are not the acts upon which the State's claim is based. However, allegations of the private defendants' individual, corporate, and religious activities are necessary allegations in support of the State of Oregon's claim that granting municipal power and status to the City of Rajneeshpuram gives sovereign governmental power to a religion and its leaders.

Defendants next argue in support of their motion to dismiss the State of Oregon's complaint that governments do not violate the Establishment Clause simply by doing acts that incidentally benefit religion, so long as the acts have a secular purpose and the non-secular benefit to religion is remote, indirect, and incidental.

Defendants' final argument is that the first amendment not only prohibits governmental establishment of religion, but also restricts governments from prohibiting the free exercise of religion and the right to free association. Defendants contend that if they are not allowed to incorporate and to operate the City of Rajneeshpuram, their own first amendment rights to practice religion and to associate freely will be violated.

The State of Oregon does not quarrel with these premises articulated by defendants, but rather argues that the particular *factual* situation alleged is so extreme as to permit a finding that the existence and operation of the City of Rajneeshpuram is unconstitutional. The State of Oregon's main argument is that it is unconstitutional to give municipal power and status to a city (1) in which all land is subject to the control of a religious corporation, (2) in which residency is controlled by a religious corporation and limited to followers of that religion or their guests, and (3) whose *raison d'etre* is the practice and advancement of a particular religion. Under such facts, the State of Oregon argues, giving the City of Rajneeshpuram municipal status and power is the same as giving municipal status and power to a religion, and that a clearer example of establishment of religion could not be imagined.

Defendants counter that the only alleged factual difference between a city composed entirely of adherents of one religion, such as the German Benedictines of Mount Angel, and the Rajneeshees of the City of Rajneeshpuram, is the form of land ownership and the concomitant restriction on residency in the city. Defendants argue that to find the existence and operation of the City of Rajneeshpuram unconstitutional would be to penalize defendants because they believe in communal rather than private ownership of land.

But the State of Oregon argues that denying municipal status to the City of Rajneeshpuram would not

interfere with defendants' rights to practice religion, or to associate freely, or to have access to public services. If the City of Rajneeshpuram did not exist, the State of Oregon argues, defendants could still practice their religion and freely associate; the only difference would be that public services would be provided by Wasco County rather than by the City of Rajneeshpuram.

Undoubtedly there is an inherent tension between the Establishment Clause on the one hand, and the Free Exercise Clause on the other. A review of the cases indicates that there is no precise legal formulation for the court to follow in determining whether under the facts as alleged by the State of Oregon the existence and operation of the City of Rajneeshpuram is an unconstitutional establishment of religion, or whether on the other hand, not allowing the City of Rajneeshpuram to exist would violate defendants' rights to freely practice their religion. No federal case has addressed the precise situation present in this case.

The State relies heavily on Larkin v. Grendel's Den. There, the Supreme Court held unconstitutional a Massachusetts statute giving churches a discretionary power to veto liquor license applications of premises within five hundred feet of the church. The court held that the statute failed both the "primary effect" and "excessive entanglement" tests of Lemon.

In the present case, assuming as true the facts alleged by the State of Oregon, the existence and operation of the City of Rajneeshpuram impacts a number of the Grendel's Den concerns. The existence of the City of Rajneeshpuram gives the appearance of a joint exercise of legislative authority by church and state. Religious organizations control or own all real property within the City of Rajneeshpuram. The potential for religious-secular conflict with respect to actions of the City is inherent. Finally, the nature and extent of potential or actual control by religion over the government of the City raises serious entanglement problems. . . .

Defendants argue that the Free Exercise Clause of the first amendment requires that the existence and operation of the City of Rajneeshpuram be allowed to continue. Otherwise, defendants argue, they will be denied benefits flowing from the incorporation and operation of the City of Rajneeshpuram ordinarily available to them as citizens solely because of their religious beliefs—a result forbidden by the Free Exercise Clause. Defendants rely in part on Thomas v. Review Board of the Indiana Employment Security Division and Sherbert v. Verner. As the Supreme Court [stated in Thomas]:

Where the state conditions receipt of an important benefit ... or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

The mere fact that [an individual's] religious practice is burdened ... does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.

CONCLUSIONS AND RULING

If the facts alleged in the State of Oregon's complaint are true, the court concludes that the potential injury to the anti-establishment principle of the first amendment by the existence and the operation of the City of Rajneeshpuram clearly outweighs the potential harm to defendants' free exercise of religion rights. To deny defendants the right to operate a city is the only means of achieving a compelling state and federal interest—that of avoiding an establishment of religion. If the City of Rajneeshpuram were to cease to exist, defendants would not be precluded from practicing their religion nor from associating with whom they choose in order to do so. Defendants would not be denied access to public services. Public services would be provided by Wasco County. In short, although defendants' freedom to freely practice their religion would be burdened if the City of Rajneeshpuram were no longer recognized as a city, the burden upon them is small and indirect compared to the harm to be done to the Establishment Clause by allowing the City of Rajneeshpuram to operate as a city.

[T]here is a difference between the effect on and benefit to religion of the provision of ordinary municipal services to a city of private landowners of one religion and to the City of Rajneeshpuram, where the land is communally owned and controlled by religious organizations. The provision of services by a municipal government in a city whose residents are private landowners of one religious faith has the direct and primary effect of aiding the individual landowners and residents living in the city. The effect on the religion of those private landowners is remote, indirect, and incidental. In contrast, if, as alleged, all of the real property in the City of Rajneeshpuram is owned or controlled by religious organizations, the provision of municipal services by the City of Rajneeshpuram necessarily has the effect of aiding not only the individual residents of the City of Rajneeshpuram, but also of directly, obviously, and immediately benefitting the religious organizations themselves.

Given the facts as alleged by the State of Oregon, the court could conclude that the acts of the State of Oregon and Wasco County in recognizing the existence and operation of the City of Rajneeshpuram have as a principal and primary effect the advancement of the religion of Rajneeshism. Finally, given the alleged power and control of religious organizations and leaders over all real property and residency within the City of Rajneeshpuram, the court could conclude that the existence and operation of the City of Rajneeshpuram would represent "an excessive government entanglement with religion."

IT IS ORDERED that defendants' motion to dismiss is DENIED.

Reynolds v. United States

98 U.S. 145 (1878)

Mr. Chief Justice WAITE delivered the opinion of the Court.

[This case presents the question to the Court whether the accused should have been acquitted if he married the second time, because he believed it to be his religious duty.]

[The accused] proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.' He also proved . . . 'that such marriage ceremony was performed under and pursuant to the doctrines of said church.'

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he 'was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty." This request was refused, and the court [charged] 'that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right, deliberately married a second time, having a first wife living, the [lack] of evil intent—the [lack] of understanding on his part that he was committing a crime—did not excuse him; but the law inexorably in such case implies the criminal intent.'

[T]he question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. At the next session the

proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

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 of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society.

By the statute of 1 James I., the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth.' From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government

of the people, to a greater or less extent, rests.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

Davis v. Beason

133 U.S. 333 (1890)

Mr. Justice FIELD delivered the opinion of the Court.

On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment, of which the defendant was found guilty. If it had jurisdiction, we can go no further. We cannot look into any alleged errors in its rulings, on the trial of the defendant. Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of an order or organization known as the 'Mormon Church,' called the 'Church of Jesus Christ of Latter-Day Saints,' or the fact that the order of organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy, as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases. The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole

punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of this court through the late Chief Justice WAITE, in Reynolds v. U. S., are pertinent. And in Murphy v. Ramsey, referring to the act of congress excluding polygamists and bigamists from voting or holding office, the court, speaking by Mr. Justice MATTHEWS, said: 'Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.' It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'

It only remains to refer to the laws which authorized the legislature of the territory of Idaho to prescribe the qualifications of voters, and the oath they were required to take. The Revised Statutes provide that 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.' Under this general authority it would seem that the territorial legislature was authorized to prescribe any qualifications for voters, calculated to secure obedience to its laws. But, in addition to the above law, section 1859 of the Revised Statutes provides that 'every male citizen above the age of twenty-one, including persons who have legally declared their intention to become citizens in any territory hereafter organized, and who are actual residents of such territory at the time of the organization thereof, shall be entitled to vote at the first election in such territory, and to hold any office therein; subject, nevertheless, to the limitations specified in the next section,' namely, that at all elections in any territory subsequently organized by congress, as well as at all elections in territories already organized, the qualifications of voters and for holding office shall be such as may be prescribed by the legislative assembly of each territory, subject, nevertheless, to the following restrictions: *First*, that the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of 21, or persons above that age who have declared their intention to become such citizens; *second*, that the elective franchise or the right of holding office shall not be denied to any citizen on account of race, color, or previous condition of servitude; *third*, that no soldier or sailor, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made his permanent domicile in the territory for six months; and, *fourth*, that no person belonging to the army or navy shall be elected to or hold a civil office or appointment in the territory. These limitations are the only ones placed upon the authority of territorial legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office, not inconsistent with the above limitations. In our judgment, section 501 of the Revised Statutes of Idaho territory, which provides that 'no person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery in this territory, or in any other state or territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or

ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory,'—is not open to any constitutional or legal objection. With the exception of persons under guardianship or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust, or profit, those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the territory, and justify and approve the commission of crimes forbidden by it. The second subdivision of section 504 of the Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection to which out attention has been called.

The position that congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The statute of congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares 'that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States.' This is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses, or over the means for their ascertainment and prevention. The cases in which the legislation of congress will supersede the legislation of a state or territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of congress may well be considered as covering the entire ground. But here there is nothing of this kind. The act of congress does not touch upon teaching, advising, and counseling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country. The judgment of the court below is therefore affirmed.

Late Corporation of the Church of Latter-Day Saints v. United States

136 U.S. 1 (1890)

On behalf of the Court, Mr. Justice BRADLEY stated the case as follows:

This case originated under and in pursuance of the act of congress, which was passed February 19, 1887, and became a law by not being returned by the president. This act, besides making additional provision with regard to the prosecution of polygamy in the territories, and other matters concerning the territory of Utah, provided, in the 13th, 17th, and 26th sections, as follows: 'Sec. 13. That it shall be the duty of the attorney general of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the act of congress approved the first day of July, eighteen hundred and sixty-two, entitled 'And act to punish and prevent the practice of polygamy in the territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the territory of Utah,' or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States; and all such property so forfeited and escheated to the United States shall be disposed of by the secretary of the interior, and the proceeds thereof applied to the use of the use and benefit of the common schools in the territory in which such property may be: provided, that no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial-ground, shall be forfeited.' That the acts of the legislative assembly of the territory of Utah incorporating, continuing, or providing for the corporation known as the 'Church of Jesus Christ of Latter-Day Saints,' and the ordinance of the so-called general assembly of the state of Deseret incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved.'

In pursuance of the thirteenth section, above recited, proceedings were instituted by information on behalf of the United States in the third district court of the territory of Utah, for the purpose of having declared forfeited and escheated to the government the real estate of the corporation called the 'Church of Jesus Christ of Latter-Day Saints,' except a certain block in Salt Lake City used exclusively for public worship.

The principal questions raised are-*First*, as to the power of congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, *secondly*, as to the power of congress and the courts to seize the property of said corporation, and to hold the same for the purposes mentioned in the decree.

The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory is derived from the treaty-making power, and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession, is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident.

The supreme power of congress over the territories, and over the acts of the territorial legislatures

established therein, is generally expressly reserved in the organic acts establishing governments in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect.'

. . . It is distinctly stated in the pleadings and findings of fact that the property of the said corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy,-a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by congress,-notwithstanding all the efforts made to suppress this barbarous practice,-the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting, and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society. It is unnecessary here to refer to the past history of the sect; to their defiance of the government authorities; to their attempt to establish an independent community; to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority. The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced. And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used, and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the late corporation was endowed, for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises whether the government, finding these funds without legal ownership, has or has not the right, through its courts, and in due course of administration, to cause them to beseized and devoted to objects of undoubted charity and usefulness,-such for example, as the maintenance of schools,-for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings, and burying-grounds, as provided in the law.

The property in question has been dedicated to public and charitable uses. It matters not whether it is the product of private contributions, made during the course of half a century, or of taxes imposed upon the people, or of gains arising from fortunate operations in business or appreciation in values, the charitable uses for which it is held are stamped upon it by charter, by ordinance, by regulation, and by usage, in such an indelible manner that there can be no mistake as to their character, purpose, or object. The principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity. They are found imbedded in the civil law of Rome, in the laws of European nations, and especially in the laws of that nation from which our institutions are derived. A leading and prominent principle prevailing in them all is that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use, it is considered as given to the public, and is therefore taken under the guardianship of the laws. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the state, it will be applied to some object of kindred character, so as to fulfill in substance, if not in manner and form, the purpose of its consecration.

Then, looking at the case as the finding of facts presents it, we have before us-congress had before it-a contumacious organization, wielding by its resources an immense power in the territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart, and subvert the legislation of congress, and the will of the government of the United States. Under these circumstances, we have no doubt of the power of congress to do as it did. It is not our province to pass judgment upon the necessity or expediency of the act of February 19, 1887, under which this proceeding was taken. The only question we have to consider in this regard is as to the constitutional power of congress to pass it. Nor are we now called upon to declare what disposition ought to make of the property of the Church of Jesus Christ of Latter-Day Saints.

As to the constitutional question, we see nothing in the act which, in our judgment, transcends the power of congress over the subject. We have already considered the question of its power to repeal the charter of the corporation. It certainly also had power to direct proceedings to be instituted for the forfeiture and escheat of the real estate of the corporation; and, if a judgment should be rendered in favor of the government in these proceedings, the power to dispose of the proceeds of the lands thus forfeited and escheated, for the use and benefit of common schools in the territory, is beyond dispute. It would probably have power to make such a disposition of the proceeds if the question were merely one of charitable uses, and not of forfeiture. Schools and education were regarded by the congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality. In the ordinance of 1787, passed for the government of the territory northwest of the Ohio, it is declared: ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’ Mr. Dane, who is reputed to have drafted the said ordinance, speaking of some of the statutory provisions of the English law regarding charities as inapplicable to America, says: ‘But, in construing these laws, rules have been laid down which are valuable in every state; as that the erection of schools and the relief of the poor are always right, and the law will deny the application of private property only as to uses the nation deems superstitious.’

The Integrity of Survival

Frederick Gedicks

42 DePaul L. Rev. 167 (1992)

Most of you are probably familiar with the nineteenth-century confrontation between Mormons and the federal government, and I will not relate the chapter and verse on that. It lasted nearly fifty years, and was largely about the practice of polygamy or, as the Mormons preferred to call it, "plural marriage." By 1890, it had become clear that the Mormons would lose this confrontation. The church was bankrupt; its assets were in the hands of a federal receiver; its leadership was in prison or in hiding; and legislation that would have disenfranchised Mormons simply by virtue of their membership in the church had been introduced in Congress and seemed likely to pass. On September 25, 1890, Wilford Woodruff, then the president and prophet of the Mormon church, issued a declaration which Mormons know as the Manifesto. The Manifesto proclaimed that the church would immediately cease all belief in and practice of plural marriage. Woodruff made it clear that he had seen a prophetic vision in which it was revealed to him that the Mormon Church would be utterly destroyed unless it abandoned polygamy: "I have arrived at a point in the History of my life as the President of the Church of Jesus Christ of Latter Day Saints where I am under the necessity of acting for the Temporal Salvation of the Church. The United States Government has taken a Stand & passed Laws to destroy the Latter day Saints upon the Subject of polygamy or Patriarchal order of Marriage. And after Praying to the Lord & feeling inspired by his spirit, I have issued the following Proclamation [i.e., the Manifesto]."

Following issuance of the Manifesto, federal persecution ended in short order.

Mormonism is a religion that is centered to a significant degree on action and works. It is not true, as some conservative Protestants maintain, that Mormons believe they can earn their way to salvation by doing good works. But I think it is a fair observation that the connection between salvation and works in Mormonism is closer than it is in Protestantism. The Book of Mormon states: "We know that it is by grace that we are saved, after all we can do." So it is not enough for Mormons simply to be faithful to the end. The way we live our religion is by doing everything we possibly can to be faithful to God. In a conflict between faith and survival, our beliefs require that we do all we can to stave off the end. That is exactly what the church did in its confrontation with the federal government over plural marriage. The church engaged lobbyists, retained the best lawyers it could find, repeatedly petitioned Congress and the presidents, politically organized, and sponsored economic boycotts. When these legal means failed, the church employed illegal means to combat the government, going underground and engaging in civil disobedience in an attempt to thwart federal enforcement efforts. If there had been any other course that showed any chance of success, the church certainly would have tried it. When all its efforts failed, the church came face to face with one of the most serious crises of religious conscience: the choice between faithfulness and survival. Just as Wilford Woodruff had made it clear that the survival of the Mormon church depended on its abandoning plural marriage, he had also made it clear that this abandonment was the will of God. He maintained that he had received direct revelation that God no longer required the church to practice polygamy. In my religion, God does not always demand faithfulness over survival. As Woodruff stated in the aftermath of the Manifesto: "The Lord has given us commandments concerning many things, and we have carried them out as far as we could; but when we cannot do it, we are justified. The Lord does not require at our hands things we cannot do."

In some respects, this is comforting because one knows that at some point, God may release the believer from obligations of faith that require too much suffering and pain and that are, frankly, impossible to accomplish. But this possibility also is a heavy burden of faith, because one can never be sure that she has done enough to be in the moral and religious position to ask God for release from an obligation of faith. At any rate, while there were obvious costs to what Wilford Woodruff did on behalf of the Mormon Church, it does not seem to me that he erred in compromising to preserve the church. Mormons understand their church to exist in the world to do God's work, and the church clearly cannot do

God's work unless it exists in the world. For Mormons, then, there is religious integrity even in compromise and survival. From the perspective of the nineteenth-century church, there were aspects of Mormonism which were more important than plural marriage, and it became clear to the leaders of the church at that time that it was necessary to choose between them. They chose, with God's help, the religious practices and principles that they felt were more important than plural marriage. The tragedy, of course, is that they were forced to this choice at all. [I believe] that one must do all in her power to avoid the choice between faithfulness and survival, [but] sometimes survival is more important than faithfulness when a choice between the two is unavoidable.

For me, religious freedom is deadly serious. It is serious because my church almost disappeared for lack of this freedom. Indeed, in a certain way, the church did disappear. The Mormon church was transformed by the Manifesto, and the church of today is very different from the church of 1890. Is the church today better off than it would have been had it chosen faithfulness over survival? I do not even know how to think about this question, about whether it was better for the church to have compromised and survived than to have been absolutely faithful and disappeared. I do not know how to think about that at all. I only know that there is integrity in survival, and that faithfulness is not the only religious value. Faithfulness is not the only Christian value and, from my standpoint, it surely is not the only Mormon value. I can only trust that Wilford Woodruff made a choice approved by God. I will close by stating the obvious: The Mormons of the nineteenth century would have preferred, I would prefer, and most religious people would prefer, never to face the choice between faithfulness and survival. One of the ways we can avoid this choice is by working for something called freedom of religion. I am not so naive as to think that working within as well as against the state to carve out a space for the free exercise of religion does not undermine the principles of one's faith. For me, as a Mormon, almost anything is worth avoiding the choice between faithfulness and survival. It is an agonizing choice, a terrible choice, a frightening choice. It is, truly, Hobson's choice. We must do what we can to save ourselves from it.

Epperson v. Arkansas

393 U.S. 97 (1968)

Mr. Justice FORTAS delivered the opinion of the Court.

I.

This appeal challenges the constitutionality of the 'anti-evolution' statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of 'fundamentalist' religious fervor of the twenties. The Arkansas statute was an adaption of the famous Tennessee 'monkey law' which that State adopted in 1925. The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated Scopes case in 1927.

The Arkansas law makes it unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course did not have a section on the Darwinian Theory. Then, for the academic year 1965—1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth 'the theory about the origin of man from a lower form of animal.'

Susan Epperson, a young woman who graduated from Arkansas' school system and then obtained her master's degree in zoology at the University of Illinois, was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions. H. H. Blanchard, a parent of children attending the public schools, intervened in support of the action.

The Chancery Court, in an opinion by Chancellor Murray O. Reed, held that the statute violated the Fourteenth Amendment to the United States Constitution. The court noted that this Amendment encompasses the prohibitions upon state interference with freedom of speech and thought which are contained in the First Amendment. Accordingly, it held that the challenged statute is unconstitutional because, in violation of the First Amendment, it 'tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach.' In this perspective, the Act, it held, was an unconstitutional and void restraint upon the freedom of speech guaranteed by the Constitution.

On appeal, the Supreme Court of Arkansas reversed. Its two-sentence opinion is set forth in the margin. It sustained the statute as an exercise of the State's power to specify the curriculum in public schools. It did not address itself to the competing constitutional considerations.

Appeal was duly prosecuted to this Court under 28 U.S.C. s 1257(2). Only Arkansas and Mississippi have such 'anti-evolution' or 'monkey' laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II.

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. That court, perhaps reflecting the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind, stated that it 'expressed no opinion' as to whether the Act prohibits 'explanation' of the theory of evolution or merely forbids 'teaching that the theory is true.' Regardless of this uncertainty, the court held that the statute is constitutional.

On the other hand, counsel for the State, in oral argument in this Court, candidly stated that, despite the State Supreme Court's equivocation, Arkansas would interpret the statute 'to mean that to make a student aware of the theory just to teach that there was such a theory' would be grounds for dismissal and for prosecution under the statute; and he said 'that the Supreme Court of Arkansas' opinion should be interpreted in that manner.' He said: 'If Mrs. Epperson would tell her students that 'Here is Darwin's theory, that man ascended or descended from a lower form of being,' then I think she would be under this statute liable for prosecution.'

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas' statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term 'teaching.' Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

III.

The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

As early as 1872 [in Watson v. Jones], this Court said: 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' As this Court said in Keyishian v. Board of Regents, the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' . . .

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In Everson v. Board of Education, this Court, in upholding a state law to provide free bus service to school children, including those attending parochial schools, said: 'Neither (a State nor the Federal Government) can pass laws which aid one religion, aid all religions, or prefer one religion over another.'

At the following Term of Court, in McCollum v. Board of Education, the Court held that Illinois

could not release pupils from class to attend classes of instruction in the school buildings in the religion of their choice. This, it said, would involve the State in using tax-supported property for religious purposes, thereby breaching the 'wall of separation' which, according to Jefferson, the First Amendment was intended to erect between church and state. While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in Joseph Burstyn, Inc. v. Wilson, 'the state has no legitimate interest in protecting any or all religions from views distasteful to them.' The test was stated as follows in Abington School District v. Schempp: '(W)hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'

These precedents inevitably determine the result in the present case. The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose: to make it unlawful 'to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is reversed.

Mr. Justice BLACK, concurring.

I am by no means sure that this case presents a genuinely justiciable case or controversy. Although Arkansas Initiated Act No. 1, the statute alleged to be unconstitutional, was passed by the voters of Arkansas in 1928, we are informed that there has never been even a single attempt by the State to enforce it. And the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law should it remain on the books for the next century. Now, nearly 40 years after the law has slumbered on the books as though dead, a teacher alleging fear that the State might arouse from its lethargy and try to punish her has asked for a declaratory judgment holding the law unconstitutional. She was subsequently joined by a parent who alleged his interest in seeing that his two then schoolage sons 'be informed of all scientific theories and hypotheses.' But whether this Arkansas teacher is still a teacher, fearful of punishment under the Act, we do not know.

It may be, as has been published in the daily press, that she has long since given up her job as a teacher and moved to a distant city, thereby escaping the dangers she had imagined might befall her under this lifeless Arkansas Act. And there is not one iota of concrete evidence to show that the parent-intervenor's sons have not been or will not be taught about evolution. The textbook adopted for use in biology classes in Little Rock includes an entire chapter dealing with evolution. There is no evidence that this chapter is not being freely taught in the schools that use the textbook and no evidence that the intervenor's sons, who were 15 and 17 years old when this suit was brought three years ago, are still in high school or yet to take biology. Unfortunately, however, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit as moot or as lacking the qualities of a genuine case or controversy.

Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts and leaps headlong into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils. While I hesitate to enter into the consideration and decision of such sensitive state-federal relationships, I reluctantly acquiesce. But, agreeing to consider this as a genuine case or controversy, I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decision of this particular case requires. . . .

The Court, not content to strike down this Arkansas Act on the unchallengeable ground of its plain vagueness, chooses rather to invalidate it as a violation of the Establishment of Religion Clause of the First Amendment. I would not decide this case on such a sweeping ground for the following reasons, among others.

1. In the first place I find it difficult to agree with the Court's statement that ‘there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man.’ It may be instead that the people's motive was merely that it would be best to remove this controversial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this Court has consistently held that it is not for us to invalidate a statute because of our views that the ‘motives' behind its passage were improper; it is simply too difficult to determine what those motives were.

2. A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an ‘anti-religious' doctrine to schoolchildren? The very cases cited by the Court as supporting its conclusion that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.

3. I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech ‘while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.’ I question whether it is absolutely certain, as the Court's opinion indicates, that ‘academic freedom’ permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

Certainly the Darwinian theory, precisely like the Genesis story of the creation of man, is not above

challenge. In fact the Darwinian theory has not merely been criticized by religionists but by scientists, and perhaps no scientist would be willing to take an oath and swear that everything announced in the Darwinian theory is unquestionably true. The Court, it seems to me, makes a serious mistake in bypassing the plain, unconstitutional vagueness of this statute in order to reach out and decide this troublesome, to me, First Amendment question. However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.

I would either strike down the Arkansas Act as too vague to enforce, or remand to the State Supreme Court for clarification of its holding and opinion.

Mr. Justice STEWART, concurring in the result.

The States are most assuredly free 'to choose their own curriculums for their own schools.' A State is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.

It is one thing for a State to determine that 'the subject of higher mathematics, or astronomy, or biology' shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth. . . .

Mozert v. Hawkins County Board of Education

826 F.2d 1058 (6th Cir. 1987)

Lively, Chief Judge

This case arose under the Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment. The district court held that a public school requirement that all students in grades one through eight use a prescribed set of reading textbooks violated the constitutional rights of objecting parents and students. The district court entered an injunction which required the schools to excuse objecting students from participating in reading classes where the textbooks are used and awarded the plaintiff parents more than $50,000 damages.

I.

A.

Early in 1983 the Hawkins County, Tennessee Board of Education adopted the Holt, Rinehart and Winston basic reading series (the Holt series) for use in grades 1–8 of the public schools of the county.

Like many school systems, Hawkins County schools teach "critical reading" as opposed to reading exercises that teach only word and sound recognition. "Critical reading" requires the development of higher order cognitive skills that enable students to evaluate the material they read, to contrast the ideas presented, and to understand complex characters that appear in reading material.

The plaintiff Vicki Frost is the mother of four children, three of whom were students in Hawkins County public schools in 1983. At the beginning of the 1983–84 school year Mrs. Frost read a story in a daughter's sixth grade reader that involved mental telepathy. Mrs. Frost, who describes herself as a "born again Christian," has a religious objection to any teaching about mental telepathy. Reading further, she found additional themes in the reader to which she had religious objections. After discussing her objections with other parents, Mrs. Frost talked with the principal of Church Hill Middle School and obtained an agreement for an alternative reading program for students whose parents objected to the assigned Holt reader. The students who elected the alternative program left their classrooms during the reading sessions and worked on assignments from an older textbook series in available office or library areas. Other students in two elementary schools were excused from reading the Holt books.

B.

In November 1983 the Hawkins County School Board voted unanimously to eliminate all alternative reading programs and require every student in the public schools to attend classes using the Holt series. Thereafter the plaintiff students refused to read the Holt series or attend reading classes where the series was being used. The children of several of the plaintiffs were suspended for brief periods for this refusal. Most of the plaintiff students were ultimately taught at home, or attended religious schools, or transferred to public schools outside Hawkins County. One student returned to school because his family was unable to afford alternate schooling. Even after the board's order, two students were allowed some accommodation, in that the teacher either excused them from reading the Holt stories, or specifically noted on worksheets that the student was not required to believe the stories.

On December 2, 1983, the plaintiffs, consisting of seven families—14 parents and 17 children—filed this action pursuant to 42 U.S.C. § 1983. In their complaint the plaintiffs asserted that they have sincere religious beliefs which are contrary to the values taught or inculcated by the reading textbooks and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to read the books and a violation of the religious beliefs of the plaintiff parents to permit their children to read the books. The plaintiffs sought to hold the defendants liable because "forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution."

II.

A.

[The defendants acknowledged that the plaintiffs' religious beliefs are sincere and that certain passages in the reading texts offend those beliefs. However, they did not agree with the plaintiffs' claim that because they found the passages offense, the reading requirement burdened their constitutional right to the free exercise of their religion. Similarly, the plaintiffs agreed that there was a compelling state interest for the defendants to provide a public education to the children of Hawkins County. However, they did not agree that the compelling interest required all students in grades 1–8 of the Hawkins County public schools to use the Holt, Rinehart and Winston basal reading textbooks. These disputed matters were left to be resolved at trial.]

B.

The plaintiffs do not belong to a single church or denomination, but all consider themselves born again Christians. Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs." There was evidence that other members of their churches, and even their pastors, do not agree with their position in this case.

Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and "secular humanism" to less familiar themes such as "futuristic supernaturalism," pacifism, magic and false views of death.

In her lengthy testimony Mrs. Frost identified passages from stories and poems used in the Holt series that fell into each category. Illustrative is her first category, futuristic supernaturalism, which she defined as teaching "Man As God." Passages that she found offensive described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch." Similarly, she felt that a passage entitled "Seeing Beneath the Surface" related to an occult theme, by describing the use of imagination as a vehicle for seeing things not discernible through our physical eyes. She interpreted a poem, "Look at Anything," as presenting the idea that by using imagination a child can become part of anything and thus understand it better. Mrs. Frost testified that it is an "occult practice" for children to use imagination beyond the limitation of scriptural authority. She testified that the story that alerted her to the problem with the reading series fell into the category of futuristic supernaturalism. Entitled "A Visit to Mars," the story portrays thought transfer and telepathy in such a way that "it could be considered a scientific concept," according to this witness. This theme appears in the testimony of several witnesses, i.e., the materials objected to "could" be interpreted in a manner repugnant to their religious beliefs.

Mrs. Frost described objectionable passages from other categories in much the same way. Describing evolution as a teaching that there is no God, she identified 24 passages that she considered to have evolution as a theme. She admitted that the textbooks contained a disclaimer that evolution is a theory, not a proven scientific fact. Nevertheless, she felt that references to evolution were so pervasive and presented in such a factual manner as to render the disclaimer meaningless. After describing her objection to passages that encourage children to make moral judgments about whether it is right or wrong to kill animals, the witness stated, "I thought they would be learning to read, to have good English and grammar, and to be able to do other subject work." Asked by plaintiffs' attorney to define her objection to the text books, Mrs. Frost replied:

Very basically, I object to the Holt, Rhinehart [sic] Winston series as a whole, what the message is as a whole. There are some contents which are objectionable by themselves, but my most withstanding [sic] objection would be to the series as a whole.

Another witness for the plaintiffs was Bob Mozert, father of a middle school and an elementary school student in the Hawkins County system. His testimony echoed that of Vicki Frost in large part, though his

answers to questions tended to be much less expansive. He also found objectionable passages in the readers that dealt with magic, role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes, and emphasis on one world or a planetary society. Both witnesses testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones.

III.

A.

The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment. This is precisely the way the superintendent of the Hawkins County schools framed the issue in an affidavit filed early in this litigation. In his affidavit the superintendent set forth the school system's interest in a uniformity of reading texts. The affidavit also countered the claims of the plaintiffs that the schools were inculcating values and religious doctrines contrary to their religious beliefs, stating: "Without expressing an opinion as to the plaintiffs' religious beliefs, I am of the opinion that plaintiffs misunderstand the fact that exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed. While it is true that these textbooks expose the student to varying values and religious backgrounds, neither the textbooks nor the teachers teach, indoctrinate, oppose or promote any particular value or religion." That the district court accepted the issue as thus framed is clear from its reference to "exposure to the Holt series."

It is also clear that exposure to objectionable material is what the plaintiffs objected to albeit they emphasize the repeated nature of the exposure. The complaint mentioned only the textbooks that the students were required to read. It did not seek relief from any method of teaching the material and did not mention the teachers' editions. The plaintiffs did not produce a single student or teacher to testify that any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories and passages contained in the Holt series. However, the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even "make-believe" in the Holt series were presented as facts which the students were required to believe. Nothing in the record supports this assumption.

At numerous places in her testimony Vicki Frost referred to various exercises and suggestions in the teachers' manuals as support for her view that objectionable ideas were being inculcated as truth rather than being offered as examples of the variety of approaches possible to a particular question. However, the students were not required to read the teachers' materials. While these materials suggested various ways of presenting the lessons, including "acting out" and round table discussions, there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions. Mrs. Frost seemed to assume that each teacher used every suggested exercise or teaching tool in the teachers' editions. There was evidence that reading aloud and acting out the themes encountered in school lessons help young people learn. One of the teachers stated that students read some of the stories aloud. Proof that an objecting student was required to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved. The record leaves no doubt that the district court correctly viewed this case as one involving exposure to repugnant ideas and themes as presented by the Holt series.

Vicki Frost testified that an occasional reference to role reversal, pacifism, rebellion against parents, one-world government and other objectionable concepts would be acceptable, but she felt it was the repeated references to such subjects that created the burden. The district court suggested that it was a matter of balance, apparently believing that a reading series that presented ideas with which the plaintiffs agree in juxtaposition to those with which they disagree would pass constitutional muster. While balanced textbooks are certainly desirable, there would be serious difficulties with trying to cure the omissions in

the Holt series, as plaintiffs and their expert witnesses view the texts.

However, the plaintiffs' own testimony casts serious doubt on their claim that a more balanced presentation would satisfy their religious views. Mrs. Frost testified that it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy was "profound" in that it expressed a world view that deeply undermined her religious beliefs, then her children "would have to be instructed to [the] error [of the other philosophy]." It is clear that to the plaintiffs there is but one acceptable view—the Biblical view, as they interpret the Bible. Furthermore, the plaintiffs view every human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective. Mrs. Frost testified that many political issues have theological roots and that there would be "no way" certain themes could be presented without violating her religious beliefs. She identified such themes as evolution, false supernaturalism, feminism, telepathy and magic as matters that could not be presented in any way without offending her beliefs. The only way to avoid conflict with the plaintiffs' beliefs in these sensitive areas would be to eliminate all references to the subjects so identified. However, the Supreme Court has clearly held [in Epperson v. Arkansas] that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion.

The testimony of the plaintiffs' expert witness, Dr. Vitz, illustrates the pitfalls of trying to achieve a balance of materials concerning religion in a reading course. He found "markedly little reference to religion, particularly Christianity, and also remarkably little to Judaism" in the Holt series. His solution would be to "beef up" the references to these two dominant religions in the United States. However, an adherent to a less widely professed religion might then object to the slighting of his or her faith. Balance in the treatment of religion lies in the eye of the beholder. Efforts to achieve the particular "balance" desired by any individual or group by the addition or deletion of religious material would lead to a forbidden entanglement of the public schools in religious matters, if done with the purpose or primary effect of advancing or inhibiting religion.

B.

In [previous cases finding a burden on free exercise], there was governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions. That element is missing in the present case. The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.

C.

