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The New Fourth Era of American Religious Freedom

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The U.S. Supreme Court has entered decisively into a new fourth era of American religious freedom. In the first era, from 1776 to 1940, the Court largely left governance of religious freedom to the individual states and did little to enforce the First Amendment Religion Clauses. In the second era, from 1940 to 1990, the Court "incorporated" the First Amendment into the Fourteenth Amendment Due Process Clause and applied both a strong Free Exercise Clause and a strong Establishment Clause against federal, state, and local governments alike. In the third era, from the mid-1980s to 2010, the Court softened the review available under both Religion Clauses, allowing neutral laws of general applicability to pass First Amendment challenges even if they heavily burdened religion. But since the early 2010s, while the Court has maintained a weaker Establishment Clause, it has strengthened the Free Exercise Clause, the Free Speech Clause, and federal statutes applied to religion. The Court has held that some forms of government aid to religion and religious education are not only permissible under the Establishment Clause, but also required under the Free Exercise and Free Speech Clauses. The Court has used the Free Exercise Clause to strike down several public regulations and policies that discriminated against religion. It has strengthened both the constitutional and statutory claims of religious individuals and groups to gain exemptions from general laws that substantially burdened their conscience. The Court has used religious freedom statutes to give new protections to prisoners and has even allowed the collection of money damages from government officials who violated an individual's statutory protections of religious freedom. Featuring a new emphasis on preserving history and tradition, protecting against religious coercion, and fostering religious equality rather than just state neutrality toward religion, these cases together make clear that the nation has entered decisively into a new fourth era of American religious freedom.

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In 2010, a bitterly divided U.S. Supreme Court issued *Christian Legal Society v. Martinez*.[1] The case featured (what was then) University of California, Hastings College of the Law ("Hastings"),[2] a state law school in California that invited voluntary student groups to apply to obtain "registered student organization" ("RSO") status.[3] Once registered, student groups received access to school funds, certain facilities, and communication channels that were foreclosed to other groups.[4] In order to qualify for RSO recognition, however, the group had to comply with the school's nondiscrimination policy based on the State of California's civil rights law, which barred discrimination on the basis of religious and sexual orientation, among other grounds.[5] A group of Hastings law students formed a chapter of the Christian Legal Society ("CLS").[6] Like all CLS groups in the country, this group required its members to sign a "Statement of Faith" and to live in accordance with Christian principles.[7] The group excluded anyone with religious beliefs contrary to the Statement of Faith and anyone who engaged in "unrepentant homosexual conduct."[8] Hastings regarded CLS's membership conditions as a violation of its nondiscrimination policy and thus denied the group's application for official RSO status.[9] CLS filed suit, claiming violations of their rights to free speech, expressive association, and the free exercise of religion.[10]

The 5–4 *Martinez* Court, led by Justice Ginsburg, held for Hastings.[11] The Court combined CLS's free speech and free association claims into a single claim.[12] This consolidation subjected these claims to "a less restrictive limited-public-forum analysis" than the stricter scrutiny regime of earlier free speech cases that gave religious parties "equal access" to facilities, forums, and funds

1. The case name in full is *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661 (2010) (5–4 decision). These first four paragraphs describing the case are drawn in part from JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 251–53 (5th ed. 2022) [hereinafter RCE 5th ed.].
2. The school is now called University of California College of the Law, San Francisco.
3. *Martinez*, 561 U.S. at 669.
4. *Id.* at 669–70.
5. *Id.* at 670, 689–90.
6. *Id.* at 672.
7. *Id.*
8. *Id.*
9. *Id.* at 672–73.
10. *Id.* at 673.
11. *Id.* at 667–69.
12. *Id.* at 680.

that the government made available to like-positioned nonreligious parties.[13] Here, the *Martinez* Court reasoned, Hastings was only "dangling the carrot of subsidy, not wielding the stick of prohibition."[14] Unlike religious groups in earlier equal access cases that were foreclosed from public school facilities and forums,[15] CLS could still meet as a group on the Hastings campus and could still use the school's chalkboards and bulletin boards, as well as their own forms of communication.[16] However, like every other voluntary student group at Hastings, CLS could receive RSO status, funds, and benefits only if it complied with Hastings's general nondiscrimination policy in selecting its members.[17] "It is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers," Justice Ginsburg concluded for the majority.[18]