[The court then distinguished several cases, including Board of Education v. Barnette.] Barnette grew out of a school board rule that required all schools to make a salute to the flag and a pledge of allegiance a regular part of their daily program. All teachers and students were required to participate in the exercise and refusal to engage in the salute was considered an act of insubordination which could lead to expulsion and possible delinquency charges for being unlawfully absent. The plaintiff was a Jehovah's Witness who considered the flag an "image" which the Bible forbids worshiping in any way. Justice Jackson, writing for the Court, stated:

[W]e are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.

Further, explaining the basis of the decision, Justice Jackson wrote:

Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.

It is abundantly clear that the exposure to materials in the Holt series did not compel the plaintiffs to "declare a belief," "communicate by word and sign [their] acceptance" of the ideas presented, or make an "affirmation of a belief and an attitude of mind." In Barnette the unconstitutional burden consisted of compulsion either to do an act that violated the plaintiff's religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.

It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause.

The plaintiffs appear to contend that the element of compulsion was supplied by the requirement of class participation in the reading exercises. As we have pointed out earlier, there is no proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling. In fact, the Director of Education for the State of Tennessee testified that most teachers do not adhere to the suggestions in the teachers' manuals and a teacher for 11 years in the Hawkins County system stated that she looks at the lesson plans in the teachers' editions, but "does her own thing." Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage or refrain from engaging in a practice contrary to sincerely held religious beliefs.

D.

[The plaintiffs also rely upon Wisconsin v. Yoder] to support the proposition that requiring mere exposure to materials that offend one's religious beliefs creates an unconstitutional burden on the free exercise of religion. However, Yoder rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden. The plaintiff parents in Yoder were Old Order Amish and members of the Conservative Amish Mennonite Church, who objected to their children being required to attend either public or private schools beyond the eighth grade. Wisconsin school attendance law required them to cause their children to attend school until they reached the age of 16. Unlike the plaintiffs in the present case, the parents in Yoder did not want their children to attend any high school or be exposed to any part of a high school curriculum. The Old Order Amish and the Conservative Amish Mennonites separate themselves from the world and avoid assimilation into society, and attempt to shield their children from all worldly influences. The Supreme Court found from the record that—

[C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat to undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

As if to emphasize the narrowness of its holding because of the unique 300 year history of the Old Amish Order, the Court wrote:

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

This statement points up dramatically the difference between Yoder and the present case. The parents in Yoder were required to send their children to some school that prepared them for life in the outside world, or face official sanctions. The parents in the present case want their children to acquire all the skills required to live in modern society. They also want to have them excused from exposure to some

ideas they find offensive. Tennessee offers two options to accommodate this latter desire. The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home. Tennessee law prohibits any state interference in the education process of church schools:

The state board of education and local boards of education are prohibited from regulating the selection of faculty or textbooks or the establishment of a curriculum in church-related schools.

Similarly the statute permitting home schooling by parents or other teachers prescribes nothing with respect to curriculum or the content of class work.

Yoder was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community. As the Court noted, the requirement of school attendance to age 16 posed a "very real threat of undermining the Amish community and religious practice as they exist today." No such threat exists in the present case, and Tennessee's school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs.

IV.

A.

The Supreme Court has recently affirmed that public schools serve the purpose of teaching fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views" while taking into account "consideration of the sensibilities of others." The Court has noted with apparent approval the view of some educators who see public schools as an "assimilative force" that brings together "diverse and conflicting elements" in our society "on a broad but common ground." The critical reading approach furthers these goals. Mrs. Frost stated specifically that she objected to stories that develop "a religious tolerance that all religions are merely different roads to God." Stating that the plaintiffs reject this concept, presented as a recipe for an ideal world citizen, Mrs. Frost said, "We cannot be tolerant in that we accept other religious views on an equal basis with ours." While probably not an uncommon view of true believers in any religion, this statement graphically illustrates what is lacking in the plaintiffs' case.

The "tolerance of divergent . . . religious views" referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must "live and let live." If the Hawkins County schools had required the plaintiff students either to believe or say they believe that "all religions are merely different roads to God," this would be a different case. No instrument of government can, consistent with the Free Exercise Clause, require such a belief or affirmation. However, there was absolutely no showing that the defendant school board sought to do this; indeed, the school board agreed at oral argument that it could not constitutionally do so. Instead, the record in this case discloses an effort by the school board to offer a reading curriculum designed to acquaint students with a multitude of ideas and concepts, though not in proportions the plaintiffs would like. While many of the passages deal with ethical issues, on the surface at least, they appear to us to contain no religious or anti-religious messages. Because the plaintiffs perceive every teaching that goes beyond the "three Rs" as inculcating religious ideas, they admit that any value-laden reading curriculum that did not affirm the truth of their beliefs would offend their religious convictions.

Although it is not clear that the plaintiffs object to all critical reading, Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer. There is no evidence that any child in the Hawkins County schools was required to make such judgments. It was a goal of the school system to encourage this exercise, but nowhere was it shown that it was required. When asked to comment on a reading assignment, a student would be free to give the Biblical interpretation of the material or to interpret it from a different value base. The only conduct

compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion.

B.

In his concurring opinion [in *McCollum v. Board of Education*,] Justice Jackson emphasized that some compulsion to perform a religiously prohibited ritual or make a religiously prohibited affirmation is essential to a claim of infringement of the free exercise rights of students in public schools. Noting the large number of separate religious bodies existing in the United States, he wrote:

If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

The Supreme Court has cautioned [in Epperson] that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." When asked to "interpose," courts must examine the record very carefully to make certain that a constitutional violation has occurred before they order changes in an educational program adopted by duly chosen local authorities. . . .

Since we have found none of the prohibited forms of governmental compulsion in this case, we conclude that the plaintiffs failed to establish the existence of an unconstitutional burden. Having determined that no burden was shown, we do not reach the issue of the defendants' compelling interest in requiring a uniform reading series or the question, raised by the defendant, of whether awarding damages violated the Establishment Clause.

Boggs, Circuit Judge, concurring.

I concur with my colleagues that Hawkins County is not required by the Constitution to allow plaintiffs the latitude they seek in the educational program of these children. However, I reach that result on a somewhat different view of the facts and governing principles here. It seems that the court's opinion rests first on the view that plaintiffs' objection is to any exposure to contrary ideas, and that no one's religious exercise can be burdened simply by compelled exposure. Second, the opinion rests on the view that no burden can exist here because plaintiffs were not compelled to engage in any conduct prohibited by, or refrain from any practice required by, their religious beliefs.

I do not believe these attempted distinctions will survive analysis. If the situation of these children is not a burden on their religious exercise, it must be because of a principle applicable to all religious objectors to public school curricula. Thus, I believe a deeper issue is present here, is implicitly decided in the court's opinion, and should be addressed openly. The school board recognizes no limitation on its power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause. Our opinion today confirms that right, and I would like to make plain my reasons for taking that position.

Preliminarily, as my colleagues indicate, we make no judgment on the educational, political or social soundness of the school board's decision to adopt this particular set of books and this general curricular approach. This is not a case about fundamentalist Christians or any particular set of beliefs. It is about the constitutional limits on the powers of school boards to prescribe a curriculum. For myself, I approach this case with a profound sense of sadness. At the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation. Only by the decisions of higher levels of political authority, and by more conceptualized presentations of the plaintiffs' positions, have we reached the point where we must decide these harsh questions today. The school board faced what must have seemed a prickly and difficult group of parents, however dedicated to their children's welfare.

As this case now reaches us, the school board rejects any effort to reach out and take in these children and their concerns. At oral argument, the board specifically argued that it was better for both plaintiffs' children and other children that they not be in the public schools, despite the children's obvious desire to obtain some of the benefits of public schooling. Though the board recognized that their allegedly compelling interests in shaping the education of Tennessee children could not be served at all if they drove the children from the school, the board felt it better not to be associated with any hybrid program.

Plaintiffs' requests were unusual, but a variety of accommodations in fact were made, with no evidence whatsoever of bad effects. Given the masses of speculative testimony as to the hypothetical future evils of accommodating plaintiffs in any way, had there been any evidence of bad effects from what actually occurred, the board would surely have presented it. As we ultimately decide here, on the present state of constitutional law, the school board is indeed entitled to say, "my way or the highway." But in my view the school board's decision here is certainly not required by the Establishment Clause.

Returning to the treatment of plaintiffs' free exercise claim, I believe this is a more difficult case than outlined in the court's opinion. I disagree with the first proposition in the court's opinion, that plaintiffs object to any exposure to any contrary idea. I do not believe we can define for plaintiffs their belief as to what is religiously forbidden to be so comprehensive, where both they and the district court have spoken to the contrary. A reasonable reading of plaintiffs' testimony shows they object to the overall effect of the Holt series, not simply to any exposure to any idea opposing theirs. The district court specifically found that the objection was to exposure to the Holt series, not to any single story or idea.

Ultimately, I think we must address plaintiffs' claims as they actually impact their lives: it is their belief that they should not take a course of study which, on balance, to them, denigrates and opposes their religion, and which the state is compelling them to take on pain of forfeiting all other benefits of public education.

Their view may seem silly or wrong-headed to some, but it is a sincerely held religious belief. By focusing narrowly on references that make plaintiffs appear so extreme that they could never be accommodated, the court simply leaves resolution of the underlying issues here to another case, when we have plaintiffs with a more sophisticated understanding of our own and Supreme Court precedent, and a more careful and articulate presentation of their own beliefs.

Under the court's assessment of the facts, this is a most uninteresting case. It is not the test case sought, or feared, by either side. The court reviews the record and finds that the plaintiffs actually want a school system that affirmatively teaches the correctness of their religion, and prevents other students from mentioning contrary ideas. If that is indeed the case, then it can be very simply resolved. It would obviously violate the Establishment Clause for any school system to agree with such an extravagant view.

It should be noted and emphasized that if such is the holding, this decision is largely irrelevant to the national legal controversy over this case. The extent to which school systems may constitutionally require students to use educational materials that are objectionable, contrary to, or forbidden by their religious beliefs is a serious and important issue. The question of exactly how terms such as "contrary," "objectionable," and "forbidden," are to be assessed in the context of religious beliefs is a subtle and interesting one. But this decision, as I understand it, addresses none of those questions. When a case arises with more sophisticated or cagey plaintiffs, or less skillful cross-examination, that true issue must be faced anew, with little guidance from this decision. Since these plaintiffs' claims are rejected because they are read to be so extreme as obviously to violate the Establishment Clause, this case is no precedent for the more specific and narrowly drawn complaint that the district court and plaintiffs' counsel (and, to me, the plaintiffs) thought the plaintiffs were making.

I find the court's conclusion based on its reading of the record to be unsatisfactory on the factual basis of what was said at the trial. The trial strategies of the two sides were clear. The plaintiffs understood that the more thoroughgoing and extensive their objections, the less possible would it be to accommodate them within the bounds of the Constitution. Therefore, the plaintiffs repeatedly stated their objections in terms of the overall Holt series.

The defendants equally clearly sought to depict plaintiffs' objections in the most constitutionally offensive terms. By skillful cross-examination, they did elicit on some occasions the statements on which

the court relies. I believe these two lines of apparently contradictory testimony can be reconciled by recognizing the different meanings or usage of the same words or phrases such as "objectionable," "want," or "opposed to." These words can cover a gamut from mild objection or desire to constitutional insistence. Something may be "objectionable," in the sense that one would rather it did not happen, but it is something that must be endured. Conversely, it may be "objectionable" in the sense that it should not be permitted or one should not be required to endure it. Thus, I may find Muzak on buses, or in-flight movies, "objectionable," but that's life. However, one might find the display of pornographic material in either location "objectionable" to the point that a relatively captive audience legally should not be subjected to it.

Similarly, plaintiffs may "want" a school system tailored exactly to their religious beliefs (that is why many people choose religious education), but they very well know that that is constitutionally impermissible. They "want" a particular type of accommodation that they have sought in this lawsuit, and they believe that they are constitutionally entitled to that. Judge Hull, who sat through eight days of trial testimony over these very issues, came to the same conclusion I do, expressed it in the form of a finding, and should not be overturned unless that finding is clearly erroneous. In my reading of the testimony, the judge's finding is not only not clearly erroneous, but it can only be reversed by a failure to recognize a distinction between the ideal education the parents want, and that level of accommodation and education which they believe is constitutionally required and which they "want" here. Thus, I believe we must take plaintiffs' claims as they have stated them—that they desire the accommodation of an opt-out, or alternative reading books, and no more. That is all they have ever asked for in their pleadings, in the arguments at trial and in appellate briefing and argument.

I also disagree with the court's view that there can be no burden here because there is no requirement of conduct contrary to religious belief. That view both slights plaintiffs' honest beliefs that studying the full Holt series would be conduct contrary to their religion, and overlooks other Supreme Court Free Exercise cases which view "conduct" that may offend religious exercise at least as broadly as do plaintiffs. . . .

Here, plaintiffs have drawn their line as to what required school activities, what courses of study, do and do not offend their beliefs to the point of prohibition. I would hold that if they are forced over that line, they are "engaging in conduct" forbidden by their religion. The court's excellent summary of its holding on this point appears to concede that what plaintiffs were doing in school was conduct, but that there "was no evidence that the conduct required of the students was forbidden by their religion." I cannot agree. The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references. The district court found that "plaintiffs' religious beliefs compel them to refrain from exposure to the Holt series." I would think it could hardly be clearer that they believe their religion commands, not merely suggests, their course of action.

If plaintiffs did not use the exact words "reading these books is forbidden by our religion," they certainly seemed to me to make that point clearly. The court's summary also re-emphasizes my point, that the importance of this holding would be greatly diminished in a future case where plaintiffs can articulate the right set of words.

Thus, I believe the plaintiffs' objection is to the Holt series as a whole, and that being forced to study the books is "conduct" contrary to their beliefs. In the absence of a narrower basis that can withstand scrutiny, we must address the hard issues presented by this case: (1) whether compelling this conduct forbidden by plaintiffs' beliefs places a burden on their free exercise of their religion, in the sense of earlier Supreme Court holdings; and (2) whether within the context of the public schools, teaching material which offends a person's religious beliefs, but does not violate the Establishment Clause, can be a burden on free exercise.

Determining whether the school board's action places a substantial burden on the plaintiff's free exercise of their religion requires a determination of the scope of the religious beliefs or practices protected by the Free Exercise Clause. Although the Supreme Court has shied away from attempting to define religion, the past forty years has witnessed an expansion of the court's understanding of religious

belief. The concept of religion has shifted from a fairly narrow traditional theism, to a broader concept providing protection for the views of unorthodox and nontheistic faiths. The plaintiffs here have no problem fitting within any of the Court's various definitions of religion, as no one contends that their basic beliefs are not religious.

However, determining that plaintiffs' beliefs are religious does not automatically mean that all practices or observances springing from those beliefs are entitled to the same amount of protection under the Free Exercise Clause. At one point, the Court made a distinction [in Reynolds v. United States] between religious beliefs and actions, indicating that the government could never interfere with belief or opinion, but could always regulate practices. This distinction did not hold, as the Court has provided protection for such religious conduct as soliciting contributions, Cantwell v. Connecticut, and of course, observing one's chosen Sabbath, Sherbert v. Verner, or refusing to work on armaments.

There remains the question of which religious conduct may not be burdened (and thus must be accommodated unless a compelling interest justifies it), by government action. One theory would draw the line between actions that are compelled or dictated by religious belief and those that are merely motivated or influenced by these beliefs. "Not all actions are necessarily required (duties) or forbidden (sins); religion addresses what is 'better' as well as what is 'good.'"

For me, the key fact is that the Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims. West Virginia State Board of Education v. Barnette may be the only case, and even there a specific affirmation was required, implicating a non-religious First Amendment basis, as well.

From a common sense view of the word "burden," Sherbert and Thomas are very strong cases for plaintiffs. In any sensible meaning of a burden, the burden in our case is greater than in Thomas or Sherbert. Both of these cases involved workers who wanted unemployment compensation because they gave up jobs based on their religious beliefs. Their actual losses that the Court made good, the actual burden that the Court lifted, was one or two thousand dollars at most. Although this amount of money was certainly important to them, the Court did not give them their jobs back. The Court did not guarantee they would get any future job. It only provided them access to a sum of money equally with those who quit work for other "good cause" reasons.

Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion. I trust it is not simply because I am chronologically somewhat closer than my colleagues to the status of the students involved here that I interpret the choice forced upon the plaintiffs here as a "burden."

However, constitutional adjudication, especially for a lower court, is not simply a matter of common sense use of words. We must determine whether the common sense burden on plaintiffs' religious belief is, in the context of a public school curriculum, a constitutional "burden" on their religious beliefs.

I do not support an extension by this court of the principles of Sherbert and Thomas to cover this case, even though there is a much stronger economic compulsion exercised by public schooling than by any unemployment compensation system. I think the constitutional basis for those cases is sufficiently thin that they should not be extended blindly. The exercise there was of a narrow sort, and did not explicitly implicate the purposes or methods of the program itself.

Running a public school system of today's magnitude is quite a different proposition. A constitutional challenge to the content of instruction (as opposed to participation in ritual such as magic chants, or prayers) is a challenge to the notion of a politically-controlled school system. Imposing on school boards the delicate task of satisfying the "compelling interest" test to justify failure to accommodate pupils is a significant step. It is a substantial imposition on the schools to require them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to permitting a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.

Our interpretation of these key phrases of our Bill of Rights in the school context is certainly complicated by the fact that the drafters of the Bill of Rights never contemplated a school system that would be the most pervasive benefit of citizenship for many, yet which would be very difficult to avoid.

The average public expenditure for a pupil in Hawkins County is about 20% of the income of the average household there. Even the modest tuition in the religious schools which some plaintiffs attended here amounted to about a doubling of the state and local tax burden of the average resident. Had the Founders recognized the possibility of state intervention of this magnitude, they might have written differently. However, it is difficult for me to see that the words "free exercise of religion," at the adoption of the Bill of Rights, implied a freedom from state teaching, even of offensive material, when some alternative was legally permissible.

Therefore, I reluctantly conclude that under the Supreme Court's decisions as we have them, school boards may set curricula bounded only by the Establishment Clause, as the state contends. Thus, contrary to the analogy plaintiffs suggest, pupils may indeed be expelled if they will not read from the King James Bible, so long as it is only used as literature, and not taught as religious truth. Contrary to the position of amicus American Jewish Committee, Jewish students may not assert a burden on their religion if their reading materials overwhelmingly provide a negative view of Jews or factual or historical issues important to Jews, so long as such materials do not assert any propositions as religious truth, or do not otherwise violate the Establishment Clause.

The court's opinion well illustrates the distinction between the goals and values that states may try to impose and those they cannot, by distinguishing between teaching civil toleration of other religions, and teaching religious toleration of other religions. It is an accepted part of public schools to teach the former, and plaintiffs do not quarrel with that. Thus, the state may teach that all religions have the same civil and political rights, and must be dealt with civilly in civil society. The state itself concedes it may not do the latter. It may not teach as truth that the religions of others are just as correct as religions as plaintiffs' own.

It is a more difficult question when, as here, the state presents materials that plaintiffs sincerely believe preach religious toleration of religions by consistent omission of plaintiffs' religion and favorable presentation of opposing views. Our holding requires plaintiffs to put up with what they perceive as an unbalanced public school curriculum, so long as the curriculum does not violate the Establishment Clause. Every other sect or type of religious belief is bound by the same requirement. The rule here is not a rule just for fundamentalist dissenters, for surely the rule cannot be that when the school authorities disagree with non-fundamentalist dissenters, the school loses, and when the school authorities disagree with fundamentalists, the school wins. Rather, unless the Supreme Court chooses to extend the principle of Thomas to schools, the democratic principle must prevail.

Schools are very important, and some public schools offend some people deeply. That is one major reason private schools of many denominations—fundamentalist, Lutheran, Jewish—are growing. But a response to that phenomenon is a political decision for the schools to make. I believe that such a significant change in school law and expansion in the religious liberties of pupils and parents should come only from Supreme Court itself, and not simply from our interpretation. It may well be that we would have a better society if children and parents were not put to the hard choice posed by this case. But our mandate is limited to carrying out the commands of the Constitution and the Supreme Court.

I therefore concur in the result and reverse the judgment of the District Court.

How Christian Were the Founders?

Russell Shorto

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Last month, a week before the Senate seat of the liberal icon Edward M. Kennedy fell into Republican hands, his legacy suffered another blow that was perhaps just as damaging, if less noticed. It happened during what has become an annual spectacle in the culture wars.

Over two days, more than a hundred people — Christians, Jews, housewives, naval officers, professors; people outfitted in everything from business suits to military fatigues to turbans to baseball caps — streamed through the halls of the William B. Travis Building in Austin, Tex., waiting for a chance to stand before the semicircle of 15 high-backed chairs whose occupants made up the Texas State Board of Education. Each petitioner had three minutes to say his or her piece.

“Please keep César Chávez” was the message of an elderly Hispanic man with a floppy gray mustache.

“Sikhism is the fifth-largest religion in the world and should be included in the curriculum,” a woman declared.

Following the appeals from the public, the members of what is the most influential state board of education in the country, and one of the most politically conservative, submitted their own proposed changes to the new social-studies curriculum guidelines, whose adoption was the subject of all the attention — guidelines that will affect students around the country, from kindergarten to 12th grade, for the next 10 years. Gail Lowe — who publishes a twice-a-week newspaper when she is not grappling with divisive education issues — is the official chairwoman, but the meeting was dominated by another member. Don McLeroy, a small, vigorous man with a shiny pate and bristling mustache, proposed amendment after amendment on social issues to the document that teams of professional educators had drawn up over 12 months, in what would have to be described as a single-handed display of archconservative political strong-arming.

McLeroy moved that Margaret Sanger, the birth-control pioneer, be included because she “and her followers promoted eugenics,” that language be inserted about Ronald Reagan’s “leadership in restoring national confidence” following Jimmy Carter’s presidency and that students be instructed to “describe the causes and key organizations and individuals of the conservative resurgence of the 1980s and 1990s, including Phyllis Schlafly, the Contract With America, the Heritage Foundation, the Moral Majority and the National Rifle Association.” The injection of partisan politics into education went so far that at one point another Republican board member burst out in seemingly embarrassed exasperation, “Guys, you’re rewriting history now!” Nevertheless, most of McLeroy’s proposed amendments passed by a show of hands.

Finally, the board considered an amendment to require students to evaluate the contributions of significant Americans. The names proposed included Thurgood Marshall, Billy Graham, Newt Gingrich, William F. Buckley Jr., Hillary Rodham Clinton and Edward Kennedy. All passed muster except Kennedy, who was voted down.

This is how history is made — or rather, how the hue and cry of the present and near past gets lodged into the long-term cultural memory or else is allowed to quietly fade into an inaudible whisper. Public

education has always been a battleground between cultural forces; one reason that Texas' school-board members find themselves at the very center of the battlefield is, not surprisingly, money. The state's $22 billion education fund is among the largest educational endowments in the country. Texas uses some of that money to buy or distribute a staggering 48 million textbooks annually — which rather strongly inclines educational publishers to tailor their products to fit the standards dictated by the Lone Star State. California is the largest textbook market, but besides being bankrupt, it tends to be so specific about what kinds of information its students should learn that few other states follow its lead. Texas, on the other hand, was one of the first states to adopt statewide curriculum guidelines, back in 1998, and the guidelines it came up with (which are referred to as TEKS — pronounced "teaks" — for Texas Essential Knowledge and Skills) were clear, broad and inclusive enough that many other states used them as a model in devising their own. And while technology is changing things, textbooks — printed or online —are still the backbone of education.

The cultural roots of the Texas showdown may be said to date to the late 1980s, when, in the wake of his failed presidential effort, the Rev. Pat Robertson founded the Christian Coalition partly on the logic that conservative Christians should focus their energies at the grass-roots level. One strategy was to put candidates forward for state and local school-board elections — Robertson's protégé, Ralph Reed, once said, "I would rather have a thousand school-board members than one president and no school-board members" — and Texas was a beachhead. Since the election of two Christian conservatives in 2006, there are now seven on the Texas state board who are quite open about the fact that they vote in concert to advance a Christian agenda. "They do vote as a bloc," Pat Hardy, a board member who considers herself a conservative Republican but who stands apart from the Christian faction, told me. "They work consciously to pull one more vote in with them on an issue so they'll have a majority."

This year's social-studies review has drawn the most attention for the battles over what names should be included in the roll call of history. But while ignoring Kennedy and upgrading Gingrich are significant moves, something more fundamental is on the agenda. The one thing that underlies the entire program of the nation's Christian conservative activists is, naturally, religion. But it isn't merely the case that their Christian orientation shapes their opinions on gay marriage, abortion and government spending. More elementally, they hold that the United States was founded by devout Christians and according to biblical precepts. This belief provides what they consider not only a theological but also, ultimately, a judicial grounding to their positions on social questions. When they proclaim that the United States is a "Christian nation," they are not referring to the percentage of the population that ticks a certain box in a survey or census but to the country's roots and the intent of the founders.

The Christian "truth" about America's founding has long been taught in Christian schools, but not beyond. Recently, however — perhaps out of ire at what they see as an aggressive, secular, liberal agenda in Washington and perhaps also because they sense an opening in the battle, a sudden weakness in the lines of the secularists — some activists decided that the time was right to try to reshape the history that children in public schools study. Succeeding at this would help them toward their ultimate goal of reshaping American society. As Cynthia Dunbar, another Christian activist on the Texas board, put it, "The philosophy of the classroom in one generation will be the philosophy of the government in the next."

Imet Don McLeroy last November in a dental office — that is to say, his dental office — in a professional complex in the Brazos Valley city of Bryan, not far from the sprawling campus of Texas A&M University. The buzz of his hygienist at work sounded through the thin wall separating his office from the rest of the suite. McLeroy makes no bones about the fact that his professional qualifications have nothing to do with education. "I'm a dentist, not a historian," he said. "But I'm fascinated by history, so I've read a lot."

Indeed, dentistry is only a job for McLeroy; his real passions are his faith and the state board of education. He has been a member of the board since 1999 and served as its chairman from 2007 until he was demoted from that role by the State Senate last May because of concerns over his religious views. Until now those views have stood McLeroy in good stead with the constituents of his district, which meanders from Houston to Dallas and beyond, but he is currently in a heated re-election battle in the Republican primary, which takes place March 2.

McLeroy is a robust, cheerful and inexorable man, whose personality is perhaps typified by the framed letter T on the wall of his office, which he earned as a "yell leader" (Texas A&M nomenclature for cheerleader) in his undergraduate days in the late 1960s. "I consider myself a Christian fundamentalist," he announced almost as soon as we sat down. He also identifies himself as a young-earth creationist who believes that the earth was created in six days, as the book of Genesis has it, less than 10,000 years ago. He went on to explain how his Christian perspective both governs his work on the state board and guides him in the current effort to adjust American-history textbooks to highlight the role of Christianity. "Textbooks are mostly the product of the liberal establishment, and they're written with the idea that our religion and our liberty are in conflict," he said. "But Christianity has had a deep impact on our system. The men who wrote the Constitution were Christians who knew the Bible. Our idea of individual rights comes from the Bible. The Western development of the free-market system owes a lot to biblical principles."

For McLeroy, separation of church and state is a myth perpetrated by secular liberals. "There are two basic facts about man," he said. "He was created in the image of God, and he is fallen. You can't appreciate the founding of our country without realizing that the founders understood that. For our kids to not know our history, that could kill a society. That's why to me this is a huge thing."

"This" — the Texas board's moves to bring Jesus into American history — has drawn anger in places far removed from the board members' constituencies. (Samples of recent blog headlines on the topic: "Don McLeroy Wants Your Children to Be Stupid" and "Can We Please Mess With Texas?") The issue of Texas' influence is a touchy one in education circles. With some parents and educators elsewhere leery of a right-wing fifth column invading their schools, people in the multibillion textbook industry try to play down the state's sway. "It's not a given that Texas' curriculum translates into other states," says Jay Diskey, executive director of the school division for the Association of American Publishers, which represents most of the major companies. But Tom Barber, who worked as the head of social studies at the three biggest textbook publishers before running his own editorial company, says, "Texas was and still is the most important and most influential state in the country." And James Kracht, a professor at Texas A&M's college of education and a longtime player in the state's textbook process, told me flatly, "Texas governs 46 or 47 states."

Every year for the last few years, Texas has put one subject area in its TEKS up for revision. Each year has brought a different controversy, and Don McLeroy has been at the center of most of them. Last year, in its science re-evaluation, the board lunged into the evolution/creationism/intelligent-design debate. The conservative Christian bloc wanted to require science teachers to cover the "strengths and weaknesses" of the theory of evolution, language they used in the past as a tool to weaken the rationale for teaching evolution. The battle made headlines across the country; ultimately, the seven Christian conservatives were unable to pull another vote their way on that specific point, but the finished document nonetheless allows inroads to creationism.

The fallout from that fight cost McLeroy his position as chairman. "It's the 21st century, and the rest of the known world accepts the teaching of evolution as science and creationism as religion, yet we continue to have this debate here," Kathy Miller, president of the Texas Freedom Network, a watchdog group,

says. “So the eyes of the nation were on this body, and people saw how ridiculous they appeared.” The State Legislature felt the ridicule. “You have a point of view, and you’re using this bully pulpit to take the rest of the state there,” Eliot Shapleigh, a Democratic state senator, admonished McLeroy during the hearing that led to his ouster. McLeroy remains unbowed and talked cheerfully to me about how, confronted with a statement supporting the validity of evolution that was signed by 800 scientists, he had proudly been able to “stand up to the experts.”

The idea behind standing up to experts is that the scientific establishment has been withholding information from the public that would show flaws in the theory of evolution and that it is guilty of what McLeroy called an “intentional neglect of other scientific possibilities.” Similarly, the Christian bloc’s notion this year to bring Christianity into the coverage of American history is not, from their perspective, revisionism but rather an uncovering of truths that have been suppressed. “I don’t know that what we’re doing is redefining the role of religion in America,” says Gail Lowe, who became chairwoman of the board after McLeroy was ousted and who is one of the seven conservative Christians. “Many of us recognize that Judeo-Christian principles were the basis of our country and that many of our founding documents had a basis in Scripture. As we try to promote a better understanding of the Constitution, federalism, the separation of the branches of government, the basic rights guaranteed in the Bill of Rights, I think it will become evident to students that the founders had a religious motivation.”

Plenty of people disagree with this characterization of the founders, including some who are close to the process in Texas. “I think the evidence indicates that the founding fathers did not intend this to be a Christian nation,” says James Kracht, who served as an expert adviser to the board in the textbook-review process. “They definitely believed in some form of separation of church and state.”

There is, however, one slightly awkward issue for hard-core secularists who would combat what they see as a Christian whitewashing of American history: the Christian activists have a certain amount of history on their side.

IN 1801, A GROUP of Baptist ministers in Danbury, Conn., wrote a letter to the new president, Thomas Jefferson, congratulating him on his victory. They also had a favor to ask. Baptists were a minority group, and they felt insecure. In the colonial period, there were two major Christian factions, both of which derived from England. The Congregationalists, in New England, had evolved from the Puritan settlers, and in the South and middle colonies, the Anglicans came from the Church of England. Nine colonies developed state churches, which were supported financially by the colonial governments and whose power was woven in with that of the governments. Other Christians — Lutherans, Baptists, Quakers — and, of course, those of other faiths were made unwelcome, if not persecuted outright.

There was a religious element to the American Revolution, which was so pronounced that you could just as well view the event in religious as in political terms. Many of the founders, especially the Southerners, were rebelling simultaneously against state-church oppression and English rule. The Connecticut Baptists saw Jefferson — an anti-Federalist who was bitterly opposed to the idea of establishment churches — as a friend. “Our constitution of government,” they wrote, “is not specific” with regard to a guarantee of religious freedoms that would protect them. Might the president offer some thoughts that, “like the radiant beams of the sun,” would shed light on the intent of the framers? In his reply, Jefferson said it was not the place of the president to involve himself in religion, and he expressed his belief that the First Amendment’s clauses — that the government must not establish a state religion (the so-called establishment clause) but also that it must ensure the free exercise of religion (what became known as the free-exercise clause) — meant, as far as he was concerned, that there was “a wall of separation between Church & State.”

This little episode, culminating in the famous "wall of separation" metaphor, highlights a number of points about teaching religion in American history. For one, it suggests — as the Christian activists maintain — how thoroughly the colonies were shot through with religion and how basic religion was to the cause of the revolutionaries. The period in the early- to mid-1700s, called the Great Awakening, in which populist evangelical preachers challenged the major denominations, is considered a spark for the Revolution. And if religion influenced democracy then, in the Second Great Awakening, decades later, the democratic fervor of the Revolution spread through the two mainline denominations and resulted in a massive growth of the sort of populist churches that typify American Christianity to this day.

Christian activists argue that American-history textbooks basically ignore religion — to the point that they distort history outright — and mainline religious historians tend to agree with them on this. "In American history, religion is all over the place, and wherever it appears, you should tell the story and do it appropriately," says Martin Marty, emeritus professor at the University of Chicago, past president of the American Academy of Religion and the American Society of Church History and perhaps the unofficial dean of American religious historians. "The goal should be natural inclusion. You couldn't tell the story of the Pilgrims or the Puritans or the Dutch in New York without religion." Though conservatives would argue otherwise, James Kracht said the absence of religion is not part of a secularist agenda: "I don't think religion has been purposely taken out of U.S. history, but I do think textbook companies have been cautious in discussing religious beliefs and possibly getting in trouble with some groups."

Some conservatives claim that earlier generations of textbooks were frank in promoting America as a Christian nation. It might be more accurate to say that textbooks of previous eras portrayed leaders as generally noble, with strong personal narratives, undergirded by faith and patriotism. As Frances FitzGerald showed in her groundbreaking 1979 book "America Revised," if there is one thing to be said about American-history textbooks through the ages it is that the narrative of the past is consistently reshaped by present-day forces. Maybe the most striking thing about current history textbooks is that they have lost a controlling narrative. America is no longer portrayed as one thing, one people, but rather a hodgepodge of issues and minorities, forces and struggles. If it were possible to cast the concerns of the Christian conservatives into secular terms, it might be said that they find this lack of a through line and purpose to be disturbing and dangerous. Many others do as well, of course. But the Christians have an answer.

Their answer is rather specific. Merely weaving important religious trends and events into the narrative of American history is not what the Christian bloc on the Texas board has pushed for in revising its guidelines. Many of the points that have been incorporated into the guidelines or that have been advanced by board members and their expert advisers slant toward portraying America as having a divinely preordained mission. In the guidelines — which will be subjected to further amendments in March and then in May — eighth-grade history students are asked to "analyze the importance of the Mayflower Compact, the Fundamental Orders of Connecticut and the Virginia House of Burgesses to the growth of representative government." Such early colonial texts have long been included in survey courses, but why focus on these in particular? The Fundamental Orders of Connecticut declare that the state was founded "to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus." The language in the Mayflower Compact — a document that McLeroy and several others involved in the Texas process are especially fond of — describes the Pilgrims' journey as being "for the Glory of God and advancement of the Christian Faith" and thus instills the idea that America was founded as a project for the spread of Christianity. In a book she wrote two years ago, Cynthia Dunbar, a board member, could not have been more explicit about this being the reason for the Mayflower Compact's inclusion in textbooks; she quoted the document and then said, "This is undeniably our past, and it clearly delineates us as a nation intended to be emphatically Christian."

In the new guidelines, students taking classes in U.S. government are asked to identify traditions that informed America's founding, "including Judeo-Christian (especially biblical law)," and to "identify the individuals whose principles of law and government institutions informed the American founding documents," among whom they include Moses. The idea that the Bible and Mosaic law provided foundations for American law has taken root in Christian teaching about American history. So when Steven K. Green, director of the Center for Religion, Law and Democracy at Willamette University in Salem, Ore., testified at the board meeting last month in opposition to the board's approach to bringing religion into history, warning that the Supreme Court has forbidden public schools from "seeking to impress upon students the importance of particular religious values through the curriculum," and in the process said that the founders "did not draw on Mosaic law, as is mentioned in the standards," several of the board members seemed dumbstruck. Don McLeroy insisted it was a legitimate claim, since the Enlightenment took place in Europe, in a Christian context. Green countered that the Enlightenment had in fact developed in opposition to reliance on biblical law and said he had done a lengthy study in search of American court cases that referenced Mosaic law. "The record is basically bereft," he said. Nevertheless, biblical law and Moses remain in the TEKS.

The process in Texas required that writing teams, made up mostly of teachers, do the actual work of revising the curriculum, with the aid of experts who were appointed by the board. Two of the six experts the board chose are well-known advocates for conservative Christian causes. One of them, the Rev. Peter Marshall, says on the Web site of his organization, Peter Marshall Ministries, that his work is "dedicated to helping to restore America to its Bible-based foundations through preaching, teaching and writing on America's Christian heritage and on Christian discipleship and revival."

"The guidelines in Texas were seriously deficient in bringing out the role of the Christian faith in the founding of America," Marshall told me. In a document he prepared for the team that was writing the new guidelines, he urged that new textbooks mold children's impressions of the founders in particular ways: "The Founding Fathers' biblical worldview taught them that human beings were by nature self-centered, so they believed that the supernatural influence of the Spirit of God was needed to free us from ourselves so that we can care for our neighbors."

Marshall also proposed that children be taught that the separation-of-powers notion is "rooted in the Founding Fathers' clear understanding of the sinfulness of man," so that it was not safe for one person to exercise unlimited power, and that "the discovery, settling and founding of the colonies happened because of the biblical worldviews of those involved." Marshall recommended that textbooks present America's founding and history in terms of motivational stories on themes like the Pilgrims' zeal to bring the Gospel of Jesus Christ to the natives.

One recurring theme during the process of revising the social-studies guidelines was the desire of the board to stress the concept of American exceptionalism, and the Christian bloc has repeatedly emphasized that Christianity should be portrayed as the driving force behind what makes America great. Peter Marshall is himself the author of a series of books that recount American history with a strong Christian focus and that have been staples in Christian schools since the first one was published in 1977. (He told me that they have sold more than a million copies.) In these history books, he employs a decidedly unhistorical tone in which the guiding hand of Providence shapes America's story, starting with the voyage of Christopher Columbus. "Columbus's heart belonged to God," he assures his readers, and he notes that a particular event in the explorer's life "marked the turning point of God's plan to use Columbus to raise the curtain on His new Promised Land."

The other nonacademic expert, David Barton, is the nationally known leader of WallBuilders, which describes itself as dedicated to "presenting America's forgotten history and heroes, with an emphasis on

our moral, religious and constitutional heritage." Barton has written and lectured on the First Amendment and against separation of church and state. He is a controversial figure who has argued that the U.S. income tax and the capital-gains tax should be abolished because they violate Scripture (for the Bible says, in Barton's reading, "the more profit you make the more you are rewarded") and who pushes a Christianity-first rhetoric. When the U.S. Senate invited a Hindu leader to open a 2007 session with a prayer, he objected, saying: "In Hindu [sic], you have not one God, but many, many, many, many, many gods. And certainly that was never in the minds of those who did the Constitution, did the Declaration when they talked about Creator."

In his recommendations to the Texas school board, Barton wrote that students should be taught the following principles which, in his reading, derive directly from the Declaration of Independence: "1. There is a fixed moral law derived from God and nature. 2. There is a Creator. 3. The Creator gives to man certain unalienable rights. 4. Government exists primarily to protect God-given rights to every individual. 5. Below God-given rights and moral laws, government is directed by the consent of the governed."

A third expert, Daniel L. Dreisbach, a professor of justice, law and society at American University who has written extensively on First Amendment issues, stressed, in his recommendations to the guideline writers about how to frame the revolutionary period for students, that the founders were overwhelmingly Christian; that the deistic tendencies of a few — like Jefferson — were an anomaly; and that most Americans in the era were not just Christians but that "98 percent or more of Americans of European descent identified with Protestantism."

If the fight between the "Christian nation" advocates and mainstream thinkers could be focused onto a single element, it would be the "wall of separation" phrase. Christian thinkers like to point out that it does not appear in the Constitution, nor in any other legal document — letters that presidents write to their supporters are not legal decrees. Besides which, after the phrase left Jefferson's pen it more or less disappeared for a century and a half — until Justice Hugo Black of the Supreme Court dug it out of history's dustbin in 1947. It then slowly worked its way into the American lexicon and American life, helping to subtly mold the way we think about religion in society. To conservative Christians, there is no separation of church and state, and there never was. The concept, they say, is a modern secular fiction. There is no legal justification, therefore, for disallowing crucifixes in government buildings or school prayer.

David Barton reads the "church and state" letter to mean that Jefferson "believed, along with the other founders, that the First Amendment had been enacted *only* to prevent the federal establishment of a national denomination." Barton goes on to claim, " 'Separation of church and state' currently means almost exactly the opposite of what it originally meant." That is to say, the founders were all Christians who conceived of a nation of Christians, and the purpose of the First Amendment was merely to ensure that no single Christian denomination be elevated to the role of state church.

Mainstream scholars disagree, sometimes vehemently. Randall Balmer, a professor of American religious history at Barnard College and writer of the documentary "Crusade: The Life of Billy Graham," told me: "David Barton has been out there spreading this lie, frankly, that the founders intended America to be a Christian nation. He's been very effective. But the logic is utterly screwy. He says the phrase 'separation of church and state' is not in the Constitution. He's right about that. But to make that argument work you would have to argue that the phrase is not an accurate summation of the First Amendment. And Thomas Jefferson, who penned it, thought it was." (David Barton declined to be interviewed for this article.) In his testimony in Austin, Steven Green was challenged by a board member with the fact that the phrase does

not appear in the Constitution. In response, Green pointed out that many constitutional concepts — like judicial review and separation of powers — are not found verbatim in the Constitution.

In what amounts to an in-between perspective, Daniel Dreisbach — who wrote a book called "Thomas Jefferson and the Wall of Separation Between Church and State" — argues that the phrase "wall of separation" has been misapplied in recent decades to unfairly restrict religion from entering the public sphere. Martin Marty, the University of Chicago emeritus professor, agrees. "I think 'wall' is too heavy a metaphor," Marty says. "There's a trend now away from it, and I go along with that. In textbooks, we're moving away from an unthinking secularity." The public seems to agree. Polls on some specific church-state issues — government financing for faith-based organizations and voluntary prayer in public schools — consistently show majorities in favor of those positions.

Then too, the "Christian nation" position tries to trump the whole debate about separation of church and state by portraying the era of the nation's founding as awash in Christianity. David Barton and others pepper their arguments with quotations, like one in which John Adams, in a letter to Jefferson, refers to American independence as having been achieved on "the general Principles of Christianity." But others find just as many instances in which one or another of the founders seems clearly wary of religion.

In fact, the founders were rooted in Christianity — they were inheritors of the entire European Christian tradition — and at the same time they were steeped in an Enlightenment rationalism that was, if not opposed to religion, determined to establish separate spheres for faith and reason. "I don't think the founders would have said they were applying Christian principles to government," says Richard Brookhiser, the conservative columnist and author of books on Alexander Hamilton, Gouverneur Morris and George Washington. "What they said was 'the laws of nature and nature's God.' They didn't say, 'We put our faith in Jesus Christ.' " Martin Marty says: "They had to invent a new, broad way. Washington, in his writings, makes scores of different references to God, but not one is biblical. He talks instead about a 'Grand Architect,' deliberately avoiding the Christian terms, because it had to be a religious language that was accessible to all people."

Or, as Brookhiser rather succinctly summarizes the point: "The founders were not as Christian as those people would like them to be, though they weren't as secularist as Christopher Hitchens would like them to be."

THE TOWN OF Lynchburg, Va., was founded in 1786 at the site of a ferry crossing on what would later be called the James River. During the Civil War, it was a Confederate supply post, and in 1864 it was the site of one of the last Confederate victories. In 1933, Jerry Falwell was born in Lynchburg, the son of a sometime bootlegger. In 1971 — in an era of pot smoking and war protests — the Rev. Jerry Falwell inaugurated Liberty University on one of the city's seven hills. It was to be a training ground for Christians and a bulwark against moral relativism. In 2004, three years before his death, Falwell completed another dream by founding the Liberty University School of Law, whose objective, in the words of the university's current chancellor, Jerry Falwell Jr., is "to transform legislatures, courts, commerce and civil government at all levels."

I visited the law-school building in late fall, with the remnants of Hurricane Ida turning the Blue Ridge Mountains skyline into a series of smudges. The building's crisp, almost militaristic atmosphere bespeaks a seriousness of purpose; and the fact that it houses, as one of its training facilities, the only full-scale replica of the U.S. Supreme Court chamber points to the school's ambitions.

I had come to sit in on a guest lecture by Cynthia Dunbar, an assistant law professor who commutes to Lynchburg once a week from her home in Richmond, Tex., where she is a practicing lawyer as well as a

member of the Texas board of education. Her presence in both worlds — public schools and the courts — suggests the connection between them that Christian activists would like to deepen. The First Amendment class for third-year law students that I watched Dunbar lead neatly merged the two components of the school's program: "lawyering skills" and "the integration of a Christian worldview."

Dunbar began the lecture by discussing a national day of thanksgiving that Gen. George Washington called for after the defeat of the British at Saratoga in 1777 — showing, in her reckoning, a religious base in the thinking of the country's founders. In developing a line of legal reasoning that the future lawyers in her class might use, she wove her way to two Supreme Court cases in the 1960s, in both of which the court ruled that prayer in public schools was unconstitutional. A student questioned the relevance of the 1777 event to the court rulings, because in 1777 the country did not yet have a Constitution. "And what did we have at that time?" Dunbar asked. Answer: "The Declaration of Independence." She then discussed a legal practice called "incorporation by reference." "When you have in one legal document reference to another, it pulls them together, so that they can't be viewed as separate and distinct," she said. "So you cannot read the Constitution distinct from the Declaration." And the Declaration famously refers to a Creator and grounds itself in "the Laws of Nature and of Nature's God." Therefore, she said, the religiosity of the founders is not only established and rooted in a foundational document but linked to the Constitution. From there she moved to "judicial construction and how you should go forward with that," i.e., how these soon-to-be lawyers might work to overturn rulings like that against prayer in schools by using the founding documents.

Jay Sekulow, chief counsel of the American Center for Law and Justice, a Christian legal center, told me that the notion of connecting the Declaration of Independence and the Constitution is "part of a strategy to give a clear historical understanding of the role of religion in American public life" that organizations like his have been pursuing for the last 10 or 15 years.

Besides the fact that incorporation by reference is usually used for technical purposes rather than for such grandiose purposes as the reinterpretation of foundational texts, there is an oddity to this tactic. "The founders deliberately left the word 'God' out of the Constitution — but not because they were a bunch of atheists and deists," says Susan Jacoby, author of "Freethinkers: A History of American Secularism." "To them, mixing religion and government meant trouble." The curious thing is that in trying to bring God into the Constitution, the activists — who say their goal is to follow the original intent of the founders — are ignoring the fact that the founders explicitly avoided religious language in that document.

And here again there is a link to Texas. David Barton specifically advised the writers of the Texas guidelines that textbooks "should stipulate (but currently do not) that the Declaration of Independence is symbiotic with the Constitution rather than a separate unrelated document."

In 2008, Cynthia Dunbar published a book called "One Nation Under God," in which she stated more openly than most of her colleagues have done the argument that the founding of America was an overtly Christian undertaking and laid out what she and others hope to achieve in public schools. "The underlying authority for our constitutional form of government stems directly from biblical precedents," she writes. "Hence, the only accurate method of ascertaining the intent of the Founding Fathers at the time of our government's inception comes from a biblical worldview."

Then she pushes forward: "We as a nation were intended by God to be a light set on a hill to serve as a beacon of hope and Christian charity to a lost and dying world." But the true picture of America's Christian founding has been whitewashed by "the liberal agenda" — in order for liberals to succeed "they must first rewrite our nation's history" and obscure the Christian intentions of the founders. Therefore,

she wrote, “this battle for our nation’s children and who will control their education and training is crucial to our success for reclaiming our nation.”

After the book came out, Dunbar was derided in blogs and newspapers for a section in which she writes of “the inappropriateness of a state-created, taxpayer-supported school system” and likens sending children to public school to “throwing them into the enemy’s flames, even as the children of Israel threw their children to Moloch.” (Her own children were either home-schooled or educated in private Christian schools.) When I asked, over dinner in a honky-tonk steakhouse down the road from the university, why someone who felt that way would choose to become an overseer of arguably the most influential public-education system in the country, she said that public schools are a battlefield for competing ideologies and that it’s important to combat the “religion” of secularism that holds sway in public education.

Ask Christian activists what they really want — what the goal is behind the effort to bring Christianity into American history — and they say they merely want “the truth.” “The main thing I’m looking for as a state board member is to make sure we have good standards,” Don McLeroy said. But the actual ambition is vast. Americans tell pollsters they support separation of church and state, but then again 65 percent of respondents to a 2007 survey by the First Amendment Center agreed with the statement that “the nation’s founders intended the United States to be a Christian nation,” and 55 percent said they believed the Constitution actually established the country as a Christian nation. The Christian activists are aware of such statistics and want to build on them, as Dunbar made clear. She told me she looks to John Jay’s statement that it is the duty of the people “of our Christian nation to select and prefer Christians for their rulers” and has herself called for a preference for selecting Christians for positions of leadership.

Dunbar’s book lays out the goal: using courts and public schools to fuse Christianity into the nation’s founding. It may be unlikely that it will be attained any time soon, in which case the seeding of Texas’ history-textbook guidelines with “Christian nation” concepts may be mostly symbolic. But symbols can accumulate weight over time, and the Christian activists are in it for the long haul. Some observers say that over time their effort could have far-reaching consequences. “The more you can associate Christianity with the founding, the more you can sway the future Supreme Court,” Martin Marty says. “That is what Pat Robertson was about years ago. Establish the founders as Christians, and you have it made.”

“BROWN BEAR, BROWN BEAR**,** What Do You See?” It’s not an especially subversive-sounding title, but the author of this 1967 children’s picture book, Bill Martin Jr., lost his place in the Texas social-studies guidelines at last month’s board meeting due to what was thought to be un-American activity — to be precise, “very strong critiques of capitalism and the American system.” Martin, the creator of 300 children’s books, was removed from the list of cultural figures approved for study by third graders in the blizzard of amendments offered by board members.

Over all, the TEKS guidelines make for impressive reading. They are thoughtful and deep; you can almost feel the effort at achieving balance. Poring down the long columns and knowing that the 1998 version of these guidelines served as the basis for textbooks in most U.S. states, you even begin to feel some hope for the future.

What is wrong with the Texas process, according to many observers, is illustrated by the fate of Bill Martin Jr. The board has the power to accept, reject or rewrite the TEKS, and over the past few years, in language arts, science and now social studies, the members have done all of the above. Yet few of these elected overseers are trained in the fields they are reviewing. “In general, the board members don’t know anything at all about content,” Tom Barber, the textbook executive, says. Kathy Miller, the watchdog, who has been monitoring the board for 15 years, says, referring to Don McLeroy and another board

member: “It is the most crazy-making thing to sit there and watch a dentist and an insurance salesman rewrite curriculum standards in science and history. Last year, Don McLeroy believed he was smarter than the National Academy of Sciences, and he now believes he’s smarter than professors of American history.” In this case, one board member sent an e-mail message with a reference to “Ethical Marxism,” by Bill Martin, to another board member, who suggested that anyone who wrote a book with such a title did not belong in the TEKS. As it turned out, Bill Martin and Bill Martin Jr. are two different people. But by that time, the author of “Brown Bear, Brown Bear” was out. “That’s a perfect example of these people’s lack of knowledge,” Miller says. “They’re coming forward with hundreds of amendments at the last minute. Don McLeroy had a four-inch stack of amendments, and they all just voted on them, whether or not they actually knew the content. What we witnessed in January was a textbook example of how not to develop textbook standards.”

Before the January board meeting, one of the social-studies curriculum writers, Judy Brodigan, told me that she was very pleased with the guidelines her team produced. After the meeting, with its 10-hour marathon of amendments by board members, she spoke very differently. “I think they took a very, very good document and weakened it,” she said. “The teachers take their work seriously. I do believe there are board members on the ultraright who have an agenda. They want to make our standards very conservative and fit their viewpoint. Our job is not to take a viewpoint. It’s to present sides fairly. I thought we had done that.”

Regarding religion, the writing teams had included in their guidelines some of the recommendations of the experts appointed by the Christian bloc but had chosen to ignore most. I was led to expect that the January meeting would see a torrent of religion amendments, in which Don McLeroy would reinsert items that the team failed to include, just as he did with other subjects in the past. Last November, over dinner at a Tex-Mex restaurant across the street from the Texas A&M campus, McLeroy vowed to do so, saying, “I’ll get the details in there.” At that time, he and others were full of information and bravado as they pushed toward the “Christian nation” goal. But at the January meeting, while there were many conservative political amendments, there were only a few religion amendments. When I talked to him afterward, he shrugged it off in an uncharacteristically vague way. “We’re basically happy with things,” he said.

It’s possible a wave of religion amendments will come in the next meeting, in March, when American government will still be among the subjects under review. But the change of tone could signal a shift in strategy. “It could be that they feel they’ve already got enough code words sprinkled throughout the guidelines,” Kathy Miller says. The laws of Nature and Nature’s God. Moses and the Bible “informing” the American founding. “The Glory of God and advancement of the Christian Faith” as America’s original purpose. “We’ve seen in the past how one word here or there in the curriculum standards gets seized upon by the far-right members at adoption time,” Miller says. “In the science debate, the words ‘intelligent design’ did not appear, but they used ‘strengths and weaknesses’ as an excuse to pitch a battle. The phrase became a wedge to try to weaken the theory of evolution, to suggest that scientists had serious problems with it. We’ve seen the board use these tiny fragments to wage war on publishers.”

This squares with what Tom Barber, the textbook executive, told me: that in the next stage in the Texas process, general guidelines are chiseled into fact-size chunks in crisp columns of print via backroom cajoling. “The process of reviewing the guidelines in Texas is very open, but what happens behind the scenes after that is quite different,” Barber says. “McLeroy is kind of the spokesman for the social conservatives, and publishers will work with him throughout. The publishers just want to make sure they get their books listed.”

To give an illustration simultaneously of the power of ideology and Texas' influence, Barber told me that when he led the social-studies division at Prentice Hall, one conservative member of the board told him that the 12th-grade book, "Magruder's American Government," would not be approved because it repeatedly referred to the U.S. Constitution as a "living" document. "That book is probably the most famous textbook in American history," Barber says. "It's been around since World War I, is updated every year and it had invented the term 'living Constitution,' which has been there since the 1950s. But the social conservatives didn't like its sense of flexibility. They insisted at the last minute that the wording change to 'enduring.' " Prentice Hall agreed to the change, and ever since the book — which Barber estimates controlled 60 or 65 percent of the market nationally — calls it the "enduring Constitution."

Last fall, McLeroy was frank in talking about how he applies direct pressure to textbook companies. In the language-arts re-evaluation, the members of the Christian bloc wanted books to include classic myths and fables rather than newly written stories whose messages they didn't agree with. They didn't get what they wanted from the writing teams, so they did an end run around them once the public battles were over. "I met with all the publishers," McLeroy said. "We went out for Mexican food. I told them this is what we want. We want stories with morals, not P.C. stories." He then showed me an e-mail message from an executive at Pearson, a major educational publisher, indicating the results of his effort: "Hi Don. Thanks for the impact that you have had on the development of Pearson's Scott Foresman Reading Street series. Attached is a list of some of the Fairy Tales and Fables that we included in the series."

If there has been a shift in strategy, politics may have brought it about. The Christian bloc may have determined it would be wiser to work for this kind of transformational change out of the public gaze. Of the seven members of the Christian bloc, Ken Mercer is in a battle to keep his seat, Cynthia Dunbar recently announced she won't run for re-election and after 11 years of forceful advocacy for fundamentalist causes on the Texas state board, during which time he was steadfastly supported by everyone from Gov. Rick Perry — who originally picked him as chairman — to tea-party organizers, Don McLeroy is now facing the stiffest opposition of his career. Thomas Ratliff, a well-connected lobbyist, has squared off against McLeroy in the Republican primary and is running an aggressive campaign, positioning himself as a practical, moderate Republican. "I'm not trying to out-conservative anyone," Ratliff told me. "I think the state board of education has lost its way, and the social-studies thing is a prime example. They keep wanting to talk about this being a Christian nation. My attitude is this country was founded by a group of men who were Christians but who didn't want the government dictating religion, and that's exactly what McLeroy and his colleagues are trying to do."

Ratliff has received prominent endorsements and has outraised McLeroy in the neighborhood of 10 to 1. But hard-core conservatives tend to vote in primaries. Anyone looking for signs of where the Republican Party is headed might scan the results of the Texas school-board District 9 Republican primary on the morning of March 3. If Don McLeroy loses, it could signal that the Christian right's recent power surge has begun to wane. But it probably won't affect the next generation of schoolbooks. The current board remains in place until next January. By then, decisions on what goes in the Texas curriculum guidelines will be history.

Cantwell v. State of Connecticut

310 U.S. 296 (1940)

Mr. Justice ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses, [including the offense of inciting a breach of the peace, of which they were convicted].

[T]he appellants pressed the contention that the statute under which the[y were prosecuted] was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner they made the point that they could not be found guilty on the [charge of inciting a breach of the peace], without violation of the Amendment.

The facts adduced to sustain the convictions follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled 'Enemies', included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah's witnesses.

The statute under which the appellants were charged provides:

No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, and periodicals.

The facts which were held to support the conviction of Jesse Cantwell on the fifth count (inciting a breach of the peace) were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record 'Enemies', which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First

Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, However, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the State court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation

by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians' permission to play to them a phonograph record. The permission was granted. It is not claimed that he intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question 'Did you do anything else or have any other reaction?' 'No, sir, because he said he would take the victrola and he went.' The other witness testified that he told Cantwell he had better get off the street before something happened to

him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Reversed and remanded.

Chaplinsky v. New Hampshire

315 U.S. 568 (1942)

MR. Justice Murphy delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

The complaint charged that appellant,

with force and arms, in a certain public place in said city of Rochester, to-wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names.

Upon appeal, there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty, and the judgment of conviction was affirmed by the Supreme Court of the State.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled, and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity. . . .

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have

never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [As we noted in Cantwell:]

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions -- the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said:

The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which, by general consent, are 'fighting words' when said without a disarming smile. . . . [S]uch words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker -- including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, doe not contravene the Fourteenth Amendment.

Affirmed.

West Virginia State Board of Education v. Barnette

319 U.S. 624 (1943)

Mr. Justice JACKSON delivered the opinion of the Court.

The West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.' Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to 'prescribe the courses of study covering these subjects' for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study 'similar to those required for the public schools.'

The Board of Education on January 9, 1942, adopted a resolution ordering that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.'

The resolution originally required the 'commonly accepted salute to the Flag' which it defined. Objections to the salute as 'being too much like Hitler's' were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. What is now required is the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.'

Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the 'due process' and 'equal protection' clauses of the Fourteenth Amendment to the Federal Constitution.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this

case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

Here we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Stromberg v. California. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a

legal duty.

The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.

It was said that the flag-salute controversy confronted the Court with 'the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?' and that the answer must be in favor of strength. Minersville School District v. Gobitis.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this

case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

The Gobitis opinion reasons that 'National unity is the basis of national security,' that the authorities have 'the right to select appropriate means for its attainment,' and hence reaches the conclusion that such compulsory measures toward 'national unity' are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we 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. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the

right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in Minersville School District v. Gobitis [is] overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing, as they do, the thought and action of a lifetime. But, as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution, and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could, in reason, have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The reason why, from the beginning, even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are, in fact, passing judgment on "the power of the State as a whole." Practically, we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To

suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system, the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures, and cannot stand. But it by no means follows that legislative power is wanting whenever a general nondiscriminatory civil regulation, in fact, touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations, and that school administration would not find it too difficult to make them, and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process -- it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and, more particularly, with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" -- something without which "a fair and enlightened system of justice would be impossible." If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure, and they should be made directly responsible to the electorate. There have been many, but unsuccessful, proposals in the last sixty years to amend the Constitution to that end. . . .

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a nondiscriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority, and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the man claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not, of itself, establish their

constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise, the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church, but the establishment of all churches, and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment -- these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior, and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith -- in the language of the Constitution, it may "exercise" it freely -- but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way, either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's belief. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue, and with ample opportunity for seeking its change or abrogation. . . .

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief, nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow, as publicly as they choose to do so, the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution. . . .

Prince v. Massachusetts

321 U.S. 158 (1944)

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. This time Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

When the offenses were committed she was the aunt and custodian of Betty M. Simmons, a girl nine years of age. Originally there were three separate complaints. They were, shortly, for (1) refusal to disclose Betty's identity and age to a public officer whose duty was to enforce the statutes; (2) furnishing her with magazines, knowing she was to sell them unlawfully, that is, on the street; and (3) as Betty's custodian, permitting her to work contrary to law. The complaints were made, respectively, pursuant to Sections 79, 80 and 81 of Chapter 149, Gen.Laws of Mass. The Supreme Judicial Court reversed the conviction under the first complaint on state grounds; but sustained the judgments founded on the other two. They present the only questions for our decision. These are whether Sections 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law. They provide methods for enforcing the prohibitions of Section 69, which is as follows:

No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.

Section 80 and 81, so far as pertinent, read:

Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.

Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both.

The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute ‘Watchtower’ and ‘Consolation,’ according to the usual plan. She had permitted the children to engage in this activity previously, and had been warned against doing so by the school attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children ‘to engage in the preaching work with her upon the sidewalks.’ That is, with

specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passersby to see, copies of 'Watch Tower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation 5¢ per copy.' No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

Mrs. Prince and Betty remained until 8:45 p.m. A few minutes before this Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warnings and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, 'Neither you nor anybody else can stop me. This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands.' However, Mrs. Prince and Betty departed. She remarked as she went, 'I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed.' It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was excluded, to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'

As the case reaches us, the questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' within Section 69 or was 'work' within Section 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law. The only question remaining therefore is whether, as construed and applied, the statute is valid. Upon this the court said: 'We think that freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen and in the further statutory provisions herein considered, which have been adopted as a means of enforcing that prohibition.'

Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be restricted as Massachusetts has done. Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is 'to preach the gospel by public distribution' of 'Watchtower' and 'Consolation,' in conformity with the scripture: 'A little child shall lead them.'

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for

growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in West Virginia State Board of Education v. Barnette. Previously in Pierce v. Society of Sisters, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But [as we noted in Reynolds v. United States and Davis v. Beason], the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger; and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity. And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a ‘sale’ or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or

one that religious scruples dictate contrary action.

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses. But, for obvious reasons, notwithstanding appellant's contrary view, the validity of such a prohibition applied to children not accompanied by an older person hardly would seem open to question. The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

In so ruling we dispose also of appellant's argument founded upon denial of equal protection. It falls with that based on denial of religious freedom, since in this instance the one is but another phrasing of the other. Shortly, the contention is that the street, for Jehovah's Witnesses and their children, is their church, since their conviction makes it so; and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The argument hardly needs more than statement, after what has been said, to refute it. However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do.

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation ‘for any (that is, every) state intervention in the indoctrination and participation of children in religion’ which may be done ‘in the name of their health and welfare’ nor give warrant for ‘every limitation on their religious training and activities.’ The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

The judgment is affirmed.

Mr. Justice JACKSON, dissenting.

The novel feature of this decision is this: the Court holds that a state may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: ‘This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of

religion.' 'The mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. [As we noted in Murdock v. Pennsylvania], the constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books.'

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets 'occupy the same high estate' and have the 'same claim to protection' it would seem that child labor laws may be applied to both if to either. If the Murdock doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.

My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.

The Court in the Murdock case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion, and Murdock overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts.

Mr. Justice MURPHY, dissenting.

This attempt by the state of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. She was a member of Jehovah's Witnesses and had been taught the tenets of that sect by her guardian, the appellant. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of the appellant, Betty Simmons on the night of December 18, 1941, was standing on a public street corner and offering to distribute Jehovah's Witness literature to passersby. There was no expectation of pecuniary profit to herself or to appellant. It is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in 'an age-old form of missionary evangelism' with a purpose 'as evangelical as the revival meeting.'

Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations

adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. No question of freedom of speech or freedom of press is present and we are not called upon to determine the permissible restraints on those rights. Nor are any truancy or curfew restrictions in issue. The statutes in question prohibit all children within the specified age limits from selling or offering to sell 'any newspapers, magazines, periodicals or any other articles of merchandise of any description in any street or public place.' Criminal sanctions are imposed on the parents and guardians who compel or permit minors in their control to engage in the prohibited transactions. The state court has construed these statutes to cover the activities here involved, thereby imposing an indirect restraint through the parents and guardians on the free exercise by minors of their religious beliefs. This indirect restraint is no less effective than a direct one. A square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented.

As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general. The great interest of the state in shielding minors from the evil vicissitudes of early life does not warrant every limitation on their religious training and activities. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the reasonableness that justifies such a drastic restriction when the distribution is part of their religious faith. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. The vital freedom of religion, which is 'of the very essence of a scheme of ordered liberty,' cannot be erased by slender references to the state's power to restrict the more secular activities of children.

The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. It was carried on in an orderly, lawful manner at a public street corner. And 'one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.' The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to the Jehovah's Witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. Reference is made in the majority opinion to 'the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.' To the extent that they flow from participation in ordinary commercial

activities, these harms are irrelevant to this case. And the bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial. Yet there is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful 'diverse influences of the street.' Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least. And the fact that the zealous exercise of the right to propagandize the community may result in violent or disorderly situations difficult for children to face is no excuse for prohibiting the exercise of that right.

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

American Legion v. American Humanist Association

139 S.Ct. 2067 (2019)

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, and an opinion with respect to Parts II–A and II–D, in which THE CHIEF JUSTICE, Justice BREYER, and Justice KAVANAUGH join.

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse.

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions." Van Orden v. Perry, (Breyer, J., concurring in judgment). And contrary to respondents' intimations, there is no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

I.A

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.

A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products. Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular.

The familiar symbol of the Red Cross—a red cross on a white background—shows how the meaning of a symbol that was originally religious can be transformed. The International Committee of the Red Cross (ICRC) selected that symbol in 1863 because it was thought to call to mind the flag of Switzerland, a country widely known for its neutrality. The Swiss flag consists of a white cross on a red background. In an effort to invoke the message associated with that flag, the ICRC copied its design with the colors inverted. Thus, the ICRC selected this symbol for an essentially secular reason, and the current secular

message of the symbol is shown by its use today in nations with only tiny Christian populations. But the cross was originally chosen for the Swiss flag for religious reasons. So an image that began as an expression of faith was transformed.

The image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I. "During and immediately after the war, the army marked soldiers' graves with temporary wooden crosses or Stars of David"—a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. The vast majority of these grave markers consisted of crosses, [Footnote 7: Of the roughly 116,000 casualties the United States suffered in World War I, some 3,500 were Jewish soldiers. In the congressional hearings involving the appropriate grave markers for those buried abroad, one Representative stated that approximately 1,600 of these Jewish soldiers were buried in overseas graves marked by Stars of David. That would constitute about 5.2% of the 30,973 graves in American World War I cemeteries abroad."] and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross "developed into a 'central symbol'" of the conflict. Contemporary literature, poetry, and art reflected this powerful imagery. Perhaps most famously, John McCrae's poem, In Flanders Fields, began with these memorable lines:

"In Flanders fields the poppies blow
Between the crosses, row on row."

The poem was enormously popular. A 1921 New York Times article quoted a description of McCrae's composition as "'the poem of the army'" and "'of all those who understand the meaning of the great conflict.'" The image of "the crosses, row on row," stuck in people's minds, and even today for those who view World War I cemeteries in Europe, the image is arresting.

After the 1918 armistice, the War Department announced plans to replace the wooden crosses and Stars of David with uniform marble slabs like those previously used in American military cemeteries. But the public outcry against that proposal was swift and fierce. Many organizations, including the American War Mothers, a nonsectarian group founded in 1917, urged the Department to retain the design of the temporary markers. When the American Battle Monuments Commission took over the project of designing the headstones, it responded to this public sentiment by opting to replace the wooden crosses and Stars of David with marble versions of those symbols. A Member of Congress likewise introduced a resolution noting that "these wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades and of the Nation with these World War graves." This national debate and its outcome confirmed the cross's widespread resonance as a symbol of sacrifice in the war.

B

Recognition of the cross's symbolism extended to local communities across the country. In late 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's fallen soldiers. Among the committee's members were the mothers of 10 deceased soldiers. The committee decided that the memorial should be a cross and hired sculptor and architect John Joseph Earley to design it. Although we do not know precisely why the committee chose the cross, it is unsurprising that the committee—and many others commemorating World War I—adopted a symbol so widely associated with that wrenching event. . . .

Many of those who responded were local residents who gave small amounts: Donations of 25 cents to 1 dollar were the most common. Local businesses and political leaders assisted in this effort. . . . By 1922,

however, the committee had run out of funds, and progress on the Cross had stalled. The local post of the American Legion took over the project, and the monument was finished in 1925.

The completed monument is a 32-foot tall Latin cross that sits on a large pedestal. The American Legion's emblem is displayed at its center, and the words "Valor," "Endurance," "Courage," and "Devotion" are inscribed at its base, one on each of the four faces. The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is "Dedicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world." The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson's request for a declaration of war: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives."

At the dedication ceremony, a local Catholic priest offered an invocation. United States Representative Stephen W. Gambrill delivered the keynote address, honoring the "'men of Prince George's County'" who "'fought for the sacred right of all to live in peace and security.'" He encouraged the community to look to the "'token of this cross, symbolic of Calvary,'" to "'keep fresh the memory of our boys who died for a righteous cause.'" The ceremony closed with a benediction offered by a Baptist pastor.

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road.

As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns. The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. Over the next five decades, the Commission spent approximately $ 117,000 to maintain and preserve the monument. In 2008, it budgeted an additional $100,000 for renovations and repairs to the Cross.

C

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after the Commission acquired it, the American Humanist Association (AHA) lodged a complaint with the Commission. The complaint alleged that the Cross's presence on public land and the Commission's maintenance of the memorial violate the Establishment Clause of the First Amendment. The AHA, along with three residents of Washington, D. C., and Maryland, also sued the Commission in the District Court for the District of Maryland, making the same claim. The AHA sought declaratory and injunctive relief requiring "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." The American Legion intervened to defend the Cross.

The District Court granted summary judgment for the Commission and the American Legion. The Cross, the District Court held, satisfies both the three-pronged test announced in Lemon v. Kurtzman, and the analysis applied by Justice Breyer in upholding the Ten Commandments monument at issue in Van Orden

v. Perry. . . . Applying [*Lemon*], the District Court determined that the Commission had secular purposes for acquiring and maintaining the Cross—namely, to commemorate World War I and to ensure traffic safety. The court also found that a reasonable observer aware of the Cross's history, setting, and secular elements "would not view the Monument as having the effect of impermissibly endorsing religion." Nor, according to the court, did the Commission's maintenance of the memorial create the kind of "continued and repeated government involvement with religion" that would constitute an excessive entanglement. Finally, in light of the factors that informed its analysis of Lemon's "effects" prong, the court concluded that the Cross is constitutional under Justice Breyer's approach in Van Orden.