The *Martinez* Court rejected CLS's arguments that this regulation would systematically burden groups whose viewpoints were out of favor at the law school.[19] The Court held that a regulation is neutral if it is unrelated to the content of expression, even if it adversely affects some speakers but not others.[20] The Court also rejected CLS's argument that this policy would "facilitate hostile takeovers" from students who would infiltrate their groups and "subvert their mission and message."[21] This was only a hypothetical danger, which Hastings would no doubt redress if it occurred.[22] The Court further rejected CLS's request for a free exercise exemption from full compliance with the school's nondiscrimination policy.[23] Justice Ginsburg identified as dispositive the free exercise case of *Employment Division v. Smith* (1990), which held that a

13. *Id.* at 679–83; *see* Widmar v. Vincent, 454 U.S. 263, 265, 276 (1981) (finding a state university's policy unconstitutional for excluding a student group from using otherwise generally available facilities for religious discussion and worship); Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 231, 235–36, 246–47 (1990) (holding that a high school's exclusion of a religious student group from meeting on campus violated the Equal Access Act, 20 U.S.C. §§ 4071–4074, which bars public secondary schools from denying groups access to a "limited open forum" on the basis of the group's religious speech); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 390, 393–94, 397 (1993) (holding that a school board's refusal to let a church access school premises to show a film series violated the First Amendment); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837 (1995) (finding that the University of Virginia's refusal to fund printing costs of a student group's paper on the basis of the paper's religious content was a "denial of [the group's] right of free speech"); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102–03 (2001) (holding that a public school's exclusion of a private Christian organization from meeting "after hours at the school" violated the "Club's free speech rights").

14. 561 U.S. at 683.

15. *See* cases cited *supra* note 13.

16. *Martinez*, 561 U.S. at 690–91.

17. *Id.* at 672–73.

18. *Id.* at 694.

19. *Id.* at 695.

20. *See id.* at 696.

21. *Id.* at 692–93.

22. *Id.*

23. *Id.* at 694 n.24.

"neutral, generally applicable law," like the nondiscrimination policy at issue here, is constitutional and requires no free exercise exemptions.[24]

Speaking for the dissent, Justice Alito argued that this case had established an odious new "principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[25] Of the sixty current student groups, only CLS had ever been denied RSO status at Hastings, Alito argued.[26] For many years, Hastings's policy allowed "political, social, and cultural student organizations to select officers and members . . . dedicated to a particular set of ideals and beliefs."[27] Only after it denied CLS's registration did the school's "all-comers policy" for all student groups suddenly come to the foreground.[28] Additionally, this policy was not applied to preclude RSO registration for students who formed distinct political groups (Democrat or Republican); other religious groups (Muslim or Jewish); social action groups (pro-life or pro-choice); or specific ethnic, racial, or gender-based groups.[29] Targeting CLS for a special exclusion from facilities and funds open to all other student groups, the dissent concluded, was blatant discrimination in direct violation of the Court's well-established equal access principles.[30]

The 2010 *Martinez* case proved to be the last major Supreme Court case of what we call the "third era" of American religious freedom jurisprudence. Justice Alito's arguments in dissent foreshadowed a good deal of the pro–religious freedom logic of a new "fourth era" that began two years after *Martinez* and now features two dozen Supreme Court cases on religious freedom and rapidly counting.[31]

In this new fourth era, the Court has used the First Amendment Establishment and Free Exercise Clauses, as well as religious freedom statutes, to strengthen the rights of religious organizations to make their own internal decisions about employment and employee benefits.[32] The Court has held that

24. *Id.*; *see* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–82 (1990).

25. *Martinez*, 561 U.S. at 706 (Alito, J., dissenting).

26. *Id.* at 707.

27. *Id.* at 707, 711.

28. *See id.* at 708–16.

29. *See id.* at 712–13, 726, 730.

30. *See id.* at 723–24, 726.

31. *See* RCE 5th ed., *supra* note 1, at app. 2 (summarizing Supreme Court cases on religious liberty from 1815 to 2021); *see also* SCOTUS RELIGION CASES, https://scotusreligioncases.org/ (last visited Aug. 23, 2023) (digital version of RCE 5th ed., *supra* note 1, at app. 2).

32. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (Thomas, J., concurring) (noting the Court's holding that the ministerial exception bars ministers from launching employment discrimination suits against their churches); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055, 2066–69 (2020) (holding that the ministerial exception as presented in *Hosanna-Tabor* barred judicial intervention in employment discrimination disputes between teachers and the religious schools at which

some forms of government aid to religion and religious education are not only permissible under the Establishment Clause, but also required under the Free Exercise and Free Speech Clauses.[33] The Court has used the Free Exercise Clause to enjoin several public regulations and policies that discriminated against religion.[34] The Court has strengthened both the First Amendment and statutory claims of religious individuals and groups to gain exemptions from general laws that substantially burdened their conscience.[35] The Court has used religious freedom statutes to give new protections to Muslim prisoners,[36] and insisted that death row inmates have access to their chaplains to the very end.[37] The Court has even allowed the collection of money damages from government

they teach); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (holding that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, barred the state from mandating a corporation to provide coverage for contraception against the corporation owners' religious beliefs); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) ("We hold that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections."). *See generally* DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000 (Mass. 2021) (relying on the ministerial exception to dismiss a plaintiff's unlawful discrimination lawsuit against a private Christian liberal arts college), *cert. denied*, 142 S. Ct. 952 (2022).

33. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017, 2021, 2024–25 (2017) (holding that the Free Exercise Clause prohibited Missouri from excluding a church from publicly available playground funds solely on the basis of the church's religious character); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251, 2254–55 (2020) (holding that the same clause barred the Montana Supreme Court from applying a state constitutional provision so as to exclude religious schools from receiving state aid in the form of a scholarship program); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2002 (2022) ("Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment."); *see also* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) (holding that the Free Speech Clause precluded the city from refusing to fly a Christian flag when it granted hundreds of other requests to fly the flags of other private groups).

34. *See supra* note 33; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874, 1881–82 (2021).

35. *See Hobby Lobby*, 573 U.S. at 688–91; *Little Sisters of the Poor*, 140 S. Ct. at 2373; 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2307–08, 2312–13 (2023) (holding that the First Amendment prohibits a state from coercing a website designer to create a wedding website for same-sex couples contrary to her religious beliefs in heterosexual monogamous marriage only). *See generally* Groff v. DeJoy, 143 S. Ct. 2279 (2023) (upholding the Title VII religious discrimination claim of a Sunday worker who was not accommodated, and remanding the case to determine whether the employer can show "that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business"); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015) (deciding a Title VII disparate treatment case where a Muslim job applicant who wore a headscarf for religious reasons did not need to show that a prospective employer had actual knowledge of her need for a religious accommodation, but only needed to show that her need for an accommodation was a *motivating* factor in the adverse decision).

36. *See* Holt v. Hobbs, 574 U.S. 352, 355–56 (2015) (holding that a state's beard-grooming policy substantially burdened a Muslim inmate's religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5).

37. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1272, 1277–81 (2022) (holding that a death row inmate was likely to succeed on his claims that Texas's refusal to permit his pastor to "lay hands on him and pray over him" violated his rights under RLUIPA); *cf.* Dunn v. Smith, 141 S. Ct. 725, 725–26 (2021) (Kagan, J., concurring) (finding that Alabama's "exclusion of all clergy members from the execution chamber" violated RLUIPA because it substantially burdened a claimant's exercise of religion and failed strict scrutiny).

officials who violated individuals' statutory protections of religious freedom.[38] Together, these cases make clear that the nation has entered decisively into a new fourth era of American religious freedom.

These dramatic shifts over the past decade reflect the Court's belief that religion is the "first freedom"[39] of our constitutional order—not a "second class right."[40] They reflect the Court's new effort to harmonize the First Amendment religious freedom cases around respect for tradition and history, freedom from religious coercion, and guarantees of equality and nondiscrimination for religious individuals and groups.[41] The Court has not yet reached consensus on a consistent new test or approach to either the Free Exercise or the Establishment Clause—let alone the application of the two clauses together or in tandem with the Free Speech Clause, or with the sundry federal and state religious freedom statutes.[42] Individual Justices have pushed their preferred approaches in concurring opinions, sometimes expressing frustration with the Court's minimalist decisions in some recent cases.[43] No "grand unified theory"[44] of the First Amendment is yet at hand. But make no mistake: a dramatic new era of American religious freedom has opened, leaving cases like *Martinez* a distant memory.

This Essay first places this new fourth era of religious freedom cases in historical perspective, briefly mapping some of the main patterns and features of the law of the first three eras before returning to the main cases in the fourth. Next, this Essay highlights three striking new teachings about tradition, coercion, and equality that cut across the establishment and free exercise cases

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38. Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020).

39. *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (per curiam) ("In far too many places, for far too long, our first freedom has fallen on deaf ears."). *See generally* Michael W. McConnell, *Why Is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243 (2000).

40. *See generally* Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom—A Second-Class Right?*, 61 EMORY L.J. 971 (2012).

41. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022) ("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." (citations omitted)).

42. For example, in free exercise jurisprudence, individual Justices have disagreed over whether to overturn *Smith*. *See infra* note 43 and accompanying text. In establishment jurisprudence, the Justices have disagreed over whether coercion is necessary to confer standing and what type of coercion is necessary to launch a prima facie establishment case. *See infra* notes 172–74 and accompanying text.