A divided panel of the Court of Appeals for the Fourth Circuit reversed. The majority relied primarily on the Lemon test but also took cognizance of Justice Breyer's Van Orden concurrence. While recognizing that the Commission acted for a secular purpose, the court held that the Bladensburg Cross failed Lemon's "effects" prong because a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity. The court emphasized the cross's "inherent religious meaning" as the "'preeminent symbol of Christianity.'" Although conceding that the monument had several "secular elements," the court asserted that they were "overshadow[ed]" by the Cross's size and Christian connection—especially because the Cross's location and condition would make it difficult for "passers-by" to "read" or otherwise "examine" the plaque and American Legion emblem. The court rejected as "too simplistic" an argument defending the Cross's constitutionality on the basis of its 90-year history, suggesting that "[p]erhaps the longer a violation persists, the greater the affront to those offended." In the alternative, the court concluded, the Commission had become excessively entangled with religion by keeping a display that "aggrandizes the Latin cross" and by spending more than de minimis public funds to maintain it.

Chief Judge Gregory dissented in relevant part, contending that the majority misapplied the "effects" test by failing to give adequate consideration to the Cross's "physical setting, history, and usage." He also disputed the majority's excessive-entanglement analysis, noting that the Commission's maintenance of the Cross was not the kind of "comprehensive, discriminating, and continuing state surveillance" of religion that Lemon was concerned to rule out. . . .

II.A

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." While the concept of a formally established church is straightforward, pinning down the meaning of a "law respecting an establishment of religion" has proved to be a vexing problem. Prior to the Court's decision in Everson v. Board of Ed. of Ewing, Establishment Clause was applied only to the Federal Government, and few cases involving this provision came before the Court. After Everson recognized the incorporation of the Clause, however, the Court faced a steady stream of difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools, to Sunday closing laws, to state subsidies for church-related schools or the parents of students attending those schools. After grappling with such cases for more than 20 years, Lemon ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter (O'Connor, J., concurring in part and concurring in judgment).

If the Lemon Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to

apply the test or has simply ignored it.

This pattern is a testament to the Lemon test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the Lemon test could not resolve them. It could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, ... certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving." The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.

For at least four reasons, the Lemon test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. [Footnote 16: "While we do not attempt to provide an authoritative taxonomy of the dozens of Establishment Clause cases that the Court has decided since Everson, most can be divided into six rough categories: (1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies, e.g., Lynch v. Donnelly, (1984); Van Orden v. Perry (2005); (2) religious accommodations and exemptions from generally applicable laws, e.g., Cutter v. Wilkinson (2005); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos (1987); (3) subsidies and tax exemptions, e.g., Walz v. Tax Comm'n of City of New York, (1970); Zelman v. Simmons-Harris (2002); (4) religious expression in public schools, e.g., School Dist. of Abington Township v. Schempp (1963); Lee v. Weisman (1992); (5) regulation of private religious speech, e.g., Capitol Square Review and Advisory Bd. v. Pinette (1995); and (6) state interference with internal church affairs, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012). A final, miscellaneous category, including cases involving such issues as Sunday closing laws, see McGowan, v. Maryland (1961), and church involvement in governmental decisionmaking, see Larkin v. Grendel's Den, Inc. (1982); Board of Ed. of Kiryas Joel Village School Dist. v. Grumet (1994), might be added. We deal here with an issue that falls into the first category."]. Together, these considerations counsel against efforts to evaluate such cases under Lemon and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

B

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. In Salazar v. Buono (2010), for example, we dealt with a cross that a small group of World War I veterans had put up at a remote spot in the Mojave Desert more than seven decades earlier. The record contained virtually no direct evidence regarding the specific motivations of these men. We knew that they had selected a plain white cross, and there was some evidence that the man who looked after the monument for many years—"a miner who had served as a medic and had thus presumably witnessed the carnage of the war firsthand"—was said not to have been "particularly religious."

Without better evidence about the purpose of the monument, different Justices drew different inferences. The plurality thought that this particular cross was meant "to commemorate American servicemen who had died in World War I" and was not intended "to promote a Christian message." . The dissent, by contrast, "presume[d]" that the cross's purpose "was a Christian one, at least in part, for the simple reason that those who erected the cross chose to commemorate American veterans in an explicitly Christian manner." The truth is that 70 years after the fact, there was no way to be certain about the motivations of the men who were responsible for the creation of the monument. And this is often the case with old monuments, symbols, and practices. Yet it would be inappropriate for courts to compel their removal or termination based on supposition.

Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. Take the example of Ten Commandments monuments, the subject we addressed in Van Orden and McCreary. For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. They have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent public buildings in our Nation's capital. In Van Orden and McCreary, no Member of the Court thought that these depictions are unconstitutional.

Just as depictions of the Ten Commandments in these public buildings were intended to serve secular purposes, the litigation in Van Orden and McCreary showed that secular motivations played a part in the proliferation of Ten Commandments monuments in the 1950s. . . .

The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage. Cf. Schempp (Brennan, J., concurring) ("[The] government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends").

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, "[t]he 'message' conveyed ... may change over time." Consider, for example, the message of the Statue of Liberty, which began as a monument to the solidarity and friendship between France and the United States and only decades later came to be seen "as a beacon welcoming immigrants to a land of freedom."

With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots. . . .

In the same way, consider the many cities and towns across the United States that bear religious names. Religion undoubtedly motivated those who named Bethlehem, Pennsylvania; Las Cruces, New Mexico; Providence, Rhode Island; Corpus Christi, Texas; Nephi, Utah, and the countless other places in our country with names that are rooted in religion. Yet few would argue that this history requires that these names be erased from the map. Or take a motto like Arizona's, "Ditat Deus" ("God enriches"), which was adopted in 1864, or a flag like Maryland's, which has included two crosses since 1904. Familiarity itself can become a reason for preservation.

Fourth, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality. . . .

D

While the Lemon Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

In Marsh v. Chambers, the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored Lemon and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the Lemon test. Instead, the Court found it highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. We took a similar approach more recently in Town of Greece.

We reached these results even though it was clear, as stressed by the Marsh dissent, that prayer is by definition religious. As the Court put it in Town of Greece: " Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." "The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings' " and that the decision of the First Congress to "provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." . . .

In Town of Greece, which concerned prayer before a town council meeting, there was disagreement about the inclusiveness of the town's practice. But there was no disagreement that the Establishment Clause permits a nondiscriminatory practice of prayer at the beginning of a town council session. Of course, the specific practice challenged in Town of Greece lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what mattered was that the town's practice "fi[t] within the tradition long followed in Congress and the state legislatures."

The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

III

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause.

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. Due in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. As long as it is retained in its original place and form, it speaks as well of the community that erected the monument

nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community.

The monument would not serve that role if its design had deliberately disrespected area soldiers who perished in World War I. More than 3,500 Jewish soldiers gave their lives for the United States in that conflict, and some have wondered whether the names of any Jewish soldiers from the area were deliberately left off the list on the memorial or whether the names of any Jewish soldiers were included on the Cross against the wishes of their families. There is no evidence that either thing was done, and we do know that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran.

The AHA's brief strains to connect the Bladensburg Cross and even the American Legion with anti-Semitism and the Ku Klux Klan, but the AHA's disparaging intimations have no evidentiary support. And when the events surrounding the erection of the Cross are viewed in historical context, a very different picture may perhaps be discerned. The monument was dedicated on July 12, 1925, during a period when the country was experiencing heightened racial and religious animosity. Membership in the Ku Klux Klan, which preached hatred of Blacks, Catholics, and Jews, was at its height. On August 8, 1925, just two weeks after the dedication of the Bladensburg Cross and less than 10 miles away, some 30,000 robed Klansmen marched down Pennsylvania Avenue in the Nation's Capital. But the Bladensburg Cross memorial included the names of both Black and White soldiers who had given their lives in the war; and despite the fact that Catholics and Baptists at that time were not exactly in the habit of participating together in ecumenical services, the ceremony dedicating the Cross began with an invocation by a Catholic priest and ended with a benediction by a Baptist pastor. We can never know for certain what was in the minds of those responsible for the memorial, but in light of what we know about this ceremony, we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day.

Finally, it is surely relevant that the monument commemorates the death of particular individuals. It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. In some circumstances, the exclusion of any such recognition would make a memorial incomplete. This well explains why Holocaust memorials invariably include Stars of David or other symbols of Judaism. It explains why a new memorial to Native American veterans in Washington, D. C., will portray a steel circle to represent "'the hole in the sky where the creator lives.'" And this is why the memorial for soldiers from the Bladensburg community features the cross—the same symbol that marks the graves of so many of their comrades near the battlefields where they fell.

IV

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings.

Justice BREYER, with whom Justice KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its "separate sphere."

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. The Court's opinion eloquently explains why that is so: The Latin cross is uniquely associated with the fallen soldiers of World War I; the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group; the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration; and, finally, the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. Nothing in the record suggests that the lack of public outcry "was due to a climate of intimidation." In light of all these circumstances, the Peace Cross cannot reasonably be understood as "a government effort to favor a particular religious sect" or to "promote religion over nonreligion." And, as the Court explains, ordering its removal or alteration at this late date would signal "a hostility toward religion that has no place in our Establishment Clause traditions."

The case would be different, in my view, if there were evidence that the organizers had "deliberately disrespected" members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. But those are not the circumstances presented to us here, and I see no reason to order this cross torn down simply because other crosses would raise constitutional concerns.

Nor do I understand the Court's opinion today to adopt a "history and tradition test" that would permit any newly constructed religious memorial on public land. The Court appropriately "looks to history for guidance," but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community. A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach.

As I have previously explained, "where the Establishment Clause is at issue," the Court must "'distinguish between real threat and mere shadow.'" In light of all the circumstances here, I agree with the Court that the Peace Cross poses no real threat to the values that the Establishment Clause serves.

Justice KAVANAUGH, concurring.

I join the Court's eloquent and persuasive opinion in full. I write separately to emphasize two points.

I

Consistent with the Court's case law, the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross.

As this case again demonstrates, this Court no longer applies the old test articulated in Lemon v. Kurtzman. The Lemon test examined, among other things, whether the challenged government action had a primary effect of advancing or endorsing religion. If Lemon guided this Court's understanding of the Establishment Clause, then many of the Court's Establishment Clause cases over the last 48 years would have been decided differently, as I will explain.

The opinion identifies five relevant categories of Establishment Clause cases: (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums.

The Lemon test does not explain the Court's decisions in any of those five categories.

In the first category of cases, the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events. The Court does so again today. Lemon does not account for the results in these cases.

In the second category of cases, this Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws. But accommodations and exemptions "by definition" have the effect of advancing or endorsing religion to some extent. Lemon, fairly applied, does not justify those decisions.

In the third category of cases, the Court likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion. Those outcomes are not easily reconciled with Lemon.

In the fourth category of cases, the Court has proscribed government-sponsored prayer in public schools. The Court has done so not because of Lemon, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. The Court's most prominent modern case on that subject, Lee v. Weisman, did not rely on Lemon. In short, Lemon was not necessary to the Court's decisions holding government-sponsored school prayers unconstitutional.

In the fifth category, the Court has allowed private religious speech in public forums on an equal basis with secular speech. That practice does not violate the Establishment Clause, the Court has ruled. Lemon does not explain those cases.

Today, the Court declines to apply Lemon in a case in the religious symbols and religious speech category, just as the Court declined to apply Lemon in Town of Greece v. Galloway, Van Orden v. Perry, and Marsh v. Chambers. The Court's decision in this case again makes clear that the Lemon test does not apply to Establishment Clause cases in that category. And the Court's decisions over the span of several decades demonstrate that the Lemon test is not good law and does not apply to Establishment Clause cases in any of the five categories.

On the contrary, each category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition. The Bladensburg Cross does not violate the Establishment Clause. . . .

II

The Bladensburg Cross commemorates soldiers who gave their lives for America in World War I. I agree with the Court that the Bladensburg Cross is constitutional. At the same time, I have deep respect for the plaintiffs' sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an amicus brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

The conclusion that the cross does not violate the Establishment Clause does not necessarily mean that those who object to it have no other recourse. The Court's ruling allows the State to maintain the cross on public land. The Court's ruling does not require the State to maintain the cross on public land. The Maryland Legislature could enact new laws requiring removal of the cross or transfer of the land. The Maryland Governor or other state or local executive officers may have authority to do so under current Maryland law. And if not, the legislature could enact new laws to authorize such executive action. The Maryland Constitution, as interpreted by the Maryland Court of Appeals, may speak to this question. And if not, the people of Maryland can amend the State Constitution.

Those alternative avenues of relief illustrate a fundamental feature of our constitutional structure: This Court is not the only guardian of individual rights in America. This Court fiercely protects the individual rights secured by the U. S. Constitution. But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U. S. Constitution.

Justice KAGAN, concurring in part.

I fully agree with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II–B, II–C, III, and IV of its opinion, as well as Justice Breyer's concurrence. Although I agree that rigid application of the Lemon test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows. I therefore do not join Part II–A. I do not join Part II–D out of perhaps an excess of caution. Although I too "look[ ] to history for guidance," I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis. But I find much to admire in this section of the opinion—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.

Justice THOMAS, concurring in the judgment.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." The text and history of this Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to "law[s]" enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did, this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the Cross is clearly constitutional. . . .

III

As to the long-discredited test set forth in Lemon v. Kurtzman and reiterated in County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, the plurality rightly rejects its relevance to claims, like this one, involving "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." I agree with that aspect of its opinion. I would take the logical next step and overrule the Lemon test in all contexts. First, that test has no basis in the original meaning of the Constitution. Second, "since its inception," it has "been manipulated to fit whatever result the Court aimed to achieve." Third, it continues to cause enormous confusion in the States and the lower courts. In recent decades, the Court has tellingly refused to apply Lemon in the very cases where it purports to be most useful. The obvious explanation is that Lemon does not provide a sound basis for judging Establishment Clause claims. However, the court below "s[aw] fit to apply Lemon." It is our job to say what the law is, and because the Lemon test is not good law, we ought to say so. . . .

Justice GORSUCH, with whom Justice THOMAS joins, concurring in the judgment.

The American Humanist Association wants a federal court to order the destruction of a 94 year-old war memorial because its members are offended. Today, the Court explains that the plaintiffs are not entitled to demand the destruction of longstanding monuments, and I find much of its opinion compelling. In my judgment, however, it follows from the Court's analysis that suits like this one should be dismissed for lack of standing. Accordingly, while I concur in the judgment to reverse and remand the court of appeals' decision, I would do so with additional instructions to dismiss the case.

The Association claims that its members "regularly" come into "unwelcome direct contact" with a World War I memorial cross in Bladensburg, Maryland "while driving in the area." And this, the Association suggests, is enough to allow it to insist on a federal judicial decree ordering the memorial's removal. Maybe, the Association concedes, others who are less offended lack standing to sue. Maybe others still who are equally affected but who come into contact with the memorial too infrequently lack standing as well. But, the Association assures us, its members are offended enough—and with sufficient frequency—that they may sue.

This "offended observer" theory of standing has no basis in law. Federal courts may decide only those cases and controversies that the Constitution and Congress have authorized them to hear. And to establish standing to sue consistent with the Constitution, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability. The injury-in-fact test requires a plaintiff to prove "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife.

Unsurprisingly, this Court has already rejected the notion that offense alone qualifies as a "concrete and particularized" injury sufficient to confer standing. We could hardly have been clearer: "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." Imagine if a bystander disturbed by a police stop tried to sue under the Fourth Amendment. Suppose an advocacy organization whose members were distressed by a State's decision to deny someone else a civil jury trial sought to complain under the Seventh Amendment. Or envision a religious group upset about the application of the death penalty trying to sue to stop it. Does anyone doubt those cases would be rapidly dispatched for lack of standing?

It's not hard to see why this Court has refused suits like these. If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other

branches of government. Courts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves.

Proceeding on these principles, this Court has held offense alone insufficient to convey standing in analogous—and arguably more sympathetic—circumstances. Take Allen v. Wright, where the parents of African-American schoolchildren sued to compel the Internal Revenue Service to deny tax-exempt status to schools that discriminated on the basis of race. The parents claimed that their children suffered a "stigmatic injury, or denigration" when the government supported racially discriminatory institutions. But this Court refused to entertain the case, reasoning that standing extends "only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." Now put the teachings there alongside the Association's standing theory here and you get this utterly unjustifiable result: An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks that could be the law?

Consider, as well, the Free Exercise Clause. In Harris v. McRae, this Court denied standing to a religious group that raised a free exercise challenge to federal restrictions on abortion funding because "the plaintiffs had 'not contended that the [statute in question] in any way coerce[d] them as individuals in the practice of their religion.'" Instead, the Court has held, a free exercise plaintiff generally must "show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause." And if standing doctrine has such bite under the Free Exercise Clause, it's difficult to see how it could be as toothless as plaintiffs suppose under the neighboring Establishment Clause.

In fact, this Court has already expressly rejected "offended observer" standing under the Establishment Clause itself. In Valley Forge Christian College v. Americans United for Separation of Church and State, the plaintiffs objected to a transfer of property from the federal government to a religious college, an action they had learned about through a news release. This Court had little trouble concluding that the plaintiffs lacked standing to challenge the transfer, explaining that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not an injury-in-fact "sufficient to confer standing under Art. III." To be sure, this Court has sometimes resolved Establishment Clause challenges to religious displays on the merits without first addressing standing. But as this Court has held, its own failure to consider standing cannot be mistaken as an endorsement of it: "[D]rive-by jurisdictional rulings of this sort" carry "no precedential effect." . . .

Offended observer standing cannot be squared with this Court's longstanding teachings about the limits of Article III. Not even today's dissent seriously attempts to defend it. So at this point you might wonder: How did the lower courts in this case indulge the plaintiffs' "offended observer" theory of standing? And why have other lower courts done similarly in other cases?

The truth is, the fault lies here. Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court's decision in Lemon v. Kurtzman. Lemon held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to "'excessive[ly] ... entangl[e]'" church and state, a standard this Court came to understand as prohibiting the government from doing anything that a "'reasonable observer'" might perceive as "endorsing" religion. And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. Here alone, lower courts concluded, though never with this Court's approval, an observer's offense must "suffice to make an Establishment Clause claim justiciable."

As today's plurality rightly indicates in Part II–A, however, Lemon was a misadventure. It sought a "grand unified theory" of the Establishment Clause but left us only a mess. How much "purpose" to promote religion is too much (are Sunday closing laws that bear multiple purposes, religious and secular, problematic)? How much "effect" of advancing religion is tolerable (are even incidental effects disallowed)? What does the "entanglement" test add to these inquiries? Even beyond all that, how "reasonable" must our "reasonable observer" be, and what exactly qualifies as impermissible "endorsement" of religion in a country where "In God We Trust" appears on the coinage, the eye of God appears in its Great Seal, and we celebrate Thanksgiving as a national holiday ("to Whom are thanks being given")? Nearly half a century after Lemon and, the truth is, no one has any idea about the answers to these questions. As the plurality documents, our "doctrine [is] in such chaos" that lower courts have been "free to reach almost any result in almost any case." Scores of judges have pleaded with us to retire Lemon, scholars of all stripes have criticized the doctrine, and a majority of this Court has long done the same. Today, not a single Member of the Court even tries to defend Lemon against these criticisms—and they don't because they can't. As Justice Kennedy explained, Lemon is "flawed in its fundamentals," has proved "unworkable in practice," and is "inconsistent with our history and our precedents."

In place of Lemon, Part II–D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that "the Establishment Clause must be interpreted by reference to historical practices and understandings." So, by way of example, the plurality explains that a state legislature may permissibly begin each session with a prayer by an official chaplain because "Congress for more than 200 years had opened its sessions with a prayer and ... many state legislatures had followed suit." The constitutionality of a practice doesn't depend on some artificial and indeterminate three-part test; what matters, the plurality reminds us, is whether the challenged practice fits "'within the tradition'" of this country.

I agree with all this and don't doubt that the monument before us is constitutional in light of the nation's traditions. But then the plurality continues on to suggest that "longstanding monuments, symbols, and practices" are "presumpt[ively]" constitutional. And about that, it's hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror? And where exactly in the Constitution does this presumption come from? The plurality does not say, nor does it even explain what work its presumption does. To the contrary, the plurality proceeds to analyze the "presumptively" constitutional memorial in this case for its consistency with " 'historical practices and understandings' " under Marsh and Town of Greece—exactly the same approach that the plurality, quoting Town of Greece, recognizes "'must be'" used whenever we interpret the Establishment Clause. Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply Town of Greece, not Lemon. Indeed, some of our colleagues recognize this implication and blanch at its prospect. But if that's the real message of the plurality's opinion, it seems to me exactly right—because what matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago. . . .

In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends somebody. No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an "offended viewer" may "avert his eyes," or pursue a political solution. Today's decision represents a welcome step toward restoring this Court's recognition of these truths, and I respectfully concur in the

judgment.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland. "[M]onumental, clear, and bold" by day, the cross looms even larger illuminated against the night-time sky. Known as the Peace Cross, the monument was erected by private citizens in 1925 to honor local soldiers who lost their lives in World War I. "[T]he town's most prominent symbol" was rededicated in 1985 and is now said to honor "the sacrifices made [in] all wars," by "all veterans." Both the Peace Cross and the traffic island are owned and maintained by the Maryland-National Capital Park and Planning Commission (Commission), an agency of the State of Maryland.

Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. Numerous times since, the Court has reaffirmed the Constitution's commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual liberty and civic harmony in favor of a "presumption of constitutionality for longstanding monuments, symbols, and practices."

The Latin cross is the foremost symbol of the Christian faith, embodying the "central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life." Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol, as the Courts of Appeals have uniformly recognized. Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation. Soldiers of all faiths "are united by their love of country, but they are not united by the cross." Brief for Jewish War Veterans of the United States of America, Inc., as Amicus Curiae.

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an "admirable and unquestionably secular" objective. But the Commission does not serve that objective by displaying a symbol that bears "a starkly sectarian message." . . .

I.B

In cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the "effect of 'endorsing' religion." The display fails this requirement if it objectively "convey[s] a message that religion or a particular religious belief is favored or preferred." [Footnote 3: "Justice Gorsuch's "no standing" opinion is startling in view of the many religious-display cases this Court has resolved on the merits. And, if Justice Gorsuch is right, three Members of the Court were out of line when they recognized that "[t]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall," Buono (opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.), for no one, according to Justice Gorsuch, should be heard to complain about such a thing."]. To make that determination, a court must consider "the pertinent facts and circumstances surrounding the symbol and its placement."

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. "It certainly is not common for property owners to open up their property [to] monuments that convey a message with which they do not wish to be associated."

To non-Christians, nearly 30% of the population of the United States, Pew Research Center, America's Changing Religious Landscape 4 (2015), the State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they "are outsiders, not full members of the political community."

A presumption of endorsement, of course, may be overcome. A display does not run afoul of the neutrality principle if its "setting ... plausibly indicates" that the government has not sought "either to adopt [a] religious message or to urge its acceptance by others." The "typical museum setting," for example, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

II.A

"For nearly two millennia," the Latin cross has been the "defining symbol" of Christianity, evoking the foundational claims of that faith. Christianity teaches that Jesus Christ was "a divine Savior" who "illuminate[d] a path toward salvation and redemption." Central to the religion are the beliefs that "the son of God," Jesus Christ, "died on the cross," that "he rose from the dead," and that "his death and resurrection offer the possibility of eternal life." "From its earliest times," Christianity was known as "religio crucis—the religion of the cross." Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity.

An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. The principal symbol of Christianity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy.

B

The Commission urges in defense of its monument that the Latin cross "is not merely a reaffirmation of Christian beliefs"; rather, "when used in the context of a war memorial," the cross becomes "a universal symbol of the sacrifices of those who fought and died."

The Commission's "[a]ttempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith." See, e.g., Brief for Amici Christian and Jewish Organizations ("For Christians who think seriously about the events and message that the cross represents, [the Commission's] claims are deeply offensive."). The asserted commemorative meaning of the cross rests on—and is inseparable from—its Christian meaning: "the crucifixion of Jesus Christ and the redeeming benefits of his passion and death," specifically, "the salvation of man."

Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. The cross on a grave "says that a Christian is buried here," and "commemorates [that person's death] by evoking a conception of salvation and eternal life reserved for Christians," As a commemorative symbol, the Latin cross simply "makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life."

The cross affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life. "To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning." Scarcely "a universal symbol of sacrifice," the cross is "the symbol of one particular sacrifice." . . .

C

The Commission nonetheless urges that the Latin cross is a "well-established" secular symbol commemorating, in particular, "military valor and sacrifice [in] World War I." Calling up images of United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, the Commission overlooks this reality: The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity.

1

A page of history is worth retelling. On November 11, 1918, the Great War ended. Bereaved families of American soldiers killed in the war sought to locate the bodies of their loved ones, and then to decide what to do with their remains. Once a soldier's body was identified, families could choose to have the remains repatriated to the United States or buried overseas in one of several American military cemeteries, yet to be established. Eventually, the remains of 46,000 soldiers were repatriated, and those of 30,000 soldiers were laid to rest in Europe.

While overseas cemeteries were under development, the graves of American soldiers in Europe were identified by one of two temporary wooden markers painted white. Christian soldiers were buried beneath the cross; the graves of Jewish soldiers were marked by the Star of David. The remains of soldiers who were neither Christian nor Jewish could be repatriated to the United States for burial under an appropriate headstone.

When the War Department began preparing designs for permanent headstones in 1919, "no topic managed to stir more controversy than the use of religious symbolism." Everyone involved in the dispute, however, saw the Latin cross as a Christian symbol, not as a universal or secular one. To achieve uniformity, the War Department initially recommended replacing the temporary sectarian markers with plain marble slabs resembling "those designed for the national cemeteries in the United States."

The War Department's recommendation angered prominent civil organizations, including the American Legion and the Gold Star associations: the United States, they urged, ought to retain both the cross and Star of David. In supporting sectarian markers, these groups were joined by the American Battle Monuments Commission (ABMC), a newly created independent agency charged with supervising the establishment of overseas cemeteries. Congress weighed in by directing the War Department to erect headstones "of such design and material as may be agreed upon by the Secretary of War and the American Battle Monuments Commission."

Throughout the headstone debate, no one doubted that the Latin cross and the Star of David were sectarian gravemarkers, and therefore appropriate only for soldiers who adhered to those faiths. . . .

2

Reiterating its argument that the Latin cross is a "universal symbol" of World War I sacrifice, the Commission states that "40 World War I monuments ... built in the United States ... bear the shape of a cross." This figure includes memorials that merely "incorporat[e]" a cross. Moreover, the 40 monuments compose only 4% of the "948 outdoor sculptures commemorating the First World War." The Court lists just seven freestanding cross memorials, less than 1% of the total number of monuments to World War I in the United States. Cross memorials, in short, are outliers. The overwhelming majority of World War I memorials contain no Latin cross.

In fact, the "most popular and enduring memorial of the [post-World War I] decade" was "[t]he mass-produced Spirit of the American Doughboy statue." That statue, depicting a U. S. infantryman, "met with widespread approval throughout American communities." Indeed, the first memorial to World War I erected in Prince George's County "depict[s] a doughboy." The Peace Cross, as Plaintiffs' expert historian observed, was an "aberration ... even in the era [in which] it was built and dedicated."

Like cities and towns across the country, the United States military comprehended the importance of "pay[ing] equal respect to all members of the Armed Forces who perished in the service of our country," and therefore avoided incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb. In sum, "[t]here is simply 'no evidence ... that the cross has been widely embraced by'—or even applied to—'non-Christians as a secular symbol of death' or of sacrifice in military service" in World War I or otherwise. . . .

Engel v. Vitale

370 U.S. 421 (1962)

MR. JUSTICE BLACK delivered the opinion of the Court.

Board of Education of Union Free School District No. 9, New Hyde Park, New York, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their 'Statement on Moral and Spiritual Training in the Schools,' saying: 'We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.'

[The parents of ten students challenged the constitutionality of the mandatory recitation of the Regents' prayer. They alleged that the state law and school regulation mandating the prayer were contrary to the beliefs of both themselves and their children. They also argued that the prayer violated the First Amendment. The New York Court of Appeals found no constitutional violation in the prayer so long as the schools did not compel any pupil to join in the prayer.]

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious and none of the respondents has denied this.

The parents contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established

religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785—1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous 'Virginia Bill for Religious Liberty' by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was being considered and passed in other States.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The Board's argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'nondenominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. 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. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward

prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.' It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

It is proper to take alarm at the first experiment on our liberties. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice STEWART, dissenting.

A local school board in New York has provided that those pupils who wish to do so may join in a brief prayer at the beginning of each school day, acknowledging their dependence upon God and asking His blessing upon them and upon their parents, their teachers, and their country. The Court today decides that in permitting this brief non-denominational prayer the school board has violated the Constitution of the United States. I think this decision is wrong. With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

School District of Abington Township v. Schempp

374 U.S. 203 (1963)

Mr. Justice CLARK delivered the opinion of the Court.

I.

The Commonwealth of Pennsylvania by law requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.' The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment.

Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they, as well as another son, Ellory, regularly attend religious services.

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

II.

It is true that religion has been closely identified with our history and government. The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.

This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom

to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups.

III.

This Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment. *Cantwell v. Connecticut*.

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in Everson, the Court said that '(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.'

IV.

The interrelationship of the Establishment and the Free Exercise Clauses was first touched upon by Mr. Justice Roberts for the Court in Cantwell v. Connecticut,, where it was said that their 'inhibition of legislation' had

a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.

A half dozen years later in Everson v. Board of Education, this Court, through Mr. Justice BLACK, stated that the 'scope of the First Amendment was designed forever to suppress' the establishment of religion or the prohibition of the free exercise thereof. In short, the Court held that the Amendment

requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

In McCollum v. Board of Education, Mr. Justice Frankfurter, joined by Justices Jackson, Rutledge and Burton, wrote a very comprehensive and scholarly concurrence in which he said that '(s)eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally.' Continuing, he stated that:

the Constitution prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.

And in further elaboration the Court found that the 'first and most immediate purpose (of the Establishment Clause) rested on the belief that a union of government and religion tends to destroy government and to degrade religion.' *Engel v. Vitale*. When government, the Court said, allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.'

V.

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and

religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. We agree [that such an opening exercise is a religious ceremony and was intended by the State to be so]. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

The State contends that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The short answer is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that the laws require religious exercises and such exercises are being conducted in direct violation of the rights [guaranteed by the Constitution]. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See Engel v. Vitale. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments.

It is insisted that unless these religious exercises are permitted a 'religion of secularism' is established in the schools. We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' Zorach v. Clauson. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a

study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in West Virginia Board of Education v. Barnette:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to freedom of worship and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

Lee v. Weisman

505 U.S. 577 (1992)

Justice KENNEDY delivered the opinion of the Court.

The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony [at public middle schools and high schools] is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

I

A

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

Rabbi Gutterman's prayers were as follows:

INVOCATION

God of the Free, Hope of the Brave:
For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
For the liberty of America, we thank You. May these new graduates grow up to guard it.
For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN

II

[The] facts indicate that State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the

religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." Lynch. The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," Engel v. Vitale, and that is what the school officials attempted to do.

[The school contends that its directions as to the content of the prayer were an attempt to nip in the bud any potential conflict arising out of overtly sectarian prayers.] The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo–Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance Against Religious Assessments.

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith

attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. Engel v. Vitale. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice. By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in Engel v. Vitale and School Dist. of Abington recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for

many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

The parties in this case agreed that attendance at graduation and promotional ceremonies is voluntary. The argument lacks all persuasion. To say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. Just as in Engel v. Vitale, where we found that

provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Inherent differences between the public school system and a session of a state legislature distinguish this case from Marsh v. Chambers. The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in Marsh. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh. The Marsh majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there. Today's case is different. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from Marsh and suffices to make the religious exercise a First Amendment violation. Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, and we cannot accept the parallel relied upon by petitioners and the United States between the facts of Marsh and the case now before us. Our decisions in Engel v. Vitale and School Dist. of Abington v. Schempp require us to distinguish the public school context.

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause.

Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. See School Dist. of Abington. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is affirmed

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, dissenting.

Three Terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings." It said that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would

invalidate longstanding traditions cannot be a proper reading of the Clause." County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter.

These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion. Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

I

Justice Holmes' aphorism that "a page of history is worth a volume of logic" applies with particular force to our Establishment Clause jurisprudence. As we have recognized, our interpretation of the Establishment Clause should "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." Lynch v. Donnelly. "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." School Dist. of Abington v. Schempp. "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices. Marsh v. Chambers. Thus, "[t]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality ...[,] is a fact of considerable import in the interpretation" of the Establishment Clause. Walz v. Tax Comm'n of New York City.

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, but since the Court is so oblivious to our history as to suggest that the Constitution restricts "preservation and transmission of religious beliefs ... to the private sphere," it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.

Such supplications have been a characteristic feature of inaugural addresses ever since. Thomas Jefferson, for example, prayed in his first inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity."

Most recently, President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President.

Our national celebration of Thanksgiving likewise dates back to President Washington. This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President.

The other two branches of the Federal Government also have a long-established practice of prayer at

public events. As we detailed in Marsh, congressional sessions have opened with a chaplain's prayer ever since the First Congress. And this Court's own sessions have opened with the invocation "God save the United States and this Honorable Court" since the days of Chief Justice Marshall.

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868—the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified—when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." Brodinsky, Commencement Rites Obsolete?. As the Court obliquely acknowledges in describing the "customary features" of high school graduations, and as respondents do not contest, the invocation and benediction have long been recognized to be "as traditional as any other parts of the [school] graduation program and are widely established."

II

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." American Jewish Congress v. Chicago. But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause. Neither of them is in any relevant sense true.

A

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." But what exactly is this "fair and real sense"? According to the Court, students at graduation who want "to avoid the fact or appearance of participation" in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, ... to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion—the very linchpin of the Court's opinion —is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand ... or, at least, maintain respectful silence." (emphasis added). Both halves of this disjunctive (both of which must amount to the fact or appearance of participation in prayer if the Court's analysis is to survive on its own terms) merit particular attention.

To begin with the latter: The Court's notion that a student who simply sits in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite "subtle coercive pressures") the free will to sit, there is absolutely no basis for the Court's decision. It is fanciful enough to say that "a reasonable dissenter," standing head erect in a class of bowed heads, "could believe that the group exercise signified her own participation or approval of it." It is

beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced" ... to stand! Even that half of the disjunctive does not remotely establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing ... can signify adherence to a view or simple respect for the views of others." (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a "reasonable dissenter ... could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally.

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy. West Virginia Bd. of Ed. v. Barnette. Moreover, since the Pledge of Allegiance has been revised since Barnette to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In Barnette we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to stand in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer.

I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether "mature adults" may. I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?

B

The other "dominant fac[t]" identified by the Court is that "[s]tate officials direct the performance of a formal religious exercise" at school graduation ceremonies. "Direct[ing] the performance of a formal religious exercise" has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. A Court professing to be engaged in a "delicate and fact-sensitive" line-drawing would better describe what it means as "prescribing the content of an invocation and benediction." But even that would be false. All the record shows is that principals of the Providence public schools, acting within their delegated authority, have invited clergy to deliver invocations and benedictions at graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," that school officials "monitor prayer" and attempted to "'compose official prayers,'" and that the "government involvement with religious activity in this case is pervasive," is difficult to fathom. The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored

graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term "establishment" had acquired an additional meaning— "financial support of religion generally, by public taxation"—that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced by force of law. There is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "[s]peech is not coercive; the listener may do as he likes."

IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test, see Lemon v. Kurtzman. The Court today demonstrates the irrelevance of Lemon by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced Lemon with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority

of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution. As the age-old practices of our people show, the answer to that question is not at all in doubt.

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

For the foregoing reasons, I dissent.

Kennedy v. Bremerton School District

597 U. S. ____ (2022)

JUSTICE GORSUCH delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

[*Justice Gorsuch then traced the history of Kennedy's prayers over a period of years, the School District's learning of them in September 2015, and the District identifying "two problematic practices." The first was "inspirational talks" that included "overtly religious references" likely constituting "prayer" at midfield after football games. The second was leading students and coaching staff in locker room prayers. The District instructed Kennedy to cease these practices. Kennedy stopped both practices and also stopped saying his "own quiet, on-field postgame prayer."*]

Driving home after a game, however, Mr. Kennedy felt upset that he had "broken his commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. . . .

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "ha] complied" with the "directives" in its September 17 letter. Yet instead

of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song— the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appear to a reasonable observer to endorse prayer while he is on duty as a District-paid coach." The District did so because it judged that anything less would lead it to violate the Establishment Clause.

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most [Bremerton] players were . . . engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. . . .

This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. [*Justice Gorsuch then recounted additional back-and-forth between the District and Kennedy.*]

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participating, in any capacity, in football program activities. . . ."

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he "'failed to follow district policy'" regarding religious expression and "'failed to supervise student-athletes after games.'" Mr. Kennedy did not return for the next season.

II

A

After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. . . .

B

[*The District Court found that the "sole reason" for the School District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the October 16, 23, and 26 games. Finding this reasoning persuasive, the District Court rejected Mr. Kennedy's speech and free exercise claims. The Ninth Circuit affirmed.*]

III

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts."

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. Mr. Kennedy has indicated repeatedly that he is willing to "wai[t] until the game is over and the players have left the field" to "wal[k] to mid-field to say [his] short, private, personal prayer." The contested exercise before us does not involve leading prayers with the team or before any other captive audience. Mr. Kennedy's "religious beliefs do not require [him] to lead any prayer . . . involving students." At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015.

Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at . . . religious practice." A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited "any overt actions on Mr. Kennedy's

part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer." The District further explained that it could not allow "an employee, while still on duty, to engage in *religious* conduct." Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly acknowledged as much below, conceding that its policies were "not neutral" toward religion.

The District's challenged policies also fail the general applicability test. The District's performance evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he "failed to supervise student-athletes after games." But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way. Again recognizing as much, the District conceded before the Ninth Circuit that its challenged directives were not "generally applicable."

[*Justice Gorsuch's free speech analysis omitted*]

IV

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. . . .

[The Court then rejected the District's reliance on *Lemon* in finding an Establishment Clause violation sufficient to limit the Free Exercise and Free Speech claims.]

. . . In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the "Court's Establishment Clause jurisprudence. The District and the Ninth Circuit erred by failing to heed this guidance.

B

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." Government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise," No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the

First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion. . . .

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by "including a clerical member" who publicly recited prayers "as part of an official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." In *Santa Fe Independent School Dist.* v. *Doe*, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. The Court observed that, while students generally were not required to attend games, attendance *was* required for "cheerleaders, members of the band, and, of course, the team members themselves." None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline.

C

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should "trump" the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.

V

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is Reversed.

JUSTICE SOTOMAYOR, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel* v. *Vitale*, this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50- yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon* v. *Kurtzman*, and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "praying quietly while his students were otherwise occupied." The record before us, however, tells a different story.

A

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Baha'is, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated.

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS). Kennedy's job description required him to "[a]ccompany and direct" all home and out-of-town games to which he was assigned, overseeing preparation and transportation before games, being "responsible for player behavior both on and off the field," supervising dressing rooms, and securing all facilities at the close of each practice." His duties encompassed "supervising student activities immediately following the completion of the game" until the students were released to their parents or otherwise allowed to leave. . . .

B

In September 2015, a coach from another school's football team informed BHS' principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team's coach told the principal that he

thought it was "'cool'" that the District "'would allow its coaches to go ahead and invite other teams' coaches and players to pray after a game.'"

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy re- counted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too. . . .

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "'intended to conduct ceremonies on the field after football games if others were allowed to.'" To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements . . . .

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. The BHS players, after singing the fight song, joined Kennedy at midfield after he stood up from praying. . . .

After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension. . . .

C

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

The Establishment Clause prohibits States from adopting laws "respecting an establishment of religion." The First Amendment's next Clause prohibits the government from making any law "prohibiting the free exercise thereof." Taken together, these two Clauses (the Religion Clauses) express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission."

The Establishment Clause protects this freedom by "commanding a separation of church and state." At its core, this means forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activity." In the context of public schools, it means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."

Indeed, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. "'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,'" meaning that "'[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.'" Families "entrust public schools with the education of their children . . . on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." Accordingly, the Establishment Clause "proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'" or otherwise endorsing religious beliefs.

Second, schools face a higher risk of unconstitutionally "coercing . . . support or participation in religion or its exercise" than other government entities. The State "exerts great authority and coercive power" in schools as a general matter "through mandatory attendance requirements." Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent. The Court also has held that incorporating a nondenominational general benediction into a graduation ceremony is unconstitutional. Finally, this Court has held that including prayers in student football games is unconstitutional, even when delivered by students rather than staff and even when students themselves initiated the prayer.

B

Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a "state official directing the performance of a formal religious exercise" as a part of the "ceremony" of a school event "conflicts with settled rules pertaining to prayer exercises for students." Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were "clothed in the traditional indicia of school sporting events." Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration."

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. This Court has previously recognized a heightened potential for coercion where school officials are involved, as their "efforts to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face "immense social pressure" from their peers in the "extracurricular event that is American high school football."

The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work. . . .

Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that "'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" Thus, the Court has held that the Establishment Clause "will not permit" a school "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students. . . .

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.

A

This case involves three Clauses of the First Amendment. As a threshold matter, the Court today proceeds

from two mistaken understandings of the way the protections these Clauses embody interact. . . .

The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether the particular acts in question are intended to establish or inter- fere with religious beliefs and practices or have the effect of doing so." As discussed above, that inquiry leads to the conclusion that permitting Kennedy's desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context.

B

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the practice, would perceive it as a state endorsement of prayer in public schools." The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*. . . .

C

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.'" Here again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.

For now, it suffices to say that the Court's history-and- tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court claims that the District "never raised coercion concerns" simply because the District conceded

that there was "'no evidence that students were *directly* coerced to pray with Kennedy.'" The Court's suggestion that coercion must be "direct" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Today's Court quotes the *Lee* Court's remark that enduring others' speech is "'part of learning how to live in a pluralistic society.'" The *Lee* Court, however, expressly concluded, in the very same paragraph, that "[t]his argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief" prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on . . . state intervention in religious affairs."

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regard[ed] every high school student's decision to attend . . . as purely voluntary." Kennedy's prayers raise precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. As discussed above, this mode of analysis contravenes precedent by "turning a blind eye to the context in which Kennedy's practice arose," This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quiet" and the students were otherwise "occupied." The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures

surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give "verbal" prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him "voluntarily" and pray. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

To reiterate, the District did not argue, and neither court below held, that "*any* visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive on students." Nor has anyone contended that a coach may never visibly pray on the field. The courts below simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns.

***

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government," while the second erects a "backstop that disables our government from breaking it" and "starting us down the path to the past, when the right to free exercise was routinely abridged."

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

[*Justice Sotomayor also included in her dissent three pictures of Coach Kennedy praying after football games*]

Rosenberger v. Rector and Visitors of the University of Virginia

515 U.S. 819 (1995)

Justice KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

I

The public corporation we refer to as the "University" is denominated by state law as "the Rector and Visitors of the University of Virginia," and it is responsible for governing the school. Founded by Thomas Jefferson in 1819, and ranked by him, together with the authorship of the Declaration of Independence and of the Virginia Act for Religious Freedom, as one of his proudest achievements, the University is among the Nation's oldest and most respected seats of higher learning. It has more than 11,000 undergraduate students, and 6,000 graduate and professional students. An understanding of the case requires a somewhat detailed description of the program the University created to support extracurricular student activities on its campus.

Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a "Contracted Independent Organization" (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO. CIO's enjoy access to University facilities, including meeting rooms and computer terminals. A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO's "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."

All CIO's may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities that "are related to the educational purpose of the University." The SAF is based on the University's "recognition that the availability of a wide range of opportunities" for its students "tends to enhance the University environment." The Guidelines require that it be administered "in a manner consistent with the educational purpose of the University as well as with state and federal law." The SAF receives its money from a mandatory fee of $14 per semester assessed to each full-time student. The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs.

Some, but not all, CIO's may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." One of these is "student news, information, opinion, entertainment, or academic communications media groups." The Guidelines also specify, however, that the costs of certain activities of CIO's that are otherwise eligible for funding will not be

reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses. The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which ... espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."

The Guidelines prescribe these criteria for determining the amounts of third-party disbursements that will be allowed on behalf of each eligible student organization: the size of the group, its financial self-sufficiency, and the University-wide benefit of its activities. If an organization seeks SAF support, it must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups. During the 1990–1991 academic year, 343 student groups qualified as CIO's. One hundred thirty-five of them applied for support from the SAF, and 118 received funding. Fifteen of the groups were funded as "student news, information, opinion, entertainment, or academic communications media groups."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "religious organization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF to pay its printer $5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP's request on the ground that Wide Awake was a "religious activity" within the meaning of the Guidelines, i.e., that the newspaper "promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality." It made its determination after examining the first issue. WAP appealed the denial to the full Student Council, contending that WAP met all the applicable Guidelines and that denial of SAF support on the basis of the magazine's religious perspective violated the Constitution. The appeal was denied without further comment, and WAP appealed to the next level, the Student Activities Committee. In a letter signed by the Dean of Students, the committee sustained the denial of funding.

Having no further recourse within the University structure, WAP, Wide Awake, and three of its editors and members filed suit in the United States District Court for the Western District of Virginia, challenging the SAF's action as violative of 42 U.S.C. § 1983. They alleged that refusal to authorize payment of the

printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. . . .

On cross-motions for summary judgment, the District Court ruled for the University, holding that denial of SAF support was not an impermissible content or viewpoint discrimination against petitioners' speech, and that the University's Establishment Clause concern over its "religious activities" was a sufficient justification for denying payment to third-party contractors. The court did not issue a definitive ruling on whether reimbursement, had it been made here, would or would not have violated the Establishment Clause.

The United States Court of Appeals for the Fourth Circuit, in disagreement with the District Court, held that the Guidelines did discriminate on the basis of content. It ruled that, while the State need not underwrite speech, there was a presumptive violation of the Speech Clause when viewpoint discrimination was invoked to deny third-party payment otherwise available to CIO's. The Court of Appeals affirmed the judgment of the District Court nonetheless, concluding that the discrimination by the University was justified by the "compelling interest in maintaining strict separation of church and state." We granted certiorari.

II

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. The most recent and most apposite case is our decision in Lamb's Chapel. There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective." There was no indication in the record in Lamb's Chapel that the request to use the school facilities was "denied, for any reason other than the fact that the presentation would have been from a religious perspective." Our conclusion was unanimous: "It discriminates on the basis of viewpoint

to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint."

The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in Lamb's Chapel, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in Lamb's Chapel and that we found invalid. The church group in Lamb's Chapel would have been qualified as a social or civic organization, save for its religious purposes. Furthermore, just as the school district in Lamb's Chapel pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. . . .

The University tries to escape the consequences of our holding in Lamb's Chapel by urging that this case involves the provision of funds rather than access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission. . . .Were the reasoning of Lamb's Chapel to apply to funding decisions as well as to those involving access to facilities, it is urged, its holding "would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds." . . .

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. . . .

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting,

where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . .

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. We turn to that question.

III

. . . A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was Everson v. Board of Ed. of Ewing. There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission. The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. We must treat it, then, as an exaction upon the students. But the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. The SAF cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion. Much like the arrangement in Widmar v. Vincent [a 1981 decision that permitted funding of religious student organizations at a public university], the money goes to a special fund from which any group of students with CIO status can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial

support for a church.

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." In this case, "the government has not fostered or encouraged" any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State . . . .

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses are paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room, as in . . . Widmar, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then Widmar . . . and Lamb's Chapel would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIO's by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. As a result, and as in Widmar, the University can charge the SAF, and not the taxpayers as a whole, for the discrete activity in question. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that would be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being. . . .

The judgment of the Court of Appeals must be, and is, reversed.

Justice O'CONNOR, concurring.

"We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." This insistence on government neutrality toward

religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all. Withholding access would leave an impermissible perception that religious activities are disfavored: "[T]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

As Justice Souter demonstrates, however, there exists another axiom in the history and precedent of the Establishment Clause. "Public funds may not be used to endorse the religious message." Our cases have permitted some government funding of secular functions performed by sectarian organizations. These decisions, however, provide no precedent for the use of public funds to finance religious activities.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. It is clear that the University has established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints. It is equally clear that petitioners' viewpoint is religious and that publication of Wide Awake is a religious activity, under both the University's regulation and a fair reading of our precedents. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. As Justice Holmes observed in a different context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types."

In Witters v. Washington Dept. of Servs. for Blind, for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church. We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case: "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."

The need for careful judgment and fine distinctions presents itself even in extreme cases. Everson v. Board of Ed. of Ewing provided perhaps the strongest exposition of the no-funding principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Yet the Court approved the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools. Although some would cynically dismiss the Court's disposition as inconsistent with its protestations, the decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict.

So it is in this case. The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to Wide Awake that it does to other publications, the University would not be endorsing the magazine's religious perspective.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the Contracted Independent Organizations (CIO)—i.e.,

student groups—provides:

The University is a Virginia public corporation and the CIO is not part of that corporation, but rather exists and operates independently of the University. . . .
The parties understand and agree that this Agreement is the only source of any control the University may have over the CIO or its activities. . . .

And the agreement requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer:

Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions.

Any reader of Wide Awake would be on notice of the publication's independence from the University.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard accompanying the University's financial assistance, when provided to a publication with a religious viewpoint such as Wide Awake, ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. Besides the general news publications, for example, the University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al–Salam, a publication to "promote a better understanding of Islam to the University Community," App. 92. Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens to dominate the forum. . . .

Subject to these comments, I join the opinion of the Court.

Justice THOMAS, concurring.

I agree with the Court's opinion and join it in full, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.

Even assuming that the Virginia debate on the so-called "Assessment Controversy" was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion. The dissent's historical discussion glosses over the fundamental characteristic of the Virginia assessment bill that sparked the controversy: The assessment was to be imposed for the support of clergy in the performance of their function of teaching religion. Thus, the "Bill Establishing a Provision for Teachers of the Christian Religion" provided for the collection of a specific tax, the proceeds of which were to be appropriated "by the Vestries, Elders, or Directors of each religious society . . . to a provision for a Minister or Teacher of the Gospel of their

denomination, or the providing places of divine worship, and to none other use whatsoever."

James Madison's Memorial and Remonstrance Against Religious Assessments (hereinafter Madison's Remonstrance) must be understood in this context. Contrary to the dissent's suggestion, Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. Nor did Madison embrace the argument that forms the linchpin of the dissent: that monetary subsidies are constitutionally different from other neutral benefits programs. Instead, Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards. According to Madison, the Virginia assessment was flawed because it "violate[d] that equality which ought to be the basis of every law." Madison's Remonstrance ¶ 4. The assessment violated the "equality" principle not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits.

Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy. For some, the experience in Virginia is consistent with the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others. Other commentators have rejected this view, concluding that the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion.

I find much to commend the former view. Madison's focus on the preferential nature of the assessment was not restricted to the fourth paragraph of the Remonstrance discussed above. The funding provided by the Virginia assessment was to be extended only to Christian sects, and the Remonstrance seized on this defect:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects.

Madison's Remonstrance ¶ 3.

In addition to the third and fourth paragraphs of the Remonstrance, "Madison's seventh, ninth, eleventh, and twelfth arguments all speak, in some way, to the same intolerance, bigotry, unenlightenment, and persecution that had generally resulted from previous exclusive religious establishments." The conclusion that Madison saw the principle of nonestablishment as barring governmental preferences for particular religious faiths seems especially clear in light of statements he made in the more relevant context of the House debates on the First Amendment. Moreover, even if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from "arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society," rather than the principle of nonestablishment in the Constitution. In any event, the views of one man do not establish the original understanding of the First Amendment.

But resolution of this debate is not necessary to decide this case. Under any understanding of the Assessment Controversy, the history cited by the dissent cannot support the conclusion that the Establishment Clause "categorically condemn[s] state programs directly aiding religious activity" when that aid is part of a neutral program available to a wide array of beneficiaries. Even if Madison believed that the principle of nonestablishment of religion precluded government financial support for religion per se (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies.

In fact, Madison's own early legislative proposals cut against the dissent's suggestion. In 1776, when Virginia's Revolutionary Convention was drafting its Declaration of Rights, Madison prepared an amendment that would have disestablished the Anglican Church. This amendment (which went too far for the Convention and was not adopted) is not nearly as sweeping as the dissent's version of disestablishment; Madison merely wanted the Convention to declare that "no man or class of men ought,

on account of religion, to be invested with peculiar emoluments or privileges....” Likewise, Madison's Remonstrance stressed that “just government” is “best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” Madison's Remonstrance ¶ 8.

Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government facilities but requires discrimination in access to government funds. The dissent purports to locate the prohibition against “direct public funding” at the “heart” of the Establishment Clause, but this conclusion fails to confront historical examples of funding that date back to the time of the founding. To take but one famous example, both Houses of the First Congress elected chaplains, and that Congress enacted legislation providing for an annual salary of $500 to be paid out of the Treasury. Madison himself was a member of the committee that recommended the chaplain system in the House. This same system of “direct public funding” of congressional chaplains has “continued without interruption ever since that early session of Congress.” . . . .

Consistent application of the dissent's “no-aid” principle would require that “‘a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.’” The dissent admits that “evenhandedness may become important to ensuring that religious interests are not inhibited.” Surely the dissent must concede, however, that the same result should obtain whether the government provides the populace with fire protection by reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program—that is, if a public fire department may extinguish fires at churches—then they may also benefit on equal terms in the former program.

Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

I

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that such evenhanded availability is not by itself enough to satisfy constitutional requirements for any aid scheme that results in a benefit to religion. Something more is necessary to justify any religious aid. Some

Members of the Court, at least, may think the funding permissible on a view that it is indirect, since the money goes to Wide Awake's printer, not through Wide Awake's own checking account. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums, which sometimes is permissible. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion. Different Members of the Court seek to avoid this bar in different ways. The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax. I do not read Justice O'Connor's opinion as sharing that assumption; she places this Student Activities Fund in a category of student funding enterprises from which religious activities in public universities may benefit, so long as there is no consequent endorsement of religion. The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A

The Court's difficulties will be all the more clear after a closer look at Wide Awake than the majority opinion affords. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11." . . . .

[Wide Awake's message] is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communication ..." (in the language of the University's funding criterion), but the words of "challenge to Christians to live, in word and deed, according to the faith they proclaim and ... to consider what a personal relationship with Jesus Christ means" (in the language of Wide Awake's founder). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled. Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand:

"Who does not see that ... the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3.

Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to

support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," and its text provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever..." We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it, see Jefferson's Preamble, and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment. . . .

Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter. Reasonable minds may differ over whether the Court reached the correct result in each of these cases, but their common principle has never been questioned or repudiated. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed ... indoctrination into the beliefs of a particular religious faith."

B

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section. Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint," or its "religious perspective," and in distinguishing funding of Wide Awake from the funding of a church, the Court maintains that "[Wide Awake] is not a religious institution, at least in the usual sense." The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

Nevertheless, even without the encumbrance of detail from Wide Awake's actual pages, the Court finds something sufficiently religious about the magazine to require examination under the Establishment Clause, and one may therefore ask why the unequivocal prohibition on direct funding does not lead the Court to conclude that funding would be unconstitutional. The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant factor" in certain Establishment Clause analysis, not a dispositive one. This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection.

In order to understand how the Court thus begins with sound rules but ends with an unsound result, it

is necessary to explore those rules in greater detail than the Court does. As the foregoing quotations from the Court's opinion indicate, the relationship between the prohibition on direct aid and the requirement of evenhandedness when affirmative government aid does result in some benefit to religion reflects the relationship between basic rule and marginal criterion. At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Is any government activity that provides any incidental benefit to religion likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important. However the Court may in the past have phrased its line-drawing test, the question whether such benefits are provided on an evenhanded basis has been relevant, for the question addresses one aspect of the issue whether a law is truly neutral with respect to religion (that is, whether the law either "advance[s] [or] inhibit[s] religion." . . . In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channelling aid to it exclusively. Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.

Three cases permitting indirect aid to religion, Mueller v. Allen, Witters v. Washington Dept. of Servs. for Blind, and Zobrest v. Catalina Foothills School Dist., are among the latest of those to illustrate this relevance of evenhandedness when advancement is not so obvious as to be patently unconstitutional. Each case involved a program in which benefits given to individuals on a religion-neutral basis ultimately were used by the individuals, in one way or another, to support religious institutions. In each, the fact that aid was distributed generally and on a neutral basis was a necessary condition for upholding the program at issue. But the significance of evenhandedness stopped there. We did not, in any of these cases, hold that satisfying the condition was sufficient, or dispositive. Even more importantly, we never held that evenhandedness might be sufficient to render direct aid to religion constitutional. Quite the contrary. Critical to our decisions in these cases was the fact that the aid was indirect; it reached religious institutions "only as a result of the genuinely independent and private choices of aid recipients," In noting and relying on this particular feature of each of the programs at issue, we in fact reaffirmed the core prohibition on direct funding of religious activities. Thus, our holdings in these cases were little more than extensions of the unremarkable proposition that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier...." Such "attenuated financial benefit[s], ultimately controlled by the private choices of individual[s]," we have found, are simply not within the contemplation of the Establishment Clause's broad prohibition.

Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid. And nowhere has the Court's adherence to the preeminence of the no-direct-funding principle over the principle of evenhandedness been as clear as in Bowen v. Kendrick.

Bowen involved consideration of the Adolescent Family Life Act (AFLA), a federal grant program providing funds to institutions for counseling and educational services related to adolescent sexuality and pregnancy. At the time of the litigation, 141 grants had been awarded under the AFLA to a broad array of both secular and religiously affiliated institutions. In an Establishment Clause challenge to the Act brought by taxpayers and other interested parties, the District Court resolved the case on a pretrial motion for summary judgment, holding the AFLA program unconstitutional both on its face and also insofar as religious institutions were involved in receiving grants under the Act. When this Court reversed on the issue of facial constitutionality under the Establishment Clause, we said that there was "no intimation in the statute that at some point, or for some grantees, religious uses are permitted." On the contrary, after

looking at the legislative history and applicable regulations, we found safeguards adequate to ensure that grants would not be "used by ... grantees in such a way as to advance religion."

With respect to the claim that the program was unconstitutional as applied, we remanded the case to the District Court "for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered." Specifically, we told the District Court, on remand, to "consider ... whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'" In giving additional guidance to the District Court, we suggested that application of the Act would be unconstitutional if it turned out that aid recipients were using materials "that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." At no point in our opinion did we suggest that the breadth of potential recipients, or distribution on an evenhanded basis, could have justified the use of federal funds for religious activities, a position that would have made no sense after we had pegged the Act's facial constitutionality to our conclusion that advancement of religion was not inevitable. . . .

Instead, the central enquiry in each of these general aid cases, as in Bowen, was whether secular activities could be separated from the sectarian ones sufficiently to ensure that aid would flow to the secular alone.

Witters, Mueller, and Zobrest expressly preserve the standard thus exhibited so often. Each of these cases explicitly distinguished the indirect aid in issue from contrasting examples in the line of cases striking down direct aid, and each thereby expressly preserved the core constitutional principle that direct aid to religion is impermissible. It appears that the University perfectly understood the primacy of the no-direct-funding rule over the evenhandedness principle when it drew the line short of funding "any activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." . . .

C

. . . Justice O'Connor makes a comprehensive analysis of the manner in which the activity fee is assessed and distributed. She concludes that the funding differs so sharply from religious funding out of governmental treasuries generally that it falls outside Establishment Clause's purview in the absence of a message of religious endorsement (which she finds not to be present). The opinion of the Court concludes more expansively that the activity fee is not a tax, and then proceeds to find the aid permissible on the legal assumption that the bar against direct aid applies only to aid derived from tax revenue. I have already indicated why it is fanciful to treat the fee as anything but a tax, and will not repeat the point again. The novelty of the assumption that the direct aid bar only extends to aid derived from taxation, however, requires some response.

Although it was a taxation scheme that moved Madison to write in the first instance, the Court has never held that government resources obtained without taxation could be used for direct religious support, and our cases on direct government aid have frequently spoken in terms in no way limited to tax revenues. Allowing nontax funds to be spent on religion would, in fact, fly in the face of clear principle. Leaving entirely aside the question whether public nontax revenues could ever be used to finance religion without violating the endorsement test, any such use of them would ignore one the dual objectives of the Establishment Clause, which was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government. Since the corrupting effect of government support does not turn on whether the Government's own money comes from taxation or gift or the sale of public lands, the Establishment Clause could hardly relax its vigilance simply because tax revenue was not implicated. Accordingly, in the absence of a forthright disavowal, one can only assume that the Court does not mean to eliminate one half of the Establishment Clause's justification.

D

Nothing in the Court's opinion would lead me to end this enquiry into the application of the Establishment Clause any differently from the way I began it. The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment

Clause.

II

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

The Court acknowledges the necessity for a university to make judgments based on the content of what may be said or taught when it decides, in the absence of unlimited amounts of money or other resources, how to honor its educational responsibilities. Nor does the Court generally question that in allocating public funds a state university enjoys spacious discretion. Accordingly, the Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints.

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. As when deciding whether a speech restriction is content based or content neutral, "[t]he government's purpose is the controlling consideration." So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. Nor does a municipality's decision to prohibit political advertising on bus placards amount to viewpoint discrimination when in the course of applying this policy it denies space to a person who wishes to speak in favor of a particular political candidate.

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activity," which is not eligible for funding is "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality." It is clear that this is the basis on which Wide Awake Productions was denied funding. The discussion of Wide Awake's content shows beyond any question that it "primarily promotes or manifests a particular belief(s) in or about a deity ...," in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists as the University maintained at oral argument. The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that "primarily promotes or manifests" any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Court, of course, reads the Guidelines differently, but while I believe the Court is wrong in construing their breadth, the important point is that even on the Court's own construction the Guidelines

impose no viewpoint discrimination. In attempting to demonstrate the potentially chilling effect such funding restrictions might have on learning in our Nation's universities, the Court describes the Guidelines as "a sweeping restriction on student thought and student inquiry," disentitling a vast array of topics to funding. As the Court reads the Guidelines to exclude "any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality," as well as "those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality," the Court concludes that the major works of writers from Descartes to Sartre would be barred from the funding forum. The Court goes so far as to suggest that the Guidelines, properly interpreted, tolerate nothing much more than essays on "making pasta or peanut butter cookies."

Now, the regulation is not so categorically broad as the Court protests. The Court reads the word "primarily" ("primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality") right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion. But, as I said, that is not the important point. Even if the Court were indeed correct about the funding restriction's categorical breadth, the stringency of the restriction would most certainly not work any impermissible viewpoint discrimination under any prior understanding of that species of content discrimination. If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone's viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

The Guidelines are thus substantially different from the access restriction considered in Lamb's Chapel, the case upon which the Court heavily relies in finding a viewpoint distinction here. Lamb's Chapel addressed a school board's regulation prohibiting the after-hours use of school premises "by any group for religious purposes," even though the forum otherwise was open for a variety of social, civic, and recreational purposes. "Religious" was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject.

With this understanding, it was unremarkable that in Lamb's Chapel we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums.

III

Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in Lemon v. Kurtzman: "in constitutional adjudication some steps, which when taken

were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

I respectfully dissent.

Christian Legal Society v. Martinez

561 U.S. 661 (2010)

Justice GINSBURG delivered the opinion of the Court.

This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program.

We reject CLS's First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

I

Like many institutions of higher education, Hastings encourages students to form extracurricular associations that "contribute to the Hastings community and experience."

Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law–School channels to communicate with students: They may place announcements in a weekly Office–of–Student–Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

In exchange for these benefits, RSOs must abide by certain conditions. Only a "non-commercial organization whose membership is limited to Hastings students may become [an RSO]." A prospective RSO must submit its bylaws to Hastings for approval, and if it intends to use the Law School's name or logo, it must sign a license agreement. Critical here, all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students."

The Law School's Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." Other law schools have adopted similar all-comers policies. From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, "no student organization at Hastings ever sought an exemption from the Policy."

In 2004, CLS became the first student group to do so. At the beginning of the academic year, the leaders of a predecessor Christian organization formed CLS by affiliating with the national Christian Legal Society (CLS–National). CLS chapters must adopt bylaws that require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS–National. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.

CLS formally requested an exemption from the Nondiscrimination Policy, but Hastings declined to grant one. "[T]o be one of our student-recognized organizations," Hastings reiterated, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them.

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004–2005 academic year. CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services. It also hosted a beach barbeque, Thanksgiving dinner, campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet, and other informal social activities.

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings' refusal to grant the organization RSO status violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.

III

A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, this Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced "through ... significantly less restrictive [means]." "Freedom of association," we have

recognized, "plainly presupposes a freedom not to associate." Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights."

We are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

B

Most recently and comprehensively, in Rosenberger, we reiterated that a university generally may not withhold benefits from student groups because of their religious outlook. The officially recognized student group in Rosenberger was denied student-activity-fee funding to distribute a newspaper because the publication discussed issues from a Christian perspective. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held, the university had engaged in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."

"Once it has opened a limited [public] forum," we emphasized, "the State must respect the lawful boundaries it has itself set." The constitutional constraints on the boundaries the State may set bear repetition here: "The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, ... nor may it discriminate against speech on the basis of ... viewpoint."

C

We first consider whether Hastings' policy is reasonable taking into account the RSO forum's function and "all the surrounding circumstances."

1

Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment." This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."

We therefore "approach our task with special caution," mindful that Hastings' decisions about the character of its student-group program are due decent respect.

2

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students." Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the ... educational experience is best promoted when all participants in the forum must provide equal access to all students." RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male–Superiority Club barred a female

student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Our decisions have declined to distinguish between status and conduct in this context. See Lawrence v. Texas ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.")

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings' policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove."

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

3

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place."

In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Although CLS could not take advantage of RSO-specific methods of communication, the advent of electronic media and social-networking sites reduces the importance of those channels.

Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation. Based on the record before us, CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled.

4

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." This catchphrase confuses CLS's preferred policy with constitutional limitation—the *advisability* of Hastings' policy does not control its *permissibility*. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation."

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO-hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. Several RSOs at Hastings limit their membership rolls and officer slates in just this way.

Hastings, furthermore, could reasonably expect more from its law students than the disruptive behavior CLS hypothesizes—and to build this expectation into its educational approach. A reasonable

policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

Finally, CLS asserts (and the dissent repeats) that the Law School lacks any legitimate interest—let alone one reasonably related to the RSO forum's purposes—in urging "religious groups not to favor co-religionists for purposes of their religious activities." CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.

D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

1

It is hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to Healy, Widmar, and Rosenberger, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its *own* viewpoint-based objections to ... nondiscrimination laws (which it is entitled to have and [to] voice) with viewpoint *discrimination*."

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims. Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims. [Footnote 27: CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in Employment Div. v. Smith forecloses that argument. In Smith, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.]

IV

For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

The Hastings College of the Law, a state institution, permits student organizations to register with the law school and severely burdens speech by unregistered groups. Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS). CLS claims that Hastings refused to register the group because the law school administration disapproves of the group's viewpoint and thus violated the group's free speech rights.

Rejecting this argument, the Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit any student who wishes to join. Deferring broadly to the law school's judgment about the permissible limits of student debate, the Court concludes that this "accept-all-comers" policy is both viewpoint-neutral and consistent with Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups.

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. The Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups—groups to which, as Hastings candidly puts it, these institutions "do not wish to ... lend their name[s]."

I

C

According to the majority, CLS is "seeking what is effectively a state subsidy," and the question presented in this case centers on the "use of school funds." In fact, funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. As CLS notes, "[t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen." . . .

III

The Court focuses solely on the question whether Hastings' registration policy represents a permissible regulation in a limited public forum.

In this case, the forum consists of the RSO program. Once a public university opens a limited public forum, it "must respect the lawful boundaries it has itself set." The university "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" And the university must maintain strict viewpoint neutrality.

This requirement of viewpoint neutrality extends to the expression of religious viewpoints. In an unbroken line of decisions [including Good News Club v. Milford Central School; Rosenberger; Lamb's Chapel v. Center Moriches Union Free School Dist.; and Widmar v. Vincent], analyzing private religious speech in limited public forums, we have made it perfectly clear that "religion is a viewpoint from which ideas are conveyed."

We have applied this analysis in cases in which student speech was restricted because of the speaker's

religious viewpoint, and we have consistently concluded that such restrictions constitute viewpoint discrimination.

IV

Analyzed under this framework, Hastings' refusal to register CLS pursuant to its Nondiscrimination Policy plainly fails. As previously noted, when Hastings refused to register CLS, it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation. As interpreted by Hastings and applied to CLS, both of these grounds constituted viewpoint discrimination.

Religion. The First Amendment protects the right of "'expressive association' " —that is, "the right to associate for the purpose of speaking." And the Court has recognized [in Boy Scouts v. Dale] that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."

With one important exception, the Hastings Nondiscrimination Policy respected that right. As Hastings stated in its answer, the Nondiscrimination Policy "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." But the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination. "By the very terms of the [Nondiscrimination Policy], the University ... select[ed] for disfavored treatment those student [groups] with religious ... viewpoints." Rosenberger. It is no wonder that the Court makes no attempt to defend the constitutionality of the Nondiscrimination Policy.

It bears emphasis that permitting religious groups to limit membership to those who share the groups' beliefs would not have the effect of allowing other groups to discriminate on the basis of religion. It would not mean, for example, that fraternities or sororities could exclude students on that basis. As our cases have recognized, the right of expressive association permits a group to exclude an applicant for membership only if the admission of that person would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." Groups that do not engage in expressive association have no such right. Similarly, groups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group's ability to express its views. But for religious groups, the situation is very different. This point was put well by a coalition of Muslim, Christian, Jewish, and Sikh groups: "Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association."

Sexual Orientation. The Hastings Nondiscrimination Policy, as interpreted by the law school, also discriminated on the basis of viewpoint regarding sexual morality. CLS has a particular viewpoint on this subject, namely, that sexual conduct outside marriage between a man and a woman is wrongful. Hastings would not allow CLS to express this viewpoint by limiting membership to persons willing to express a sincere agreement with CLS's views. By contrast, nothing in the Nondiscrimination Policy prohibited a group from expressing a contrary viewpoint by limiting membership to persons willing to endorse that group's beliefs. A Free Love Club could require members to affirm that they reject the traditional view of sexual morality to which CLS adheres. It is hard to see how this can be viewed as anything other than viewpoint discrimination.

VI

It is clear that the accept-all-comers policy is not reasonable in light of the purpose of the RSO forum, and it is impossible to say on the present record that it is viewpoint neutral.

A

Once a state university opens a limited forum, it "must respect the lawful boundaries it has itself set." Hastings' regulations on the registration of student groups impose only two substantive limitations: A group seeking registration must have student members and must be noncommercial. Access to the forum is not limited to groups devoted to particular purposes. The regulations provide that a group applying for registration must submit an official document including "a statement of its purpose," but the regulations make no attempt to define the limits of acceptable purposes. The regulations do not require a group seeking registration to show that it has a certain number of members or that its program is of interest to any particular number of Hastings students. Nor do the regulations require that a group serve a need not met by existing groups.

The regulations also make it clear that the registration program is not meant to stifle unpopular speech. They proclaim that "[i]t is the responsibility of the Dean to ensure an ongoing opportunity for the expression of a variety of viewpoints." They also emphatically disclaim any endorsement of or responsibility for views that student groups may express.

Taken as a whole, the regulations plainly contemplate the creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus. That is precisely what the parties in this case stipulated: The RSO forum "seeks to promote a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality."

The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus. As explained above, a group's First Amendment right of expressive association is burdened by the "forced inclusion" of members whose presence would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, "'unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'"

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints. The Court lists four justifications offered by Hastings in defense of the accept-all-comers policy and, deferring to the school's judgment, the Court finds all those justifications satisfactory. If we carry out our responsibility to exercise our own independent judgment, however, we must conclude that the justifications offered by Hastings and accepted by the Court are insufficient.

The Court first says that the accept-all-comers policy is reasonable because it helps Hastings to ensure that "'leadership, educational, and social opportunities'" are afforded to all students. The RSO forum, however, is designed to achieve these laudable ends in a very different way—by permitting groups of students, no matter how small, to form the groups they want. In this way, the forum multiplies the opportunity for students to serve in leadership positions; it allows students to decide which educational opportunities they wish to pursue through participation in extracurricular activities; and it permits them to create the "social opportunities" they desire by forming whatever groups they wish to create.

Second, the Court approves the accept-all-comers policy because it is easier to enforce than the Nondiscrimination Policy that it replaced. It would be "a daunting labor," the Court warns, for Hastings to try to determine whether a group excluded a member based on belief as opposed to status.

This is a strange argument, since the Nondiscrimination Policy prohibits discrimination on substantially the same grounds as the antidiscrimination provisions of many States, including California, and except for the inclusion of the prohibition of discrimination based on sexual orientation, the Nondiscrimination Policy also largely tracks federal antidiscrimination laws. Moreover, Hastings now willingly accepts greater burdens under its latest policy, which apparently requires the school to distinguish between certain "conduct requirements" that are allowed and others that are not. Nor is Hastings daunted by the labor of determining whether a club admissions exam legitimately tests knowledge or is a pretext for screening out students with disfavored beliefs. Asked at oral argument whether CLS could require applicants to pass a test on the Bible, Hastings' attorney responded: "If it were truly an objective knowledge test, it would be okay." The long history of disputes about the meaning of Bible passages belies any suggestion that it would be an easy task to determine whether the grading of such a test was "objective."

Third, the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Nor do they thwart the objectives that Hastings endorses. Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building," not by abridging First Amendment rights.

Fourth, the Court observes that Hastings' policy "incorporates—in fact, subsumes—state-law proscriptions on discrimination." Because the First Amendment obviously takes precedence over any state law, this would not justify the Hastings policy even if it were true—but it is not. The only Hastings policy considered by the Court—the accept-all-comers policy—goes far beyond any California antidiscrimination law. Neither Hastings nor the Court claims that California law demands that state entities must accept all comers. Hastings itself certainly does not follow this policy in hiring or student admissions.

In sum, Hastings' accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints "among "—not within—"registered student organizations."

B

The Court is also wrong in holding that the accept-all-comers policy is viewpoint neutral. The Court proclaims that it would be "hard to imagine a more viewpoint-neutral policy," but I would not be so quick to jump to this conclusion. Even if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext.

The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination. A simple example illustrates this obvious point. Suppose that a hated student group at a state university has never been able to attract more than 10 members. Suppose that the university administration, for the purpose of preventing that group from using the school grounds for meetings, adopts a new rule under which the use of its facilities is restricted to groups with more than 25 members. Although this rule would be neutral on its face, its adoption for a discriminatory reason would be illegal.

Here, CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.

Here, Hastings claims that it has had an accept-all-comers policy since 1990, but it has not produced a single written document memorializing that policy. Nor has it cited a single occasion prior to the dean's deposition when this putative policy was orally disclosed to either student groups interested in applying for registration or to the Office of Student Services, which was charged with reviewing the bylaws of applicant groups to ensure that they were in compliance with the law school's policies.

C

One final aspect of the Court's decision warrants comment. In response to the argument that the accept-all-comers-policy would permit a small and unpopular group to be taken over by students who wish to silence its message, the Court states that the policy would permit a registered group to impose membership requirements "designed to ensure that students join because of their commitment to a group's vitality, not its demise." Ante, at 2992. With this concession, the Court tacitly recognizes that Hastings does not really have an accept-all-comers policy—it has an accept-some- dissident-comers policy—and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's " demise" (who may be kept out) is hopelessly vague.

Here is an example. Not all Christian denominations agree with CLS's views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was "vital" but rectified, while CLS, I assume, would take the view that the old group had suffered its "demise." Whether a change represents reform or transformation may depend very much on the eye of the beholder.

In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely would not eliminate this threat.

The possibility of such takeovers, however, is by no means the most important effect of the Court's holding. There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. This is where the Court's decision leads.

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Our First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction. Even those who find CLS's views objectionable should be concerned about the way the group has been treated—by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.

Employment Div. v. Smith

494 U.S. 872 (1990)

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. The law defines "controlled substance" . . . [to include] the drug peyote, a hallucinogen derived from the plant Lophophorawilliamsii Lemaire.

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." . . .

II

A

. . . The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see Cantwell v. Connecticut, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the

other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Educ. v. Gobitis:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

We first had occasion to assert that principle in Reynolds v. United States, where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said,

are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

In Prince v. Massachusetts, we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." In Braunfeld v. Brown, we upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v. United States, we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was United States v. Lee. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. . . .

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see Cantwell v. Connecticut (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, to direct the education of their children, see Wisconsin v. Yoder, (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds,

have also involved freedom of religion, cf. Wooley v. Maynard, (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia Board of Education v. Barnette (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls. . . .

B

Respondents argue that, even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in Sherbert v. Verner. Under the Sherbert test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test, we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all. In Bowen v. Roy, we declined to apply Sherbert analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. In Lyng v. Northwest Indian Cemetery Protective Assn., we declined to apply Sherbert analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices." In Goldman v. Weinberger, we rejected application of the Sherbert test to military dress regulations that forbade the wearing of yarmulkes. In O'Lone v. Estate of Shabazz, we sustained, without mentioning the Sherbert test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The Sherbert test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in Roy, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment:

The statutory conditions [in Sherbert and Thomas] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions.

As the plurality pointed out in Roy, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that

system to cases of "religious hardship" without compelling reason.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself" -- contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term [in Hernandez v. Commissioner],

[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.

Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfeld v. Brown, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster

the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

* * * *

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty. . . .

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion is merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Indeed, the Court holds that, where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

A

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." In Cantwell v. Connecticut, we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. As the Court recognizes, however, the "free exercise" of religion often, if not invariably, requires the performance of (or abstention from) certain acts. [We observed in Wisconsin v. Yoder that] "belief and action cannot be neatly confined in logic-tight compartments." Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct -- conduct that happens to be an act of worship for someone -- manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the

conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. . . .

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order."

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." But as the Court later notes, as it must, in cases such as Cantwell and Yoder, we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in Yoder we expressly rejected the interpretation the Court now adopts:

[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . .

. . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.

The Court endeavors to escape from our decisions in Cantwell and Yoder by labeling them "hybrid" decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents

invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in Thomas:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The Sherbert compelling interest test applies in both kinds of cases. As I noted in Bowen v. Roy:

The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution. . . .

. . . The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them.

I would reaffirm that principle today: a neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest" or represents "the least restrictive means of achieving some compelling state interest." To me, the sounder approach -- the approach more consistent with our role as judges to decide each case on its individual merits -- is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant, and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct. . . .

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence.

There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. . . . The Court's parade of horribles not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government, and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in West Virginia Board of Education v. Barnette (overruling Minersville School District v. Gobitis) are apt:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," is to denigrate "[t]he very purpose of a Bill of Rights."

III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church, and is regarded as vital to respondents' ability to practice their religion.

Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. As we recently noted, drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today." Indeed, under federal law, peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision. In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive social security system, and military conscription, are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." Although the

question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. Unlike in Yoder, where we noted that

[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society,

religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote. But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being required to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court that because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith," our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, and one that courts are capable of making. See Tony and Susan Alamo Foundation v. Secretary of Labor.

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens, and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." Accordingly, I concur in the judgment of the Court.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." As carefully detailed in Justice O'CONNOR's concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as Cantwell v. Connecticut and Wisconsin v. Yoder as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of

benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford, and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with Justice O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion. As she points out, “the critical question in this case is whether exempting respondents from the State's general criminal prohibition will unduly interfere with fulfillment of the governmental interest.” I do disagree, however, with her specific answer to that question.

I

In weighing respondents' clear interest in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor.

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful.

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use. Moreover, other Schedule I drugs have lawful uses.

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.

Moreover, just as in Yoder, the values and interests of those seeking a religious exemption in this case

are congruent, to a great degree, with those the State seeks to promote through its drug laws. Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. There is considerable evidence that the spiritual and social support provided by the Church has been effective in combatting the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. [The dissent quotes a DEA Order indicating that the total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds, while the total amount of marijuana seized during that period was over 15 million pounds.] . . . Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This argument, however, could be made in almost any free exercise case. This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. Some religious claims involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" test to all free exercise claims, not by reaching uniform results as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make"; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. . . .

Church of the Lukumi Babalu, Inc. v. City of Hialeah

508 U.S. 520 (1993)

Justice KENNEDY delivered the opinion of the Court, except as to Part II-A-2.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas,* through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas.* The basis of the Santeria religion is the nurture of a personal relation with the *orishas,* and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

B

The Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero,* the second highest in the Santeria faith. In April 1987, the Church leased land in the City of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987.

First, the city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or

safety." Next, the council approved an emergency ordinance, Ordinance 87–40. Among other things, the incorporated state law subjected to criminal punishment "[w]hoever ... unnecessarily or cruelly ... kills any animal."

II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see Cantwell v. Connecticut, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*...." (Emphasis added). The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Indiana Employment Security Div. Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Employment Div., Dept. of Human Resources of Ore. v. Smith. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the Smith requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some.

1

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Oregon v. Smith*; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. The Church contends that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. The ordinances, furthermore, define "sacrifice" in

secular terms, without referring to religious practices.

Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. Resolution 87–66 recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan v. Maryland*. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas,* not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess [ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan v. Maryland*, seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. If the city has a real concern that certain methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence.

That the ordinances were enacted " 'because of,' not merely 'in spite of,' " their suppression of Santeria religious practice is revealed by the events preceding their enactment. Although respondent claimed at oral argument that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice.

The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from

opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you ... not to permit this Church to exist." The city attorney commented that Resolution 87–66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens...." Similar comments were made by the deputy city attorney. The legislative history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. Employment Div., Dept. of Human Resources of Ore. v. Smith. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The City claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals"; destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value"; the infliction of pain or suffering "in the interest of medical science"; the placing of poison in one's yard or enclosure; and the use of a live animal "to pursue or take wildlife or to participate in any hunting,", and "to hunt wild hogs."

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." The asserted interest in inspected meat is not pursued in contexts

similar to that of religious animal sacrifice.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *S*mith requirements is not "water[ed] ... down" but "really means what it says." A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." As we show above, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II-A and II-B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in Employment Div. v. Smith and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law ... prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those

laws that by their terms impose disabilities on the basis of religion (e. g., a law excluding members of a certain sect from public benefits; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II-A, or "general applicability," Part II-B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

I do not join that section because it departs from the opinion's general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers, i. e., whether the Hialeah City Council actually intended to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body.

Perhaps there are contexts in which determination of legislative motive must be undertaken. But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law ... prohibiting the free exercise [of religion] .... " This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

Justice BLACKMUN, with whom Justice O'CONNOR joins, concurring in the judgment.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." Employment Div. v. Smith (dissenting opinion). The Court, however, applies a different test. It applies the test announced in Smith, under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." I continue to believe that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance,

the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." If the State's goal is important enough to prohibit religiously motivated activity, it will not and must not stop at religiously motivated activity.

In this case, the ordinances at issue are both overinclusive and underinclusive in relation to the state interests they purportedly serve. They are overinclusive, as the majority correctly explains, because the "legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a fiat prohibition of all Santeria sacrificial practice." They are underinclusive as well, because "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." Moreover, the "ordinances are also underinclusive with regard to the city's interest in public health .... "

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under Sherbert v. Verner. This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." In my view, regulation that targets religion in this way, ipso facto, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "[t]he First Amendment ... does not distinguish between laws that are generally applicable and laws that target particular religious practices."

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is an easy one to decide.

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed amicus briefs on behalf of this interest, however, demonstrates that it is not a concern to be treated lightly.

City of Boerne v. Flores

521 U.S. 507 (1997)

Justice KENNEDY delivered the opinion of the Court.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA or Act). The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

I

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

The Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the commission must preapprove construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application.

II

Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith. There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. [Justice Kennedy then recounted the facts surrounding Smith and the Court's reasoning in refusing to apply to Sherbert test to that particular case.]

Many Members of Congress criticized the Court's reasoning in Smith, and this disagreement resulted in the passage of RFRA. Congress announced:

(1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

The Act's stated purposes are:

(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or ... subdivision of a State." The Act's universal coverage is confirmed in Section 2000bb–3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." In accordance with RFRA's usage of the term, we shall use "state law" to include local and municipal ordinances.

III

A

Under our Constitution, the Federal Government is one of enumerated powers. M'Culloch v. Maryland. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison.

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States. . . .The parties disagree over whether RFRA is a proper exercise of Congress's § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

[The Court then concluded that RFRA exceeded Congress's power under § 5 of the Fourteenth Amendment.]

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

Justice SCALIA, with whom Justice STEVENS joins, concurring in part.

I write to respond briefly to the claim of Justice O'CONNOR's dissent (hereinafter "the dissent") that historical materials support a result contrary to the one reached in Employment Div., Dept. of Human Resources of Oregon v. Smith. We held in Smith that the Constitution's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" The material that the dissent claims is at odds with Smith either has little to say about the issue or is in fact more consistent with Smith than with the dissent's interpretation of the Free Exercise Clause. The dissent's extravagant claim that the historical record shows Smith to have been wrong should be compared with the assessment of the most prominent scholarly critic of Smith, who, after an extensive review of the historical record, was willing to venture no more than that "constitutionally compelled exemptions [from generally applicable laws regulating conduct] were within the contemplation of the

framers and ratifiers as a possible interpretation of the free exercise clause." McConnell, The Origins and Historical Understanding of Free Exercise of Religion.

The dissent first claims that Smith's interpretation of the Free Exercise Clause departs from the understanding reflected in various statutory and constitutional protections of religion enacted by Colonies, States, and Territories in the period leading up to the ratification of the Bill of Rights. But the protections afforded by those enactments are in fact more consistent with Smith's interpretation of free exercise than with the dissent's understanding of it. The Free Exercise Clause, the dissent claims, "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law"; thus, even neutral laws of general application may be invalid if they burden religiously motivated conduct. However, the early "free exercise" enactments cited by the dissent protect only against action that is taken "for" or "in respect of" religion (Maryland Act Concerning Religion of 1649, Rhode Island Charter of 1663, and New Hampshire Constitution); or action taken "on account of" religion (Maryland Declaration of Rights of 1776 and Northwest Ordinance of 1787); or "discriminat[ory]" action; or, finally (and unhelpfully for purposes of interpreting "free exercise" in the Federal Constitution), action that interferes with the "free exercise" of religion (Maryland Act Concerning Religion of 1649 and Georgia Constitution).

Assuming, however, that the affirmative protection of religion accorded by the early "free exercise" enactments sweeps as broadly as the dissent's theory would require, those enactments do not support the dissent's view, since they contain "provisos" that significantly qualify the affirmative protection they grant. According to the dissent, the "provisos" support its view because they would have been "superfluous" if "the Court was correct in Smith that generally applicable laws are enforceable regardless of religious conscience." I disagree. In fact, the most plausible reading of the "free exercise" enactments (if their affirmative provisions are read broadly, as the dissent's view requires) is a virtual restatement of Smith: Religious exercise shall be permitted so long as it does not violate general laws governing conduct. The "provisos" in the enactments negate a license to act in a manner "unfaithfull to the Lord Proprietary" (Maryland Act Concerning Religion of 1649), or "behav[e]" in other than a "peaceabl[e] and quie[t]" manner (Rhode Island Charter of 1663), or "disturb the public peace" (New Hampshire Constitution), or interfere with the "peace [and] safety of th [e] State" (New York, Maryland, and Georgia Constitutions), or "demea[n]" oneself in other than a "peaceable and orderly manner" (Northwest Ordinance of 1787). At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws. "[E]very breach of a law is against the peace." Queen v. Lane. Even as late as 1828, when Noah Webster published his American Dictionary of the English Language, he gave as one of the meanings of "peace": "8. Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the peace; to break the peace." This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right "to do only what was not lawfully prohibited," West, The Case Against a Right to Religion–Based Exemptions. "Thus, the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions." And while, under this interpretation, these early "free exercise" enactments support the Court's judgment in Smith, I see no sensible interpretation that could cause them to support what I understand to be the position of Justice O'CONNOR, or any of Smith 's other critics. No one in that camp, to my knowledge, contends that their favored "compelling state interest" test conforms to any possible interpretation of "breach of peace and order"—i.e., that only violence or force, or any other category of action (more limited than "violation of law") which can possibly be conveyed by the phrase "peace and order," justifies state prohibition of religiously motivated conduct.

Apart from the early "free exercise" enactments of Colonies, States, and Territories, the dissent calls attention to those bodies', and the Continental Congress's, legislative accommodation of religious practices prior to ratification of the Bill of Rights. This accommodation—which took place both before and after enactment of the state constitutional protections of religious liberty—suggests (according to the

dissent) that "the drafters and ratifiers of the First Amendment ... assumed courts would apply the Free Exercise Clause similarly." But that legislatures sometimes (though not always) found it "appropriate," to accommodate religious practices does not establish that accommodation was understood to be constitutionally mandated by the Free Exercise Clause. As we explained in Smith, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."

The dissent's final source of claimed historical support consists of statements of certain of the Framers in the context of debates about proposed legislative enactments or debates over general principles (not in connection with the drafting of State or Federal Constitutions). Those statements are subject to the same objection as was the evidence about legislative accommodation: There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable. Thus, for example, the pamphlet written by James Madison opposing Virginia's proposed general assessment for support of religion does not argue that the assessment would violate the "free exercise" provision in the Virginia Declaration of Rights, although that provision had been enacted into law only eight years earlier; rather the pamphlet argues that the assessment wrongly placed civil society ahead of personal religious belief and, thus, should not be approved by the legislators. Likewise, the letter from George Washington to the Quakers by its own terms refers to Washington's "wish and desire" that religion be accommodated, not his belief that existing constitutional provisions required accommodation. These and other examples offered by the dissent reflect the speakers' views of the "proper" relationship between government and religion, but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship. The one exception is the statement by Thomas Jefferson that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises," but it is quite clear that Jefferson did not in fact espouse the broad principle of affirmative accommodation advocated by the dissent.

It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, none exists. The closest one can come in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777 required acknowledgment of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. Even this lone case is weak authority, not only because it comes from a minor court, but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege. On the other side of the ledger, moreover, there are two cases, from the Supreme Court of Pennsylvania, flatly rejecting the dissent's view.

I have limited this response to the new items of "historical evidence" brought forward by today's dissent. (The dissent's claim that "[b]efore Smith, our free exercise cases were generally in keeping" with the dissent's view is adequately answered in Smith itself.) The historical evidence marshalled by the dissent cannot fairly be said to demonstrate the correctness of Smith; but it is more supportive of that conclusion than destructive of it. And, to return to a point I made earlier, that evidence is not compatible with any theory I am familiar with that has been proposed as an alternative to Smith. The dissent's approach has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented by Smith is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall

it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in Smith: It shall be the people.

Justice O'CONNOR, with whom Justice BREYER joins except as to the first paragraph of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act of 1993 (RFRA) is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Div., Dept. of Human Resources of Oregon v. Smith (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether Smith represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in Smith, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that Smith improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I

The Court's analysis of whether RFRA is a constitutional exercise of Congress' § 5 power, set forth in Part III–B of its opinion, is premised on the assumption that Smith correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. I continue to believe that Smith adopted an improper standard for deciding free exercise claims. In Smith, five Members of this Court—without briefing or argument on the issue—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before Smith, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

The Court's rejection of this principle in Smith is supported neither by precedent nor, as discussed below, by history. The decision has harmed religious liberty. For example, a Federal District Court, in reliance on Smith, ruled that the Free Exercise Clause was not implicated where Hmong natives objected on religious grounds to their son's autopsy, conducted pursuant to a generally applicable state law. Yang v. Sturner (D.R.I. 1990). The Court of Appeals for the Eighth Circuit held that application of a city's zoning laws to prevent a church from conducting services in an area zoned for commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area. Cornerstone Bible Church v. Hastings (1991); see also Rector of St. Bartholomew's Church v. City of New York (C.A.2 1990) (no free exercise claim where city's application of facially neutral landmark designation law "drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs"); State v. Hershberger (Minn.1990) (Free Exercise Clause provided no basis for exempting an Amish farmer from displaying a bright orange triangle on his buggy, to which the farmer objected on religious grounds, even though the evidence showed that some other material would have served the State's purpose equally well). These cases demonstrate that lower courts applying Smith no longer find necessary a searching judicial inquiry into the possibility of reasonably

accommodating religious practice.

I believe that we should reexamine our holding in Smith, and do so in this very case. In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest.

II

I shall not restate what has been said in other opinions, which have demonstrated that Smith is gravely at odds with our earlier free exercise precedents. Rather, I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause—an inquiry the Court in Smith did not undertake. We have previously recognized the importance of interpreting the Religion Clauses in light of their history. Lynch v. Donnelly, (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees"); School Dist. of Abington Township v. Schempp (1963).

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-Smith jurisprudence.

A

The original Constitution, drafted in 1787 and ratified by the States in 1788, had no provisions safeguarding individual liberties, such as freedom of speech or religion. Federalists, the chief supporters of the new Constitution, took the view that amending the Constitution to explicitly protect individual freedoms was superfluous, since the rights that the amendments would protect were already completely secure. See, e.g., 1 Annals of Congress 440 (remarks of James Madison, June 8, 1789). Moreover, they feared that guaranteeing certain civil liberties might backfire, since the express mention of some freedoms might imply that others were not protected. According to Alexander Hamilton, a Bill of Rights would even be dangerous, in that by specifying "various exceptions to powers" not granted, it "would afford a colorable pretext to claim more than were granted." The Federalist No. 84. Anti–Federalists, however, insisted on more definite guarantees. Apprehensive that the newly established Federal Government would overwhelm the rights of States and individuals, they wanted explicit assurances that the Federal Government had no power in matters of personal liberty. T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 194 (1986). Additionally, Baptists and other Protestant dissenters feared for their religious liberty under the new Federal Government and called for an amendment guaranteeing religious freedom.

In the end, legislators acceded to these demands. By December 1791, the Bill of Rights had been added to the Constitution. With respect to religious liberty, the First Amendment provided: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Neither the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise protection. It would be disingenuous to say that the Framers neglected to define precisely the scope of the Free Exercise Clause because the words "free exercise" had a precise meaning. L. Levy, Essays on American Constitutional History 173 (1972). As is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase signified. But a variety of sources supplement the legislative history and shed light on the original understanding of the Free Exercise Clause. These materials suggest that—contrary to Smith—the Framers did not intend simply to prevent the government from adopting laws that discriminated against religion. Although the Framers may not have asked precisely the questions about religious liberty that we do today, the historical record indicates that they believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice.

B

The principle of religious "free exercise" and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. To the contrary, these principles were first articulated in this country in the Colonies of Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina, in the mid–1600's. These Colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups—although often limited to Christian groups—beyond their own. Thus, they encountered early on the conflicts that may arise in a society made up of a plurality of faiths.

The term "free exercise" appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant Governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the "free exercise" of their religion. McConnell, The Origins and Historical Understanding of Free Exercise of Religion (1990) (hereinafter Origins of Free Exercise). Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion: "[N]oe person ... professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof ... nor any way [be] compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt." Act Concerning Religion of 1649, reprinted in 5 The Founders' Constitution 49, 50 (P. Kurland & R. Lerner eds.1987) (hereinafter Founders' Constitution). Rhode Island's Charter of 1663 used the analogous term "liberty of conscience." It protected residents from being in any ways "molested, punished, disquieted, or called in question, for any differences in opinione, in matters of religion, and doe not actually disturb the civil peace of our sayd colony." The Charter further provided that residents may "freely, and fully have and enjoy his and their own judgments, and conscience in matters of religious concernments...; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness; nor to the civil injury, or outward disturbance of others." Charter of Rhode Island and Providence Plantations, 1663, in 8 W. Swindler, Sources and Documents of United States Constitutions 363 (1979) (hereinafter Swindler). Various agreements between prospective settlers and the proprietors of Carolina, New York, and New Jersey similarly guaranteed religious freedom, using language that paralleled that of the Rhode Island Charter of 1663.

These documents suggest that, early in our country's history, several Colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty. Moreover, these Colonies appeared to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent "licentiousness." In other words, when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise. Such notions parallel the ideas expressed in our pre-Smith cases—that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest.

C

The principles expounded in these early charters re-emerged over a century later in state constitutions that were adopted in the flurry of constitution drafting that followed the American Revolution. By 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution. Origins of Free Exercise 1455. These state provisions, which were typically longer and more detailed than the Federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests. For example, the New York Constitution of 1777 provided:

[T]he free exercise and enjoyment of religious profession and worship, without discrimination or

preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Similarly, the New Hampshire Constitution of 1784 declared:

Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, ... provided he doth not disturb the public peace, or disturb others, in their religious worship.

The Maryland Declaration of Rights of 1776 read:

[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.

The religious liberty clause of the Georgia Constitution of 1777 stated:

All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.

In addition to these state provisions, the Northwest Ordinance of 1787—which was enacted contemporaneously with the drafting of the Constitution and reenacted by the First Congress—established a bill of rights for a territory that included what is now Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota. Article I of the Ordinance declared:

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

The language used in these state constitutional provisions and the Northwest Ordinance strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to "free exercise" required, where possible, accommodation of religious practice. If not—and if the Court was correct in Smith that generally applicable laws are enforceable regardless of religious conscience—there would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State." Such a proviso would have been superfluous. Instead, these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes.

The Virginia Legislature may have debated the issue most fully. In May 1776, the Virginia Constitutional Convention wrote a constitution containing a Declaration of Rights with a clause on religious liberty. The initial drafter of the clause, George Mason, proposed the following:

That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be (directed) only by reason and conviction, not by force or violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Mason's proposal did not go far enough for a 26–year–old James Madison, who had recently completed his studies at the Presbyterian College of Princeton. He objected first to Mason's use of the term "toleration," contending that the word implied that the right to practice one's religion was a governmental favor, rather than an inalienable liberty. Second, Madison thought Mason's proposal countenanced too much state interference in religious matters, since the "exercise of religion" would have yielded whenever it was deemed inimical to "the peace, happiness, or safety of society." Madison suggested the provision read instead.

That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.

Thus, Madison wished to shift Mason's language of "toleration" to the language of rights. See S. Cobb, The Rise of Religious Liberty in America 492 (1902) (reprint 1970) (noting that Madison objected to the word "toleration" as belonging to "a system where was an established Church, and where a certain liberty of worship was granted, not of right, but of grace"). Additionally, under Madison's proposal, the State could interfere in a believer's religious exercise only if the State would otherwise "be manifestly endangered." In the end, neither Mason's nor Madison's language regarding the extent to which state interests could limit religious exercise made it into the Virginia Constitution's religious liberty clause. Like the Federal Free Exercise Clause, the Virginia religious liberty clause was simply silent on the subject, providing only that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights, Art. XVI (1776), in 10 Swindler 50. For our purposes, however, it is telling that both Mason's and Madison's formulations envisioned that, when there was a conflict, a person's interest in freely practicing his religion was to be balanced against state interests. Although Madison endorsed a more limited state interest exception than did Mason, the debate would have been irrelevant if either had thought the right to free exercise did not include a right to be exempt from certain generally applicable laws. Presumably, the Virginia Legislature intended the scope of its free exercise provision to strike some middle ground between Mason's narrower and Madison's broader notions of the right to religious freedom.

D

The practice of the Colonies and early States bears out the conclusion that, at the time the Bill of Rights was ratified, it was accepted that government should, when possible, accommodate religious practice. Unsurprisingly, of course, even in the American Colonies inhabited by people of religious persuasions, religious conscience and civil law rarely conflicted. Most 17th and 18th century Americans belonged to denominations of Protestant Christianity whose religious practices were generally harmonious with colonial law. Curry, The First Freedoms, at 219 ("The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality"). Moreover, governments then were far smaller and less intrusive than they are today, which made conflict between civil law and religion unusual.

Nevertheless, tension between religious conscience and generally applicable laws, though rare, was not unknown in pre-constitutional America. Most commonly, such conflicts arose from oath requirements, military conscription, and religious assessments. Origins of Free Exercise 1466. The ways in which these conflicts were resolved suggest that Americans in the Colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage. For example, Quakers and certain other Protestant sects refused on Biblical grounds to subscribe to oaths or "swear" allegiance to civil authority. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional

Heritage of the Religion Clauses 14 (1990) (hereinafter Adams & Emmerich). Without accommodation, their beliefs would have prevented them from participating in civic activities involving oaths, including testifying in court. Colonial governments created alternatives to the oath requirement for these individuals. In early decisions, for example, the Carolina proprietors applied the religious liberty provision of the Carolina Charter of 1665 to permit Quakers to enter pledges in a book. Curry, The First Freedoms, at 56. Similarly, in 1691, New York enacted a law allowing Quakers to testify by affirmation, and in 1734, it permitted Quakers to qualify to vote by affirmation. By 1789, virtually all of the States had enacted oath exemptions. See Adams & Emmerich 62.

Early conflicts between religious beliefs and generally applicable laws also occurred because of military conscription requirements. Quakers and Mennonites, as well as a few smaller denominations, refused on religious grounds to carry arms. Members of these denominations asserted that liberty of conscience should exempt them from military conscription. Obviously, excusing such objectors from military service had a high public cost, given the importance of the military to the defense of society. Nevertheless, Rhode Island, North Carolina, and Maryland exempted Quakers from military service in the late 1600's. New York, Massachusetts, Virginia, and New Hampshire followed suit in the mid–1700's. Origins of Free Exercise 1468. The Continental Congress likewise granted exemption from conscription:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Again, this practice of excusing religious pacifists from military service demonstrates that, long before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation. Notably, the Continental Congress exempted objectors from conscription to avoid "violence to their consciences," explicitly recognizing that civil laws must sometimes give way to freedom of conscience.

States and Colonies with established churches encountered a further religious accommodation problem. Typically, these governments required citizens to pay tithes to support either the government-established church or the church to which the tithepayer belonged. But Baptists and Quakers, as well as others, opposed all government-compelled tithes on religious grounds. Massachusetts, Connecticut, New Hampshire, and Virginia responded by exempting such objectors from religious assessments. There are additional examples of early conflicts between civil laws and religious practice that were similarly settled through accommodation of religious exercise. Both North Carolina and Maryland excused Quakers from the requirement of removing their hats in court; Rhode Island exempted Jews from the requirements of the state marriage laws; and Georgia allowed groups of European immigrants to organize whole towns according to their own faith.

To be sure, legislatures, not courts, granted these early accommodations. But these were the days before there was a Constitution to protect civil liberties—judicial review did not yet exist. These legislatures apparently believed that the appropriate response to conflicts between civil law and religious scruples was, where possible, accommodation of religiousconduct. It is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded.

E

The writings of the early leaders who helped to shape our Nation provide a final source of insight into the original understanding of the Free Exercise Clause. The thoughts of James Madison—one of the principal architects of the Bill of Rights—as revealed by the controversy surrounding Virginia's General Assessment Bill of 1784, are particularly illuminating. Virginia's debate over religious issues did not end with its adoption of a constitutional free exercise provision. Although Virginia had disestablished the Church of England in 1776, it left open the question whether religion might be supported on a

nonpreferential basis by a so-called "general assessment." Levy, Essays on American Constitutional History, at 200. In the years between 1776 and 1784, the issue how to support religion in Virginia—either by general assessment or voluntarily—was widely debated. Curry, The First Freedoms, at 136.

By 1784, supporters of a general assessment, led by Patrick Henry, had gained a slight majority in the Virginia Assembly. They introduced "A Bill Establishing a Provision for the Teachers of the Christian Religion," which proposed that citizens be taxed in order to support the Christian denomination of their choice, with those taxes not designated for any specific denomination to go to a public fund to aid seminaries. Madison viewed religious assessment as a dangerous infringement of religious liberty and led the opposition to the bill. He took the case against religious assessment to the people of Virginia in his now-famous "Memorial and Remonstrance Against Religious Assessments." This pamphlet led thousands of Virginians to oppose the bill and to submit petitions expressing their views to the legislature. The bill eventually died in committee, and Virginia instead enacted a Bill for Establishing Religious Freedom, which Thomas Jefferson had drafted in 1779.

The "Memorial and Remonstrance" begins with the recognition that "[t]he Religion ... of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 2 Writings of James Madison 184 (G. Hunt ed.1901). By its very nature, Madison wrote, the right to free exercise is "unalienable," both because a person's opinion "cannot follow the dictates of other[s]," and because it entails "a duty towards the Creator." Madison continued:

This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society.... [E]very man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

To Madison, then, duties to God were superior to duties to civil authorities—the ultimate loyalty was owed to God above all. Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.

Other early leaders expressed similar views regarding religious liberty. Thomas Jefferson, the drafter of Virginia's Bill for Establishing Religious Freedom, wrote in that document that civil government could interfere in religious exercise only "when principles break out into overt acts against peace and good order." In 1808, he indicated that he considered "'the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.'" 11 The Writings of Thomas Jefferson 428–429 (A. Lipscomb ed.1904) (quoted in Office of Legal Policy, U.S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 7 (1986)). Moreover, Jefferson believed that "'[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.'"

George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers:

[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

Oliver Ellsworth, a Framer of the First Amendment and later Chief Justice of the United States, expressed the similar view that government could interfere in religious matters only when necessary "to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil

example and detriment." Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), reprinted in 4 Founders' Constitution 640. Isaac Backus, a Baptist minister who was a delegate to the Massachusetts ratifying convention of 1788, declared that " 'every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.' " Backus, A Declaration of Rights, of the Inhabitants of the State of Massachusetts–Bay, in Isaac Backus on Church, State, and Calvinism 487 (W. McLoughlin ed.1968).

These are but a few examples of various perspectives regarding the proper relationship between church and government that existed during the time the First Amendment was drafted and ratified. Obviously, since these thinkers approached the issue of religious freedom somewhat differently, see Adams & Emmerich 21–31, it is not possible to distill their thoughts into one tidy formula. Nevertheless, a few general principles may be discerned. Foremost, these early leaders accorded religious exercise a special constitutional status. The right to free exercise was a substantive guarantee of individual liberty, no less important than the right to free speech or the right to just compensation for the taking of property. See P. Kauper, Religion and the Constitution 17 (1964) ("[O]ur whole constitutional history ... supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances..."). As Madison put it in the concluding argument of his "Memorial and Remonstrance":

[T]he equal right of every citizen to the free exercise of his Religion according to the dictates of [his] conscience' is held by the same tenure with all our other rights.... [I]t is equally the gift of nature; ... it cannot be less dear to us; ... it is enumerated with equal solemnity, or rather studied emphasis.

Second, all agreed that government interference in religious practice was not to be lightly countenanced. Adams & Emmerich 31. Finally, all shared the conviction that " 'true religion and good morals are the only solid foundation of public liberty and happiness.'" Curry, The First Freedoms, at 219 (quoting Continental Congress); see Adams & Emmerich 72 ("The Founders ... acknowledged that the republic rested largely on moral principles derived from religion"). To give meaning to these ideas—particularly in a society characterized by religious pluralism and pervasive regulation—there will be times when the Constitution requires government to accommodate the needs of those citizens whose religious practices conflict with generally applicable law.

III

The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law. As the historical sources discussed above show, the Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application. Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech—a right enumerated only a few words after the right to free exercise—has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.

Although it may provide a bright line, the rule the Court declared in Smith does not faithfully serve the purpose of the Constitution. Accordingly, I believe that it is essential for the Court to reconsider its holding in Smith—and to do so in this very case. I would therefore direct the parties to brief this issue and set the case for reargument.

I respectfully dissent from the Court's disposition of this case.

Burwell v. Hobby Lobby Stores, Inc.

134 S.Ct. 2751 (2014)

Justice ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA) permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test.

I

A

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in Employment Div., Dept. of Human Resources of Ore. v. Smith (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like Sherbert v. Verner (1963) and Wisconsin v. Yoder (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in Sherbert that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. And in Yoder, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years.

In Smith, however, the Court rejected "the balancing test set forth in Sherbert." Smith concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the Sherbert test, held that the denial of benefits violated the Free Exercise Clause.

This Court then reversed, observing that use of the Sherbert test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of

constitutionally required religious exemptions from civic obligations of almost every conceivable kind." The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores (1997).

Congress responded to Smith by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. In City of Boerne, however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith."

Following our decision in City of Boerne, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." Before RLUIPA, RFRA's definition made reference to the First Amendment. See RFRA (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA). ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individual." And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require.

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved

contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections."

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. And employers with fewer than 50 employees are not required to provide health insurance at all.

All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013.

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages ... shares humanity with those who conceived it."

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles."

As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception commonly called "morning after" pills and two types of intrauterine devices.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO.

Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.

III

A

The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

B

1

As we noted above, RFRA applies to "a person's" exercise of religion and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise."

Under the Dictionary Act, "the wor[d] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA.

This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term "person" includes some but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive

explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy ... often furthers individual religious freedom as well." But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the "exercise of religion" within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-Smith Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase "exercise of religion under the First Amendment" was meant to be tied to this Court's pre-Smith interpretation of that Amendment. When first enacted, RFRA defined the "exercise of religion" to mean "the exercise of religion under the First Amendment"—not the exercise of religion as recognized only by then-existing Supreme Court precedents. When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so.

Further, the one pre-Smith case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In Gallagher v. Crown Kosher Super Market of Mass., Inc., the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument.

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric."

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider

RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. We have little trouble concluding that it does.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. § 4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

Although these totals are high, those supporting HHS have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the

companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. Likewise, employers can deduct the cost of providing health insurance, but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Moreover, in Thomas v. Review Bd. of Indiana Employment Security Div., we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent.

Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function ... in this context is to determine" whether the line drawn reflects "an honest conviction" and there is no dispute that it does.

Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and "gender equality." RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." O Centro. This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. O Centro.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see Griswold v. Connecticut, and HHS tells us that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services."

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections."

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest."

B

The least-restrictive-means standard is exceptionally demanding and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot

be used to require creation of entirely new programs." But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. See RLUIPA ("[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements ... on the eligible organization, the group health plan, or plan participants or beneficiaries."

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," because their employers' insurers would be responsible for providing information and coverage. Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,' " because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated."

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in Lee despite the religious objection of an employer, but these cases are quite different. Our holding in Lee turned primarily on the special problems associated with a national system of taxation. We noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

Lee was a free-exercise, not a RFRA, case, but if the issue in Lee were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing tax-payers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into "undifferentiated funds." The accommodation established by HHS requires issuers to have a mechanism by which to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. In making this plea, the dissent reiterates a point made forcefully by the Court in Smith. But Congress, in enacting RFRA, took the position that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER

and Justice KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Planned Parenthood of Southeastern Pa. v. Casey. Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary. Particular services were to be recommended by the U.S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that "many women's health advocates and medical professionals believe are critically important." 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment, which added to the ACA's minimum coverage requirements a new category of preventive services specific to women's health.

B

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions." That amendment, Senator Mikulski observed, would have "pu[t] the personal opinion of employers and insurers over the practice of medicine." Rejecting the "conscience amendment," Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court's decision in Employment Div., Dept. of Human Resources of Ore. v. Smith. The First Amendment is not offended, Smith held, when "prohibiting the exercise of religion ... is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." The ACA's contraceptive coverage requirement applies generally, it is "otherwise valid," it trains on women's well being, not on the exercise of religion, and any effect it has on

such exercise is incidental.

Even if Smith did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. In sum, with respect to free exercise claims no less than free speech claims, "'[y]our right to swing your arms ends just where the other man's nose begins.'" Chafee, Freedom of Speech in War Time.

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith." Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal.

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened."

The legislative history is correspondingly emphatic on RFRA's aim. (RFRA was "designed to restore the compelling interest test for deciding free exercise claims."). In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to Smith for guidance." In short, the Act reinstates the law as it was prior to Smith, without "creat[ing] ... new rights for any religious practice or for any potential litigant."

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise ... religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-Smith case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test, as noted, applies to government actions that "substantially burden a person's exercise of religion." This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise.". Here, context does so indicate. RFRA speaks of "a person's exercise of religion." Whether a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-Smith "free-exercise caselaw." There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.

The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." Citizens United v. Federal Election Comm'n.

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." Corporation of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos. The Court's "special solicitude to the rights of religious organizations," Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC, however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in "the commercial, profit-making world." Amos.

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-Smith precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations.

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. To reiterate, "for- profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." Gilardi.

The Court questions why, if "a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't ... do the same?" But even accepting for the sake of argument the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of

RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-Smith case law, "does not require the Government to justify every action that has some effect on religious exercise."

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion ... that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. Kaemmerling v. Lappin.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." Grote v. Sebelius. It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives.

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and Inconsistent Method Use; and that only

one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be.

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes.

The ACA's grandfathering provision allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status.

The Court ultimately acknowledges a critical point: RFRA's application "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?

In sum, in view of what Congress sought to accomplish, i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-Smith decisions RFRA preserved is United States v. Lee. Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. The Government urges that Lee should control the challenges brought by Hobby Lobby and Conestoga. In contrast, today's Court dismisses Lee as a tax case.

But the Lee Court made two key points one cannot confine to tax cases. "When followers of a

particular sect enter into commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity." The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in Lee that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. [The dissent recites prior cases where, on religious grounds, business owners sought exemptions allowing them to refuse to: serve black patrons; hire anyone cohabitating with an individual of the opposite sex to whom they were not related or married; photograph a lesbian couple's commitment ceremony.] Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"?

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, "each one of these cases ... would have to be evaluated on its own ... apply[ing] the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," Lee, or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged... substantially in the exchange of goods or services for money beyond nominal amounts."

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

Holt v. Hobbs

135 S.Ct. 853 (2015)

Justice ALITO delivered the opinion of the Court.

Gregory Holt, also known as Abdul Maalik Muhammad, is an Arkansas inmate and a devout Muslim who wishes to grow a ½–inch beard in accordance with his religious beliefs. Holt's objection to shaving his beard clashes with the Arkansas Department of Correction's grooming policy, which prohibits inmates from growing beards unless they have a particular dermatological condition.

I

A

Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), "in order to provide very broad protection for religious liberty." Burwell v. Hobby Lobby Stores, Inc. RFRA was enacted three years after our decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, which held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment.

Following our decision in Smith, Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment. In making RFRA applicable to the States and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment, but in City of Boerne v. Flores, this Court held that RFRA exceeded Congress' powers under that provision.

Congress responded to City of Boerne by enacting RLUIPA, which applies to the States and their subdivisions. RLUIPA concerns two areas of government activity: Section 2 governs land-use regulation and Section 3—the provision at issue in this case—governs religious exercise by institutionalized persons. Section 3 mirrors RFRA and provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RLUIPA thus allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA." Gonzales v. O Centro Espírita Beneficente União do Vegetal.

Several provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." See Hobby Lobby.

B

Holt, as noted, is in the custody of the Arkansas Department of Correction and he objects on religious grounds to the Department's grooming policy, which provides that "[n]o inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." The policy makes no exception for inmates who object on religious grounds, but it does contain an exemption for prisoners with medical needs: "Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch." The policy provides that "[f]ailure to abide by [the Department's] grooming standards is grounds for disciplinary action."

Petitioner sought permission to grow a beard and, although he believes that his faith requires him not to trim his beard at all, he proposed a "compromise" under which he would grow only a ½–inch beard.

Prison officials denied his request, and the warden told him: "[Y]ou will abide by [Arkansas Department of Correction] policies and if you choose to disobey, you can suffer the consequences."

II

Under RLUIPA, petitioner bore the initial burden of proving that the Department's grooming policy implicates his religious exercise. RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," but, of course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation. Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.

In addition to showing that the relevant exercise of religion is grounded in a sincerely held religious belief, petitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion. Petitioner easily satisfied that obligation. The Department's grooming policy requires petitioner to shave his beard and thus to "engage in conduct that seriously violates [his] religious beliefs." If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise. Indeed, the Department does not argue otherwise.

III

Since petitioner met his burden of showing that the Department's grooming policy substantially burdened his exercise of religion, the burden shifted to the Department to show that its refusal to allow petitioner to grow a ½–inch beard "(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest."

The Department argues that its grooming policy represents the least restrictive means of furthering a " 'broadly formulated interes[t],' " namely, the Department's compelling interest in prison safety and security. But RLUIPA, like RFRA, contemplates a "'more focused'" inquiry and "'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.'" Hobby Lobby. RLUIPA requires us to " 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' " and "to look to the marginal interest in enforcing" the challenged government action in that particular context. Hobby Lobby. In this case, that means the enforcement of the Department's policy to prevent petitioner from growing a ½–inch beard.

The Department contends that enforcing this prohibition is the least restrictive means of furthering prison safety and security in two specific ways.

A

The Department first claims that the no-beard policy prevents prisoners from hiding contraband. The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards.

We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a ½–inch beard is hard to take seriously. As noted, the Magistrate Judge observed that it was "almost preposterous to think that [petitioner] could hide contraband" in the short beard he had grown at the time of the evidentiary hearing. An item of contraband would have to be very small indeed to be concealed by a ½–inch beard, and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out. Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a ½–inch beard rather than in the longer hair on his head.

RLUIPA, like RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." O Centro. That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive

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

Even if the Department could make that showing, its contraband argument would still fail because the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband. "The least-restrictive-means standard is exceptionally demanding," and it requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." Hobby Lobby. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." United States v. Playboy Entertainment Group, Inc.

The Department failed to establish that it could not satisfy its security concerns by simply searching petitioner's beard. The Department already searches prisoners' hair and clothing, and it presumably examines the ¼–inch beards of inmates with dermatological conditions. It has offered no sound reason why hair, clothing, and ¼–inch beards can be searched but ½–inch beards cannot. The Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair, clothing, and ¼–inch beards. And the Department has failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard. For all these reasons, the Department's interest in eliminating contraband cannot sustain its refusal to allow petitioner to grow a ½–inch beard.

B

The Department contends that its grooming policy is necessary to further an additional compelling interest, i.e., preventing prisoners from disguising their identities. The Department tells us that the no-beard policy allows security officers to identify prisoners quickly and accurately. It claims that bearded inmates could shave their beards and change their appearance in order to enter restricted areas within the prison, to escape, and to evade apprehension after escaping.

We agree that prisons have a compelling interest in the quick and reliable identification of prisoners, and we acknowledge that any alteration in a prisoner's appearance, such as by shaving a beard, might, in the absence of effective countermeasures, have at least some effect on the ability of guards or others to make a quick identification. But even if we assume for present purposes that the Department's grooming policy sufficiently furthers its interest in the identification of prisoners, that policy still violates RLUIPA as applied in the circumstances present here. The Department contends that a prisoner who has a beard when he is photographed for identification purposes might confuse guards by shaving his beard. But as petitioner has argued, the Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter. Once that is done, an inmate like petitioner could be allowed to grow a short beard and could be photographed again when the beard reached the ½–inch limit. Prison guards would then have a bearded and clean-shaven photo to use in making identifications. In fact, the Department (like many other States, see Brief for Petitioner 39) already has a policy of photographing a prisoner both when he enters an institution and when his "appearance changes at any time during [his] incarceration."

C

In addition to its failure to prove that petitioner's proposed alternatives would not sufficiently serve its security interests, the Department has not provided an adequate response to two additional arguments that implicate the RLUIPA analysis.

First, the Department has not adequately demonstrated why its grooming policy is substantially underinclusive in at least two respects. Although the Department denied petitioner's request to grow a ½–inch beard, it permits prisoners with a dermatological condition to grow ¼–inch beards. The Department

does this even though both beards pose similar risks. And the Department permits inmates to grow more than a ½–inch of hair on their heads. With respect to hair length, the grooming policy provides only that hair must be worn "above the ear" and "no longer in the back than the middle of the nape of the neck." Hair on the head is a more plausible place to hide contraband than a ½–inch beard—and the same is true of an inmate's clothing and shoes. Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked. Although the Department's proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct," which suggests that "those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." Church of Lukumi Babalu Aye, Inc. v. Hialeah.

In an attempt to demonstrate why its grooming policy is underinclusive in these respects, the Department emphasizes that petitioner's ½–inch beard is longer than the ¼–inch beard allowed for medical reasons. But the Department has failed to establish (and the District Court did not find) that a ¼–inch difference in beard length poses a meaningful increase in security risk. The Department also asserts that few inmates require beards for medical reasons while many may request beards for religious reasons. But the Department has not argued that denying petitioner an exemption is necessary to further a compelling interest in cost control or program administration. At bottom, this argument is but another formulation of the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." O Centro. We have rejected a similar argument in analogous contexts and we reject it again today.

Second, the Department failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow ½–inch beards, either for any reason or for religious reasons, but it cannot. "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." Procunier v. Martinez. That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks.

We do not suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do so. But when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here. Despite this, the courts below deferred to these prison officials' mere say-so that they could not accommodate petitioner's request. RLUIPA, however, demands much more. Courts must hold prisons to their statutory burden, and they must not "assume a plausible, less restrictive alternative would be ineffective." Playboy Entertainment.

We emphasize that although RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security. We highlight three ways in which this is so. First, in applying RLUIPA's statutory standard, courts should not blind themselves to the fact that the analysis is conducted in the prison setting. Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic." Cutter v. Wilkinson. Third, even if a claimant's religious belief is sincere, an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests.

IV

In sum, we hold that the Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a ½–inch beard in accordance with his religious beliefs. The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring.

Unlike the exemption this Court approved in Burwell v. Hobby Lobby Stores, Inc., accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. On that understanding, I join the Court's opinion.

Ramirez v. Collier

595 U.S. (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A Texas jury sentenced John Ramirez to death for the brutal murder of Pablo Castro. In this litigation, Ramirez does not challenge his conviction. Nor does he challenge his sentence. He asks instead that his long-time pastor be allowed to pray with him and lay hands on him while he is being executed. He says that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), requires this accommodation. Ramirez sought a preliminary injunction ordering Texas to permit his religious exercise if the State went forward with his execution. The District Court and Court of Appeals declined to grant such relief. We then stayed the execution and granted certiorari.

I

A

Pablo Castro worked the night shift at the Times Market convenience store in Corpus Christi, Texas. On July 19, 2004, Castro was outside closing up when Ramirez and an accomplice approached him with a knife. Ramirez stabbed Castro 29 times, searched his pockets, and made off with $1.25. Castro died on the pavement, leaving behind 9 children and 14 grandchildren.

Ramirez fled to Mexico, where he evaded authorities for more than three years. In 2008, he was finally apprehended near the Mexican border. Texas charged Ramirez with murdering Castro in the course of committing or attempting to commit robbery—a capital offense. Ramirez admitted to killing Castro, but denied the robbery that made the murder a capital crime. A jury disagreed, found Ramirez guilty, and sentenced him to death. The Texas Court of Criminal Appeals affirmed Ramirez's conviction and sentence on direct appeal. Ramirez's attempts to collaterally attack his conviction in state and federal court also proved unsuccessful.

B

Texas scheduled Ramirez's execution for February 2, 2017. Less than a week before that date, Ramirez moved to stay the execution, arguing that his habeas counsel had rendered constitutionally ineffective assistance. The District Court granted a stay, but later rejected Ramirez's claim. The Fifth Circuit then declined to issue a certificate of appealability. Still, this last-minute litigation had the effect of delaying Ramirez's execution for several years.

Texas rescheduled Ramirez's execution for September 9, 2020. Ramirez then asked to have his pastor accompany him into the execution chamber. Prison officials denied the request. They did so because, at the time, Texas's execution protocol barred all spiritual advisors from entering the chamber. A prior version of the protocol had allowed access for prison chaplains. But Texas employed only Christian and Muslim chaplains. In 2019, when a Buddhist inmate sought to have his spiritual advisor join him in the execution chamber, Texas declined to grant the accommodation. We stayed that execution pending certiorari, unless the State allowed a Buddhist spiritual advisor into the execution chamber. In response, Texas amended its execution protocol to bar *all* chaplains from entering the execution chamber, so as not to discriminate among religions.

Ramirez filed suit, arguing that Texas's new execution protocol violated his rights under the First

Amendment and RLUIPA. Ramirez's complaint said that he was a Christian and had received religious guidance from Pastor Dana Moore since 2016. Pastor Moore serves the Second Baptist Church in Corpus Christi, of which Ramirez is a member. Ramirez explained that he wanted his pastor "to be present at the time of his execution to pray with him and provide spiritual comfort and guidance in his final moments." Ramirez's complaint focused on prayer and explained that his pastor "need not touch [him] at any time in the execution chamber."

Texas withdrew Ramirez's death warrant before there were any further filings. As a result, the parties jointly agreed to dismiss the litigation without prejudice.

C

On February 5, 2021, Texas informed Ramirez that his new execution date would be September 8, 2021. Ramirez then filed a Step 1 prison grievance requesting that he "be allowed to have [his] spiritual advisor present in the death chamber." Texas again denied the request, but later changed course, amending its execution protocol to permit a prisoner's spiritual advisor to be present in the execution chamber…

Texas's 2021 Execution Protocol did just that. It allows a prisoner's spiritual advisor to enter the execution chamber, accompanied by a prison security escort. This accommodation is subject to various procedural requirements. For instance, the prisoner must notify the warden of his choice of spiritual advisor within 30 days of learning his execution date. Additionally, the spiritual advisor must pass a background check and undergo training. And if the spiritual advisor is "disruptive," he is subject to "immediate removal." The protocol says nothing about whether a spiritual advisor may pray aloud or touch an inmate for comfort. But Texas had long allowed its own prison chaplains to engage in such activities during executions, and it was against this backdrop that Texas enacted the new policy.

D

On June 11, 2021, Ramirez filed the grievance that is at the center of this case. Having successfully petitioned the State to allow his pastor into the execution chamber, he requested that his pastor be permitted to "lay hands" on him and "pray over" him while the execution was taking place.

Ramirez's grievance explains that it is "part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying." Texas denied the grievance on July 2, 2021. It said that spiritual advisors are "not allowed to touch an inmate while inside the execution chamber," though it did not point to any provision of its execution protocol requiring this result.

Ramirez appealed within the prison system by filing a Step 2 grievance on July 8, 2021. But with less than a month to go until his September 8 execution date, prison officials had still not ruled on that appeal. So on August 10 he filed suit in Federal District Court. Ramirez alleged that the refusal of prison officials to allow Pastor Moore to lay hands on him in the execution chamber violated his rights under RLUIPA and the First Amendment. Ramirez sought preliminary and permanent injunctive relief barring state officials from executing him unless they granted the religious accommodation.

On August 16, 2021, Ramirez's attorney inquired whether Pastor Moore would be allowed to pray audibly with Ramirez during the execution. Prison officials responded three days later that the pastor would not. So on August 22 Ramirez filed an amended complaint seeking an injunction that would allow Pastor Moore to lay hands on him *and* pray with him during the execution.

Ramirez also sought a stay of execution while the District Court considered his claims. The District Court

denied the request, as did the Fifth Circuit. Judge Dennis dissented. In his view, Ramirez's RLUIPA claims were likely to succeed because the prison's policies burdened religious exercise and were not the least restrictive means of furthering the State's compelling interest in the security of the execution.

We then stayed Ramirez's execution, granted certiorari, and heard argument on an expedited basis. Ramirez's certiorari petition asked us to determine whether Texas's restrictions on religious touch and audible prayer violate either RLUIPA or the Free Exercise Clause. Ramirez's merits brief addresses only RLUIPA, however, so we do not consider any standalone argument under the Free Exercise Clause.

We are also mindful that, while we have had full briefing and oral argument in this Court, the case comes to us in a preliminary posture: The question is whether Ramirez's execution without the requested participation of his pastor should be halted, pending full consideration of his claims on a complete record. The parties agree that the relief sought is properly characterized as a preliminary injunction. Under such circumstances, the party seeking relief "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

II

[Justice Roberts's analysis of whether Ramirez's grievance filings conformed with the statutory requirements of the Prison Litigation Reform Act of 1995 has been omitted.]

III

Congress enacted RLUIPA, and its sister statute the Religious Freedom Restoration Act of 1993, in the aftermath of our decisions in *Employment Division, Department of Human Resources of Oregon* v. *Smith* and *City of Boerne* v. *Flores*. Both statutes aim to ensure "greater protection for religious exercise than is available under the First Amendment."

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution"—including state prisoners—"even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." A plaintiff bears the initial burden of proving that a prison policy "implicates his religious exercise." Although RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," a prisoner's requested accommodation "must be sincerely based on a religious belief and not some other motivation," The burden on the prisoner's religious exercise must also be "substantial[ ].". Once a plaintiff makes such a showing, the burden flips and the government must "demonstrate[ ] that imposition of the burden on that person" is the least restrictive means of furthering a compelling governmental interest. This allocation of respective burdens applies in the preliminary injunction context.

A

To begin, we think Ramirez is likely to succeed in proving that his religious requests are "sincerely based on a religious belief." Ramirez seeks to have his pastor lay hands on him and pray over him during the execution. Both are traditional forms of religious exercise. As Ramirez's grievance states, "it is part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying." Pastor Moore, who has ministered to Ramirez for four years, agrees that prayer accompanied by touch is "a significant part of our faith tradition as Baptists." And neither the District Court nor the Court of Appeals doubted that Ramirez

had a sincere religious basis for his requested accommodations.

Respondents' argument to the contrary turns in large part on a complaint Ramirez filed in 2020. Ramirez filed the complaint while Texas's prior execution protocol, which banned all spiritual advisors from the execution chamber, was in place. The complaint sought Pastor Moore's presence and prayer in the chamber but disclaimed any need for touch. As respondents see things, this shows that Ramirez's current request for touch is insincere.

Ramirez responds that the 2020 complaint was inaccurate, and that he would have amended it had the litigation continued. The litigation, however, did not proceed, because the parties jointly agreed to dismiss the suit without prejudice less than a week after it was filed. Ramirez's specific statement in his prior complaint is certainly probative on the issue of sincerity; evolving litigation positions may suggest a prisoner's goal is delay rather than sincere religious exercise. Under the facts of this case, however, we do not think the prior complaint—dismissed without prejudice and by agreement one week after it was filed—outweighs the ample evidence that Ramirez's beliefs are sincere. Respondents do not dispute that any burden their policy imposes on Ramirez's religious exercise is substantial.

B

Because Ramirez is likely to succeed in showing that Texas's policy substantially burdens his exercise of religion, respondents must prove that their refusal to accommodate the exercise both (1) furthers "a compelling governmental interest," and (2) is the "least restrictive means of furthering that compelling governmental interest." Under RLUIPA, the government cannot dicharge this burden by pointing to "broadly formulated interests." It must instead "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened."

Here, the government has not shown that it is likely to carry that burden.

1

As for audible prayer, there is a rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation. For example, at Newgate Prison—one of London's most notorious jails—an Anglican priest would stand and pray with the condemned in their final moments. By the early 1700s, that practice had evolved to permit prisoners to be "attended by a minister, or even a priest, of their own communion." Prayer at the time of execution was also commonplace in the American Colonies. And during the Revolutionary War, General George Washington ordered that "prisoners under sentence of death" "be attended with such Chaplains, as they choose"—including at the time of their execution. These chaplains often spoke and prayed with the condemned during their final moments.

A tradition of such prayer continued throughout our Nation's history. When, for example, the Federal Government executed four members of the conspiracy that led to the assassination of President Abraham Lincoln, the prisoners were accompanied by clergy of various denominations. These "spiritual advisers" ministered to the condemned, and three spoke public prayers shortly before the prisoners were hanged. And in the aftermath of World War II, the United States Army even permitted Nazi war criminals facing execution to be accompanied by a chaplain, who "spoke" prayers on the gallows in the moments before death.

The practice continues today. In 2020 and 2021, the Federal Bureau of Prisons allowed religious advisors to speak or pray audibly with inmates during at least six federal executions. What's more, Texas itself

appears to have long allowed prison chaplains to pray with inmates in the execution chamber, deciding to prohibit such prayer only in the last several years.

Despite this long history, prison officials now insist that a categorical ban on audible prayer in the execution chamber is the least restrictive means of furthering two compelling governmental interests.

First, prison officials say that absolute silence is necessary in the execution chamber so they can monitor the inmate's condition through a microphone suspended overhead. They say that audible prayer might impede their ability to hear subtle signs of trouble or prove distracting during an emergency. We do not doubt that prison officials have a compelling interest in monitoring an execution and responding effectively during any potential emergency. And we recognize that audible prayer could present a more serious risk of interference during the delicate process of lethal injection than during the method of execution (hanging) that was used in most of the historical examples we have cited. But respondents fail to show that a categorical ban on all audible prayer is the least restrictive means of furthering their compelling interests.

Indeed, respondents offer only a conclusory defense of the policy's tailoring. They acknowledge that both the Federal Government and Alabama have recently permitted audible prayer or speech in the execution chamber, but then assert that, "under the circumstances in Texas's chamber, allowing speech during the execution is not feasible." Respondents do not explain why. Nor do they explore any relevant differences between Texas's execution chamber or process and those of other jurisdictions. Instead, they ask that we simply defer to their determination. That is not enough under RLUIPA. Nor is there a basis for deference, given that Texas has "historically and routinely allowed prison chaplains to audibly pray" with the condemned during executions, a fact Texas does not dispute.

Second, prison officials say that if they allow spiritual advisors to pray aloud during executions, the opportunity "could be exploited to make a statement to the witnesses or officials, rather than the inmate." They note that such statements might cause further trauma to the victim's family or otherwise interfere with the execution. We agree that the government has a compelling interest in preventing disruptions of any sort and maintaining solemnity and decorum in the execution chamber. But there is no indication in the record that Pastor Moore would cause the sorts of disruptions that respondents fear. Respondents' argument thus comes down to conjecture regarding what a hypothetical spiritual advisor might do in some future case. "Such speculation is insufficient to satisfy" respondents' burden, and fails to engage in the sort of case-by-case analysis that RLUIPA requires.

What's more, there appear to be less restrictive ways to handle any concerns. Prison officials could impose reasonable restrictions on audible prayer in the execution chamber—such as limiting the volume of any prayer so that medical officials can monitor an inmate's condition, requiring silence during critical points in the execution process, allowing a spiritual advisor to speak only with the inmate, and subjecting advisors to immediate removal for failure to comply with any rule. Prison officials could also require spiritual advisors to sign penalty-backed pledges agreeing to abide by all such limitations.

Given the current record, respondents have not shown that a total ban on audible prayer is the least restrictive means of furthering their asserted interests.

Respondents' categorical ban on religious touch in the execution chamber fares no better. They point to three governmental interests they say are compelling: security in the execution chamber, preventing unnecessary suffering, and avoiding further emotional trauma to the victim's family members. All three goals are commendable. But again, respondents fail to show that a categorical ban on touch is the least restrictive means of accomplishing any of them.

Respondents say that allowing a spiritual advisor to touch an inmate would place the advisor in harm's way because the inmate might escape his restraints, smuggle in a weapon, or become violent. They also contend that if a spiritual advisor were close enough to touch an inmate, he might tamper with the prisoner's restraints or yank out an IV line. We agree that prisons have compelling interests in both protecting those attending an execution and preventing them from interfering with it (though if an inmate smuggling a weapon into the execution chamber is a serious prospect, the prison has broader issues than those considered here). Even so, Texas's categorical ban on religious touch is not the least restrictive means of furthering such interests.

Under Texas's current protocol, spiritual advisors stand just three feet from the gurney in the execution chamber. A security escort is posted nearby, ready to intervene if anything goes awry. We do not see how letting the spiritual advisor stand slightly closer, reach out his arm, and touch a part of the prisoner's body well away from the site of any IV line would meaningfully increase risk. And that is all Ramirez requests here.

Respondents next argue that allowing the pastor to touch Ramirez in the execution chamber might lead to preventable suffering. The theory is that Pastor Moore might accidentally jostle, pinch, or otherwise interfere with an IV line, and that this in turn might affect the administration of the execution drugs in a way that results in greater pain or suffering. We think that preventing accidental interference with the prison's IV lines is a compelling governmental interest. But we also think it is one reasonably addressed by means short of banning *all* touch in the execution chamber.

For example, Texas could allow touch on a part of the body away from IV lines, such as a prisoner's lower leg. That seems to have been the practice of many prison chaplains during past Texas executions. Additionally, Texas could require Ramirez's pastor to stand in a location that gives the medical team an unobstructed view of the IV lines, allowing them to watch for problems and quickly respond. Texas could also restrict the time period during which touching is permitted to minimize risk during critical points in the execution process, such as the insertion of the IV line. Finally, Texas could require that the pastor undergo training so that he understands the importance of staying away from IV lines and taking whatever other precautions are necessary to avoid problems in the chamber.

Texas does nothing to rebut these obvious alternatives, instead suggesting that it is Ramirez's burden to "identify any less restrictive means." That gets things backward. Once a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy "is the least restrictive means of furthering [a] compelling governmental interest."

Finally, respondents say that allowing certain forms of religious touch might further traumatize a victim's family members who are present as witnesses, reminding them that their loved one received no such solace. As we have already noted, maintaining solemnity and decorum in the execution chamber is a compelling governmental interest. But here what is at issue is allowing Pastor Moore to respectfully touch Ramirez's foot or lower leg inside the execution chamber. Respondents do not contend that this particular act will result in trauma. Instead, their real concern seems to be with other, potentially more problematic requests down the line. RLUIPA, however, requires that courts take cases one at a time, considering only "the particular claimant whose sincere exercise of religion is being substantially burdened." As a result, respondents' final argument is unavailing.

We conclude that Ramirez is likely to prevail on his claim that Texas's categorical ban on religious touch in the execution chamber is inconsistent with his rights under RLUIPA.

IV

A

Our conclusion that Ramirez is likely to prevail on the merits of his RLUIPA claims does not end the matter. As noted earlier, he must also show "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

We think these factors also favor an injunction. Ramirez is likely to suffer irreparable harm in the absence of injunctive relief because he will be unable to engage in protected religious exercise in the final moments of his life. Compensation paid to his estate would not remedy this harm, which is spiritual rather than pecuniary.

Additionally, the balance of equities and public interest tilt in Ramirez's favor. Ramirez "does not seek an open-ended stay of execution." Rather, he requests a tailored injunction requiring that Texas permit audible prayer and religious touch during his execution. By passing RLUIPA, Congress determined that prisoners like Ramirez have a strong interest in avoiding substantial burdens on their religious exercise, even while confined. At the same time, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." Given these respective interests, a tailored injunction of the sort Ramirez seeks—rather than a stay of execution—will be the proper form of equitable relief when a prisoner raises a RLUIPA claim in the execution context. Because it is possible to accommodate Ramirez's sincere religious beliefs without delaying or impeding his execution, we conclude that the balance of equities and the public interest favor his requested relief.

B

Respondents argue that Ramirez has engaged in inequitable conduct. As they see it, this should bar the equitable relief that Ramirez seeks.

We agree that a party's inequitable conduct can make equitable relief inappropriate. When a party seeking equitable relief "has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him." These well-worn principles of equity apply in capital cases just as in all others. Thus, late-breaking changes in position, last-minute claims arising from long-known facts, and other "attempt[s] at manipulation" can provide a sound basis for denying equitable relief in capital cases.

Here, however, the record does not support the conclusion that Ramirez engaged in such misconduct. Respondents argue that Ramirez inequitably delayed this litigation by filing suit just four weeks before his scheduled execution. But this is not a case in which a litigant "slept upon his rights." To the contrary, Ramirez had sought to vindicate his rights for months. He first learned that prison officials would not allow his pastor to lay hands on him in the execution chamber on June 8, 2021. That was a break from Texas's longstanding practice. Ramirez filed a Step 1 grievance requesting both prayer and religious touch just three days later. When that grievance was rejected, he quickly filed a Step 2 grievance. Yet respondents failed to issue a final decision until August 16, 2021—39 days after Ramirez had filed his Step 2 grievance, and just a few weeks before the scheduled execution. To be sure, prison officials issued their decision within the 40 days allowed by Texas's grievance policy. But respondents can hardly complain about the inequities of delay when their own actions were a significant contributing factor.

C

As we have explained, the resolution of RLUIPA claims in the prisoner context requires a case-specific consideration of the particular circumstances and claims. At the same time, timely resolution of such claims could be facilitated if States were to adopt policies anticipating and addressing issues likely to arise. Doing so would assist both prison officials responsible for carrying out executions and prisoners preparing to confront the end of life according to their religious beliefs.

The first step would be to specify reasonable rules on the time for prisoners to request religious accommodations, and for prison officials to respond. States could also adopt streamlined procedures for claims involving requests like those at issue in this case, so that these potentially complicated matters can be litigated at all levels well in advance of any scheduled execution. If spiritual advisors are to be admitted into the execution chamber, it would also seem reasonable to require some training on procedures, including any restrictions on their movements or conduct. When a spiritual advisor would enter and must leave could be spelled out. If the advisor is to touch the prisoner, the State might also specify where and for how long. And, as noted, if audible prayer is to occur, a variety of considerations might be set forth in advance to avoid disruption. It may also be reasonable to document the advisor's advance agreement to comply with any restrictions.

If States adopt clear rules in advance, it should be the rare case that requires last-minute resort to the federal courts. If such cases do arise and a court determines that relief is appropriate under RLUIPA, the proper remedy is an injunction ordering the accommodation, not a stay of the execution. This approach balances the State's interest in carrying out capital sentences without delay and the prisoner's interest in religious exercise.

***

We hold that Ramirez is likely to prevail on the merits of his RLUIPA claims, and that the other preliminary injunction factors justify relief. If Texas reschedules Ramirez's execution and declines to permit audible prayer or religious touch, the District Court should therefore enter appropriate preliminary relief. The judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Masterpiece Cakeshop v. Colorado Civil Rights Commission

584 U.S. ____ (2018)

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti–Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious

hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." And he seeks to "honor God through his work at Masterpiece Cakeshop." One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."

B

[T]he Colorado Anti–Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services ... to the public," but excludes "a church, synagogue,

mosque, or other place that is principally used for religious purposes."

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public."

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended…

[*Free speech claim omitted*]

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in Employment Div., Dept. of Human Resources of Ore. v. Smith, the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause, The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. The Commission ordered Phillips to "cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with ... this Order." The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken."

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order.

Phillips sought review here, and this Court granted certiorari. He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation.

As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in United States v. Windsor, or Obergefell. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.” Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the

more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

On at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," featured "language and images [the baker] deemed hateful," or displayed a message the baker "deemed as discriminatory.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies" to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be

distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," West Virginia Bd. of Ed. v. Barnette, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In Church of Lukumi Babalu Aye, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance" of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be

applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

Justice KAGAN, with whom Justice BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness."

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti–Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to

the *reasoning* of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

I am pleased to join [the Court's] opinion in full. The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. But, respectfully, I do not see how we might rescue the Commission from its error.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive ... message" that the bakers in the first case refused to endorse…

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. It is no answer either simply to slide up a level of generality to

redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction…

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, or whether an adherent has "correctly perceived" the commands of his religion. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith.

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific* ; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here…

Under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith*, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. For example, in Thomas a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, ... the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

[Justice THOMAS's concurrence omitted.]

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " Gay persons may be spared from "indignities when they seek goods and services in an open market." I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] ... 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' "

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would

have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message.

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. The Commission summarily affirmed the Division's no-probable-cause finding.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, Church of Lukumi Babalu Aye, Inc. v. Hialeah, where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

Fulton v. City of Philadelphia

140 S. Ct. ____ (Jun 17, 2021)

Chief Justice Roberts delivered the opinion of the Court.

Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. During the 19th century, nuns ran asylums for orphaned and destitute youth. When criticism of asylums mounted in the Progressive Era, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code §3700.61 (2020). Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. §3700.64. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." §3700.69.

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment. CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.

The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division v. Smith*, and that the free exercise claim was therefore unlikely to succeed. The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal. The court concluded that the proposed contractual terms were a neutral and generally applicable policy under Smith. The court rejected the agency's free speech claims on the same grounds as the District Court.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under Smith and also asked this Court to reconsider that precedent.

We granted certiorari. 589 U. S. ___ (2020).

II

A

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to

merit First Amendment protection." Thomas v. Review Bd. Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule Smith, and the concurrences in the judgment argue in favor of doing so. But we need not revisit that decision here. This case falls outside Smith because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. See Church of Lukumi Babalu Aye, Inc. v. Hialeah.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n; Lukumi. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "'a mechanism for individualized exemptions.'" For example, in *Sherbert v. Verner*, a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause . . . to accept available suitable work." We held that the denial infringed her free exercise rights and could be justified only by a compelling interest.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. The City claimed that the ordinances were necessary in part to protect public health, which was "threatened by the disposal of animal carcasses in open public places." But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable.

B

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by Smith. The current version of section 3.21 specifies in pertinent part:

"Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."

This provision requires an agency to provide "Services," defined as "the work to be performed under this Contract," to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in Sherbert, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." Smith.

The City and intervenor-respondents resist this conclusion on several grounds. They first argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. The government, they observe, commands heightened powers when managing its internal operations. And when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. Given this context, the City and intervenor-respondents contend, the government should have a freer hand when dealing with contractors like CSS.

These considerations cannot save the City here. As Philadelphia rightly acknowledges, "principles of neutrality and general applicability still constrain the government in its capacity as manager." We have never suggested that the government may discriminate against religion when acting in its managerial role. And Smith itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. See Smith (citing Lyng v. Northwest Indian Cemetery Protective Assn. and Bowen v. Roy). The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

Perhaps all this explains why the City now contends that section 3.21 does not apply to CSS's refusal to certify same-sex couples after all. Instead, the City says that section 3.21 addresses only "an agency's right to refuse 'referrals' to place a child with a certified foster family." We think the City had it right the first time. Although the section is titled "Rejection of Referral," the text sweeps more broadly, forbidding the rejection of "prospective foster . . . parents" for "Services," without limitation. The City maintains that certification is one of the services foster agencies are hired to perform, so its attempt to backtrack on the reach of section 3.21 is unavailing. Moreover, the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts, confirming our understanding of the text of the provision.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." Applying that "fundamental" rule here, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons

for not complying with the policy are worthy of solicitude—here, at the Commissioner's "sole discretion."

The [Gorsuch] concurrence objects that no party raised these arguments in this Court. But CSS, supported by the United States, contended that the City's "made-for-CSS Section 3.21 permits discretionary 'exception[s]' from the requirement 'not [to] reject a child or family' based upon 'their . . . sexual orientation,' " which "alone triggers strict scrutiny." The concurrence favors the City's reading of section 3.21, but we find CSS's position more persuasive.

C

In addition to relying on the contract, the City argues that CSS's refusal to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice[ ]" in violation of the Fair Practices Ordinance. That ordinance forbids "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, . . . disability, marital status, familial status," or several other protected categories. Phila. Code §9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents.

CSS counters that "foster care has never been treated as a 'public accommodation' in Philadelphia." In any event, CSS adds, the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place. We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications.

The ordinance defines a public accommodation in relevant part as "[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." §9–1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. To make a service "available" means to make it "accessible, obtainable." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2005); see also 1 Oxford English Dictionary 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"). Related state law illustrates the same point. A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is "open to, accepts or solicits the patronage of the general public." Pa. Stat. Ann., Tit. 43, §954(l) (2009). It fleshes out that definition with examples like hotels, restaurants, drug stores, swimming pools, barbershops, and public conveyances. The "common theme" is that a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire."

Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." 55 Pa. Code §3700.64. Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, "[e]ach agency has slightly

different requirements, specialties, and training programs." All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.

The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The [Gorsuch] concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. We respectfully disagree with the view of the City and the concurrence. Although "we ordinarily defer to lower court constructions of state statutes, we do not invariably do so." Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its "foster services do not constitute a 'public accommodation' under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance." We therefore have no need to assess whether the ordinance is generally applicable.

III

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The [Gorsuch] concurrence protests that the "Court granted certiorari to decide whether to overrule [Smith]," and chides the Court for seeking to "sidestep the question." But the Court also granted review to decide whether Philadelphia's actions were permissible under our precedents. CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. Because the City's actions are therefore examined under the strictest scrutiny regardless of Smith, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. See Gonzales v. O Centro Espírita Beneficente União do Vegetal (discussing the compelling interest test applied in Sherbert and Wisconsin v. Yoder). Rather than rely on "broadly formulated interests," courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." Masterpiece Cakeshop. On the facts of this case, however, this interest cannot justify denying CSS an

exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. See Lukumi. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

* * *

As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch, with whom Justice Thomas and Justice Alito join, concurring in the judgment.

The Court granted certiorari to decide whether to overrule *Employment Division v. Smith*. As Justice Alito's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no "need" or "reason" to address the error of Smith today.

On the surface it may seem a nice move, but dig an inch deep and problems emerge. Smith exempts "neutral" and "generally applicable" laws from First Amendment scrutiny. The City argues that its challenged rules qualify for that exemption because they require all foster-care agencies—religious and non-religious alike—to recruit and certify same-sex couples interested in serving as foster parents. For its part, the majority assumes (without deciding) that Philadelphia's rule is indeed "neutral" toward religion. So to avoid Smith's exemption and subject the City's policy to First Amendment scrutiny, the majority must carry the burden of showing that the policy isn't "generally applicable."

*

That path turns out to be a long and lonely one. The district court held that the City's public accommodations law (its Fair Practices Ordinance or FPO) is both generally applicable and applicable to CSS. At least initially, the majority chooses to bypass the district court's major premise—that the FPO qualifies as "generally applicable" under Smith. It's a curious choice given that the FPO applies only to certain defined entities that qualify as public accommodations while the "generally applicable law" in Smith was "an across-the-board criminal prohibition" enforceable against anyone. But if the goal is to turn a big dispute of constitutional law into a small one, the majority's choice to focus its attack on the district court's minor premise—that the FPO applies to CSS as a matter of municipal law—begins to make some sense. Still, it isn't exactly an obvious path. The Third Circuit did not address the district

court's interpretation of the FPO. And not one of the over 80 briefs before us contests it. To get to where it wishes to go, then, the majority must go it alone. So much for the adversarial process and being "a court of review, not of first view."

Trailblazing through the Philadelphia city code turns out to be no walk in the park either. As the district court observed, the City's FPO defines "public accommodations" expansively to include "[a]ny provider" that "solicits or accepts patronage" of "the public or whose . . . services [or] facilities" are "made available to the public." And, the district court held, this definition covers CSS because (among other things) it "publicly solicits prospective foster parents" and "provides professional 'services' to the public." All of which would seem to block the majority's way. So how does it get around that problem?

It changes the conversation. The majority ignores the FPO's expansive definition of "public accommodations." It ignores the reason the district court offered for why CSS falls within that definition. Instead, it asks us to look to a different public accommodations law—a Commonwealth of Pennsylvania public accommodations statute. And, the majority promises, CSS fails to qualify as a public accommodation under the terms of that law. But why should we ignore the City's law and look to the Commonwealth's? No one knows because the majority doesn't say.

Even playing along with this statutory shell game doesn't solve the problem. The majority highlights the fact that the state law lists various examples of public accommodations—including hotels, restaurants, and swimming pools. The majority then argues that foster agencies fail to qualify as public accommodations because, unlike these listed entities, foster agencies "involv[e] a customized and selective assessment." But where does that distinction come from? Not the text of the state statute, not state case law, and certainly not from the briefs. The majority just declares it—a new rule of Pennsylvania common law handed down by the United States Supreme Court.

The majority's gloss on state law isn't just novel, it's probably wrong. While the statute lists hotels, restaurants, and swimming pools as examples of public accommodations, it also lists over 40 other kinds of institutions—and the statute emphasizes that these examples are illustrative, not exhaustive. Among its illustrations, too, the statute offers public "colleges and universities" as examples of public accommodations. Often these institutions do engage in a "customized and selective assessment" of their clients (students) and employees (faculty). And if they can qualify as public accommodations under the state statute, it isn't exactly clear why foster agencies cannot. What does the majority have to say about this problem? Again, silence.

If anything, the majority's next move only adds to the confusion. It denies cooking up any of these arguments on its own. It says it merely means to "agree with CSS's position . . . that its 'foster services do not constitute a "public accommodation" under the City's Fair Practices Ordinance.'" But CSS's cited "position"—which comes from a letter it sent to the City before litigation even began—includes nothing like the majority's convoluted chain of reasoning involving a separate state statute. Instead, CSS's letter contends that the organization's services do not qualify as "public accommodations" because they are "only available to at-risk children who have been removed by the state and are in need of a loving home." The majority tells us with assurance that it "agree[s] with" this position, adding that it would be "incongru[ous]" to "dee[m] a private religious foster agency a public accommodation."

What to make of all this? Maybe this part of the majority opinion should be read only as reaching for something—anything—to support its curious separate-statute move. But maybe the majority means to reject the district court's major premise after all—suggesting it would be incongruous for public accommodations laws to qualify as generally applicable under Smith because they do not apply to everyone. Or maybe the majority means to invoke a canon of constitutional avoidance: Before concluding

that a public accommodations law is generally applicable under Smith, courts must ask themselves whether it would be "incongru[ous]" to apply that law to religious groups. Maybe all this ambiguity is deliberate, maybe not. The only thing certain here is that the majority's attempt to cloak itself in CSS's argument introduces more questions than answers.

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Still that's not the end of it. Even now, the majority's circumnavigation of Smith remains only half complete. The City argues that, in addition to the FPO, another generally applicable nondiscrimination rule can be found in §15.1 of its contract with CSS. That provision independently instructs that foster service providers "shall not discriminate or permit discrimination against any individual on the basis of . . . sexual orientation." This provision, the City contends, amounts to a second and separate rule of general applicability exempt from First Amendment scrutiny under Smith. Once more, the majority must find some way around the problem. Its attempt to do so proceeds in three steps.

First, the majority directs our attention to another provision of the contract—§3.21. Entitled "Rejection of Referral," this provision prohibits discrimination based on sexual orientation, race, religion, or other grounds "unless an exception is granted" in the government's "sole discretion." Clearly, the majority says, that provision doesn't state a generally applicable rule against discrimination because it expressly contemplates "exceptions."

But how does that help? As §3.21's title indicates, the provision contemplates exceptions only when it comes to the referral stage of the foster process—where the government seeks to place a particular child with an available foster family. So, for example, the City has taken race into account when placing a child who "used racial slurs" to avoid placing him with parents "of that race." Meanwhile, our case has nothing to do with the referral—or placement—stage of the foster process. This case concerns the recruitment and certification stages—where foster agencies like CSS screen and enroll adults who wish to serve as foster parents. And in those stages of the foster process, §15.1 seems to prohibit discrimination absolutely.

That difficulty leads the majority to its second step. It asks us to ignore §3.21's title and its limited application to the referral stage. See ante, at 9. Instead, the majority suggests, we should reconceive §3.21 as authorizing exceptions to the City's nondiscrimination rule at every stage of the foster process. Once we do that, the majority stresses, §3.21's reservation of discretion is irreconcilable with §15.1's blanket prohibition against discrimination.

This sets up the majority's final move—where the real magic happens. Having conjured a conflict within the contract, the majority devises its own solution. It points to some state court decisions that, it says, set forth the "rule" that Pennsylvania courts shouldn't interpret one provision in a contract "to annul" another part. To avoid nullifying §3.21's reservation of discretion, the majority insists, it has no choice but to rewrite §15.1. All so that—voila—§15.1 now contains its own parallel reservation of discretion. As rewritten, the contract contains no generally applicable rule against discrimination anywhere in the foster process.

From start to finish, it is a dizzying series of maneuvers. The majority changes the terms of the parties' contract, adopting an uncharitably broad reading (really revision) of §3.21. It asks us to ignore the usual rule that a more specific contractual provision can comfortably coexist with a more general one. And it proceeds to resolve a conflict it created by rewriting §15.1. Once more, too, no party, amicus, or lower court argued for any of this.

To be sure, the majority again claims otherwise—representing that it merely adopts the arguments of CSS and the United States. But here, too, the majority's representation raises rather than resolves questions. Instead of pursuing anything like the majority's contract arguments, CSS and the United States suggest that §3.21 "alone triggers strict scrutiny," because that provision authorizes the City "to grant formal exemptions from its policy" of nondiscrimination. On this theory, it's irrelevant whether §3.21 or §15.1 reserve discretion to grant exemptions at all stages of the process or at only one stage. Instead, the City's power to grant exemptions from its nondiscrimination policy anywhere "undercuts its asserted interests" and thus "trigger[s] strict scrutiny" for applying the policy everywhere. Exceptions for one means strict scrutiny for all. See, e.g., Tandon v. Newsom (per curiam). All of which leaves us to wonder: Is the majority just stretching to claim some cover for its novel arguments? Or does it actually mean to adopt the theory it professes to adopt?

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Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about Smith's fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no "need" or "reason" to revisit Smith today.

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice Alito outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the §3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it even means.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. See Masterpiece Cakeshop. After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. Because certain government officials responsible for deciding Mr. Phillips's compliance with a local public accommodations law uttered statements exhibiting hostility to his religion, the Court held, those officials failed to act "neutrally" under Smith. But with Smith still on the books, all that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. A nine-year odyssey thus barrels on. No doubt, too, those who cannot afford such endless

litigation under Smith's regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects.

The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply Smith's test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how Smith works. See, e.g., Tandon; Roman Catholic Diocese of Brooklyn v. Cuomo; High Plains Harvest Church v. Polis. To be sure, this Court began to resolve at least some of the confusion surrounding Smith's application in Tandon. But Tandon treated the symptoms, not the underlying ailment. We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created.

It's not as if we don't know the right answer. Smith has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. The Court granted certiorari in this case to resolve its fate. The parties and amici responded with over 80 thoughtful briefs addressing every angle of the problem. Justice Alito has offered a comprehensive opinion explaining why Smith should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

We hardly need to "wrestle" today with every conceivable question that might follow from recognizing Smith was wrong. Barrett, J., concurring. To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to Smith until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, see American Legion v. American Humanist Assn., the Court should overrule it now, set us back on the correct course, and address each case as it comes.

What possible benefit does the majority see in its studious indecision about Smith when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid "picking a side." But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution is picking a side. Smith committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, concurring in the judgment.

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Division v. Smith*, the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to Smith, provides no protection. This severe holding is ripe for reexamination. . . .

[Justice Alito's 110-page concurrence omitted]

Justice Barrett, with whom Justice Kavanaugh joins, and with whom Justice Breyer joins as to all but the first paragraph, concurring.

In *Employment Division v. Smith*, this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their amici, scholars, and Justices of this Court have made serious arguments that Smith ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against Smith are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace Smith? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping Smith's categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if Smith were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC. Should there be a distinction between indirect and direct burdens on religious exercise? Cf. Braunfeld v. Brown. What forms of scrutiny should apply? Compare Sherbert v. Verner (assessing whether government's interest is "'compelling'"), with Gillette v. United States (assessing whether government's interest is "substantial"). And if the answer is strict scrutiny, would pre-Smith cases rejecting free exercise challenges to garden-variety laws come out the same way?

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether Smith stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives Smith—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether Smith should be overruled, much less what should replace it. I join the Court's opinion in full.

Roman Catholic Diocese of Brooklyn v. Cuomo

140 S. Ct. ____ (November 25, 2020)

[A church and synagogue filed § 1983 actions alleging that Governor Cuomo's emergency Executive Order imposing occupancy restrictions on houses of worship during COVID-19 pandemic violated the Free Exercise Clause. The Executive Order was issued in October and limited in-person attendance at church services to either 10 or 25 people, depending on the number of COVID-19 cases in the areas in which a particular religious institution is located.

The district court denied the church's motion for temporary restraining order (TRO), a different district-court judge denied the church's motion for preliminary injunction, and another district court denied the synagogue's motion for TRO and preliminary injunction. Both moved for emergency injunctions pending appeals and to expedite the appeals. The Second Circuit granted the motions to expedite but denied the motions for emergency injunctions. The church and synagogue applied for injunctive relief pending appeal.]

PER CURIAM.

The application for injunctive relief presented to Justice BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

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This emergency application and another, Agudath Israel of America, et al. v. Cuomo, No. 20A90, present the same issue, and this opinion addresses both cases.

Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to

irreparable injury, and that granting relief would not harm the public interest. Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

Likelihood of success on the merits. The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. [Church of Lukumi.] As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the "ultra-Orthodox [Jewish] community." But even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. [Church of Lukumi.] Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court, [FN2 : See Calvary Chapel (directive limiting in-person worship services to 50 people); South Bay United Pentecostal Church (Executive Order limiting in-person worship to 25% capacity or 100 people, whichever was lower).] much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. The District Court noted that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," and it praised the Diocese's record in combatting the spread of the disease. It found that the Diocese had been constantly "ahead of the curve, enforcing stricter safety protocols than the State required." Similarly, Agudath Israel notes that "[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols and that there has been no outbreak of COVID–19 in [its] congregations."

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

Irreparable harm. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

Public interest. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.

There is no justification for that proposed course of action. It is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. The Governor regularly changes the classification of particular areas without prior notice. [FN 3: Recent changes were made on the following dates: Monday, November 23; Thursday, November 19; Wednesday, November 18; Wednesday, November 11; Monday, November 9; Friday, November 6; Wednesday, October 28; Wednesday, October 21.] If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. At most Catholic churches, Mass is celebrated daily, and "Orthodox Jews pray in [Agudath Israel's] synagogues every day." Moreover, if reclassification occurs late in a week, as has happened in the past, there may not be time for applicants to seek and obtain relief from this Court before another Sabbath passes. Thirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago. While we could presumably act more swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.

For these reasons, we hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined.

It is so ordered.

Justice GORSUCH, concurring.

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that

Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

Today's case supplies just the latest example. New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum. In "orange zones," it's not much different. Churches and synagogues are limited to a maximum of 25 people. These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds. And the restrictions apply no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.

At the same time, the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. In far too many places, for far too long, our first freedom has fallen on deaf ears.

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What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in South Bay, in which the Chief Justice expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from South Bay, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Not only did the South Bay concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in Jacobson. But Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

Start with the mode of analysis. Although Jacobson pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, Jacobson didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, Jacobson applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption. This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In Jacobson, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors. Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses. Nothing in Jacobson purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, Jacobson explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument."

Tellingly no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic. In fact, today the author of the South Bay concurrence [Chief Justice Roberts] even downplays the relevance of Jacobson for cases like the one before us. All this is surely a welcome development. But it would require a serious rewriting of history to suggest, as the Chief Justice does, that the South Bay concurrence never really relied in significant measure on Jacobson. That was the first case South Bay cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers.

Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be

understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

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That leaves my colleagues to their second line of argument. Maybe precedent does not support the Governor's actions. Maybe those actions do violate the Constitution. But, they say, we should stay our hand all the same. Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.

To my mind, this reply only advances the case for intervention. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off " switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.

Even our dissenting colleagues do not suggest this case is moot or otherwise outside our power to decide. They counsel delay only because "the disease-related circumstances [are] rapidly changing." But look at what those "rapidly changing" circumstances suggest. Both Governor Cuomo and Mayor de Blasio have "indicated it's only a matter of time before [all] five boroughs" of New York City are flipped from yellow to orange. On anyone's account, then, it seems inevitable this dispute will require the Court's attention.

It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services. Whether this Court could decide a renewed application promptly is beside the point. The parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long.

It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Justice KAVANAUGH, concurring.

I vote to grant the applications of the Roman Catholic Diocese of Brooklyn and Agudath Israel of America for temporary injunctions against New York's 10-person and 25-person caps on attendance at religious services. On this record, temporary injunctions are warranted because New York's severe caps on attendance at religious services likely violate the First Amendment. Importantly, the Court's orders

today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States' restrictions, including the California and Nevada limits at issue in South Bay and Calvary Chapel. In South Bay, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity). And in Calvary, houses of worship were limited to 50 people.

New York has gone much further. In New York's red zones, most houses of worship are limited to 10 people; in orange zones, most houses of worship are limited to 25 people. Those strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than 10 or 25 people.

Moreover, New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.

The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. The State has not done so.

To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

In light of the devastating pandemic, I do not doubt the State's authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings alike. But the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake. To reiterate, New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in South Bay and Calvary, and much more severe than the

restrictions that most other States are imposing on attendance at religious services. And New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.

For those reasons, I agree with the Chief Justice that New York's "[n]umerical capacity limits of 10 and 25 people . . . seem unduly restrictive" and that "it may well be that such restrictions violate the Free Exercise Clause." I part ways with the Chief Justice on a narrow procedural point regarding the timing of the injunctions. The Chief Justice would not issue injunctions at this time. As he notes, the State made a change in designations a few days ago, and now none of the churches and synagogues who are applicants in these cases are located in red or orange zones. As I understand it, the Chief Justice would not issue an injunction unless and until a house of worship applies for an injunction and is still in a red or orange zone on the day that the injunction is finally issued. But the State has not withdrawn or amended the relevant Executive Order. And the State does not suggest that the applicants lack standing to challenge the red-zone and orange-zone caps imposed by the Executive Order, or that these cases are moot or not ripe. In other words, the State does not deny that the applicants face an imminent injury *today*. In particular, the State does not deny that some houses of worship, including the applicants here, are located in areas that likely will be classified as red or orange zones in the very near future. I therefore see no jurisdictional or prudential barriers to issuing the injunctions now.

There also is no good reason to delay issuance of the injunctions, as I see it. If no houses of worship end up in red or orange zones, then the Court's injunctions today will impose no harm on the State and have no effect on the State's response to COVID–19. And if houses of worship end up in red or orange zones, as is likely, then today's injunctions will ensure that religious organizations are not subjected to the unconstitutional 10-person and 25-person caps. Moreover, issuing the injunctions now rather than a few days from now not only will ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

* * *

On this record, the applicants have shown: a likelihood that the Court would grant certiorari and reverse; irreparable harm; and that the equities favor injunctive relief. I therefore vote to grant the applications for temporary injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

CHIEF JUSTICE ROBERTS, dissenting.

I would not grant injunctive relief under the present circumstances. There is simply no need to do so. After the Diocese and Agudath Israel filed their applications, the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time. The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications. As things now stand, however, the applicants have not demonstrated their entitlement to "the extraordinary remedy of injunction." An order telling the Governor

not to do what he's not doing fails to meet that stringent standard.

As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with Justice Kavanaugh that they are distinguishable from those we considered in South Bay and Calvary Chapel. I take a different approach than the other dissenting Justices in this respect.

To be clear, I do not regard my dissenting colleagues as "cutting the Constitution loose during a pandemic," yielding to "a particular judicial impulse to stay out of the way in times of crisis," or "shelter[ing] in place when the Constitution is under attack." [Quoting Justice Gorsuch's concurrence.] They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

[Justice Gorsuch's] solo concurrence today takes aim at my concurring opinion in South Bay. Today's concurrence views that opinion with disfavor because "[t]o justify its result, [it] reached back 100 years in the U. S. Reports to grab hold of our decision in Jacobson. Today's concurrence notes that Jacobson "was the first case South Bay cited on the substantive legal question before the Court," and "it was the only case cited involving a pandemic." And it suggests that, in the wake of South Bay, some have "mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic." But while Jacobson occupies three pages of today's concurrence, it warranted exactly one sentence in South Bay. What did that one sentence say? Only that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" It is not clear which part of this lone quotation today's concurrence finds so discomfiting. The concurrence speculates that there is so much more to the sentence than meets the eye, invoking—among other interpretive tools—the new "first case cited" rule. But the actual proposition asserted should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for.

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

New York regulations designed to fight the rapidly spreading—and, in many cases, fatal—COVID–19 virus permit the Governor to identify hot spots where infection rates have spiked and to designate those hot spots as red zones, the immediately surrounding areas as orange zones, and the outlying areas as yellow zones. The regulations impose restrictions within these zones (with the strictest restrictions in the red zones and the least strict restrictions in the yellow zones) to curb transmission of the virus and prevent spread into nearby areas. In October, the Governor designated red, orange, and yellow zones in parts of Brooklyn and Queens. Among other things, the restrictions in these zones limit the number of persons who can be present at one time at a gathering in a house of worship to: the lesser of 10 people or 25% of maximum capacity in a red zone; the lesser of 25 people or 33% of maximum capacity in an orange zone; and 50% of maximum capacity in a yellow zone.

Both the Roman Catholic Diocese of Brooklyn and Agudath Israel of America (together with Agudath Israel of Kew Garden Hills and its employee and Agudath Israel of Madison and its rabbi) brought lawsuits against the Governor of New York. They claimed that the fixed-capacity restrictions of 10 people in red zones and 25 people in orange zones were too strict—to the point where they violated the First Amendment's protection of the free exercise of religion. Both parties asked a Federal District Court for a preliminary injunction that would prohibit the State from enforcing these red and orange zone restrictions.

After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations were "crafted based on science and for epidemiological purposes." It wrote that they treated "religious gatherings ... more favorably than similar gatherings" with comparable risks,

such as “public lectures, concerts or theatrical performances.” The court also recognized the Diocese's argument that the regulations treated religious gatherings less favorably than what the State has called “essential businesses,” including, for example, grocery stores and banks. But the court found these essential businesses to be distinguishable from religious services and declined to “second guess the State's judgment about what should qualify as an essential business.” The District Court denied the motion for a preliminary injunction. The Diocese appealed, and the District Court declined to issue an emergency injunction pending that appeal. The Court of Appeals for the Second Circuit also denied the Diocese's request for an emergency injunction pending appeal, but it called for expedited briefing and scheduled a full hearing on December 18 to address the merits of the appeal. This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit's decision. I cannot agree with that decision.

For one thing, there is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones. Thus, none of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications. The specific applicant houses of worship are now in yellow zones where they can hold services up to 50% of maximum capacity. And the applicants do not challenge any yellow zone restrictions, as the conditions in the yellow zone provide them with more than the relief they asked for in their applications.

Instead, the applicants point out that the State might reimpose the red or orange zone restrictions in the future. But, were that to occur, they could refile their applications here, by letter brief if necessary. And this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. Why should this Court act now without argument or full consideration in the ordinary course (and prior to the Court of Appeals’ consideration of the matter) when there is no legal or practical need for it to do so? I have found no convincing answer to that question.

For another thing, the Court's decision runs contrary to ordinary governing law. We have previously said that an injunction is an “extraordinary remedy.” That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts’ determination. Here, we consider severe restrictions. Those restrictions limit the number of persons who can attend a religious service to 10 and 25 congregants (irrespective of mask-wearing and social distancing). And those numbers are indeed low. But whether, in present circumstances, those low numbers violate the Constitution's Free Exercise Clause is far from clear, and, in my view, the applicants must make such a showing here to show that they are entitled to “the extraordinary remedy of injunction.”

COVID–19 has infected more than 12 million Americans and caused more than 250,000 deaths nationwide. At least 26,000 of those deaths have occurred in the State of New York, with 16,000 in New York City alone. And the number of COVID–19 cases is many times the number of deaths. The Nation is now experiencing a second surge of infections. In New York, for example, the 7-day average of new confirmed cases per day has risen from around 700 at the end of the summer to over 4,800 last week. Nationwide, the number of new confirmed cases per day is now higher than it has ever been.

At the same time, members of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces. The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and

administrative considerations that must be balanced against the applicants' First Amendment challenges. That fact, along with others that Justice Sotomayor describes, means that the applicants' claim of a constitutional violation (on which they base their request for injunctive relief) is far from clear. (All of these matters could be considered and discussed in the ordinary course of proceedings at a later date.) At the same time, the public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that "the balance of equities tips in [the applicants'] favor," or "that an injunction is in the public interest."

Relevant precedent suggests the same. We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." That is because the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

I add that, in my view, the Court of Appeals will, and should, act expeditiously. The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York. But I see no practical need to issue an injunction to achieve these objectives. Rather, as I said, I can find no need for an immediate injunction. I believe that, under existing law, it ought not to issue. And I dissent from the Court's decision to the contrary.

Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting.

Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks. Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. I see no justification for the Court's change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation's suffering. [FN 1: Ironically, due to the success of New York's public health measures, the Diocese is no longer subject to the numerical caps on attendance it seeks to enjoin. Yet the Court grants this application to ensure that, should infection rates rise once again, the Governor will be unable to reimplement the very measures that have proven so successful at allowing the free (and comparatively safe) exercise of religion in New York.]

South Bay and Calvary Chapel provided a clear and workable rule to state officials seeking to control the spread of COVID–19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York's safety measures fall comfortably within those bounds. Like the States in South Bay and Calvary Chapel, New York applies "[s]imilar or more severe restrictions ... to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." That should be enough to decide this case.

The Diocese attempts to get around South Bay and Calvary Chapel by disputing New York's conclusion

that attending religious services poses greater risks than, for instance, shopping at big box stores. But the District Court rejected that argument as unsupported by the factual record. Undeterred, Justice Gorsuch offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.*, going to the liquor store or getting a bike repaired). But Justice Gorsuch does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. Unlike religious services, which "have every one of those risk factors," Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than South Bay and Calvary Chapel. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. And whereas the restrictions in South Bay and Calvary Chapel applied statewide, New York's fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.

The Diocese suggests that, because New York's regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions. [FN 2: Justice Kavanaugh cites Church of Lukumi and Employment Division v. Smith for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship. But those cases created no such rule. Lukumi struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a "religious gerrymander" targeted at the Santeria faith. Smith is even farther afield, standing for the entirely inapposite proposition that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."]

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York's regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York's Orthodox Jewish community. The Diocese suggests that these comments supply "an independent basis for the application of strict scrutiny." I do not see how. The Governor's comments simply do not warrant an application of strict scrutiny under this Court's precedents. Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." [Trump v. Hawaii.] If the President's statements did not show "that the challenged restrictions violate the 'minimum requirement of neutrality' to religion," it is hard to see how Governor Cuomo's do.

* * *

Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public

health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York's COVID–19 restrictions do just that, I respectfully dissent.

Tandon v. Newsom

140 S. Ct. ____ (April 9, 2021)

PER CURIAM.

The application for injunctive relief presented to Justice KAGAN and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * *

The Ninth Circuit's failure to grant an injunction pending appeal was erroneous. This Court's decisions have made the following points clear.

First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. Roman Catholic Diocese of Brooklyn v. Cuomo (2020) (per curiam). It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. Id. (KAVANAUGH, J., concurring)

Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Id. (describing secular activities treated more favorably than religious worship that either "have contributed to the spread of COVID–19" or "could" have presented similar risks). Comparability is concerned with the risks various activities pose, not the reasons why people gather. Id. (GORSUCH, J., concurring)

Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. South Bay United Pentecostal Church v. Newsom (statement of GORSUCH, J.); id. (BARRETT, J., concurring). Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions. Roman Catholic Diocese. These principles dictated the outcome in this case, as they did in Gateway City Church v. Newsom (2021). First, California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time. Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of

transmission than applicants' proposed religious exercise at home. The Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings. Third, instead of requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not "translate readily" to the home. The State cannot "assume the worst when people go to worship but assume the best when people go to work." And fourth, although California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of "moving the goalposts" retain authority to reinstate those heightened restrictions at any time.

Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights "for even minimal periods of time"; and the State has not shown that "public health would be imperiled" by employing less restrictive measures. Roman Catholic Diocese. Accordingly, applicants are entitled to an injunction pending appeal.

This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See Harvest Rock Church v. Newsom; South Bay; Gish v. Newsom; Gateway City. It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." Church of Lukumi Babalu Aye, Inc. v. Hialeah. That standard "is not watered down"; it "really means what it says."

THE CHIEF JUSTICE would deny the application.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

I would deny the application largely for the reasons stated in South Bay United Pentecostal Church v. Newsom (KAGAN, J., dissenting). The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike. California need not, as the per curiam insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. As the per curiam's reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons.

And even supposing a court should cast so expansive a comparative net, the per curiam's analysis of this case defies the factual record. According to the per curiam, "the Ninth Circuit did not conclude that" activities like frequenting stores or salons "pose a lesser risk of transmission" than applicants' at-home religious activities. But Judges Milan Smith and Bade explained for the court that those activities do pose lesser risks for at least three reasons. First, "when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting," with participants "more likely to be involved in prolonged conversations." Second, "private houses are typically smaller and less ventilated than commercial establishments." And third, "social distancing and mask-wearing are less likely in private settings and enforcement is more difficult." These are not the mere musings of two appellate judges: The district court found each of these facts based on the uncontested testimony of California's public-health experts. No doubt this evidence is inconvenient for the per curiam's preferred result. But the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments.

In ordering California to weaken its restrictions on at-home gatherings, the majority yet again "insists on treating unlike cases, not like ones, equivalently." South Bay (KAGAN, J., dissenting). And it once more commands California "to ignore its experts' scientific findings," thus impairing "the State's effort to address a public health emergency." Because the majority continues to disregard law and facts alike, I respectfully dissent from this latest per curiam decision.