43. *See e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926 (2021) (Alito, J., concurring) (lamenting that the *Fulton* Court—which did not overturn *Smith*—"emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state"); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring) (expressing that "the Establishment Clause resists incorporation against the States" and describing the Court's "inattention" to "the significant question of incorporation").

44. *See Am. Legion*, 139 S. Ct. at 2087 ("[T]he *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause . . . ."); *see also Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring) (asserting that the Court need not await until settling on "some 'grand unified theory'" before overturning *Smith*).

in this fourth era. Finally, this Essay concludes by reflecting on the promise and perils of the Court's current approach to religious freedom.

II. MAPPING THE FOUR ERAS OF AMERICAN RELIGIOUS FREEDOM

It requires a bit of historical perspective to appreciate how momentous this new fourth era of American religious freedom is proving to be. The history of American religious freedom is a complex and controversial topic and has attracted a veritable library of recent scholarship.[45] Four distinct eras can be made out. The first two eras are more readily identifiable; the third has become clearer only with the shifting case law of the fourth era.

A. THE FIRST ERA

In the first long era from 1776 to 1940, the principal governance of the American constitutional experiment with religious freedom lay with the states, each operating under its own state constitutional provisions on religion.[46] These state constitutions embraced a range of first principles of religious freedom: liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion.[47] In practice, the states varied widely in their treatment of religious freedom, and they operated largely without appeal to or interference from the federal courts.[48]

The First Amendment applied by its terms only to the federal government: "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[49] Early on, the Supreme Court made clear that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions

45. *See generally* NATHAN S. CHAPMAN & MICHAEL MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023); VINCENT P. MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022); ANDREW L. SEIDEL, AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM (2022); THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (2023).

46. *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 98–116, 299–302 (4th ed. 2016) [hereinafter RCE 4th ed.] (summarizing state constitutional developments on religious freedom before 1940). *See generally* CHESTER JAMES ANTIEAU, RELIGION UNDER THE STATE CONSTITUTIONS (1st ed. 1965); Philip Vincent Muñoz, *Church and State in the Founding-Era States*, 4 AM. POL. THOUGHT 1 (2015).

47. *See* RCE 5th ed., *supra* note 1, at 59–92; JOHN WITTE, JR., THE BLESSINGS OF LIBERTY: HUMAN RIGHTS AND RELIGIOUS FREEDOM IN THE WESTERN LEGAL TRADITION 138–70 (2021).

48. *See supra* note 46; *see also* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 150–63 (2020) (discussing different state practices in funding religious schools after rejecting church taxes). *See generally* MUÑOZ, *supra* note 45.

49. U.S. CONST. amend. I, § 1 (emphasis added).

and laws."[50] Accordingly, the First Amendment religious freedom guarantees were rarely addressed and only superficially enforced in the federal courts; not one Supreme Court case before 1940 found a violation of either the Establishment or Free Exercise Clauses.[51] On those few occasions where the Court did provide religious parties with relief, it did so under other constitutional provisions or as expressions of federal common law or a "fundamental theory of liberty."[52]

B. THE SECOND ERA

In the second era from 1940 to 1990, the Supreme Court and lower federal courts assumed leadership of the American experiment in religious freedom. The Court first did so by applying the First Amendment Religion Clauses to state and local governments in *Cantwell v. Connecticut* (1940)[53] and *Everson v. Board of Education* (1947).[54] Dismayed by the growing evidence of local bigotry against some religions and bald favoritism toward others, the *Cantwell* and *Everson* Courts set out to create a uniform law of religious freedom, enforceable by the federal courts throughout the land.[55] The Court "incorporated" the First Amendment guarantees of religious liberty into the general liberty guarantee of the Fourteenth Amendment Due Process Clause, allowing federal courts to review the actions of state and local governments as well as the actions of the federal government.[56] Religious freedom for all was too important and too universal a right to be left to the variant political policies of state governments or to local prejudices against religious minorities.

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50. Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); *see* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Bill of Rights in general, and the Fifth Amendment in particular, applies only to the national government); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 597 (Boston, Charles C. Little & James Brown 1851).

51. *See* RCE 5th ed., *supra* note 1, at app. 2, rows 1–48 (summarizing the issue and holding of each Supreme Court religious liberty case between 1815 and 1940); *see also id.* at 129 & nn.2–3 (discussing the rare moments when federal courts did review state actions in religion).

52. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925); *see* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50 (1815); Watson v. Jones 80 U.S. (13 Wall.) 679, 728 (1871); Cochran v. La. State Bd. of Educ., 281 U.S. 370, 373–74 (1930) (involving a challenge against the use of tax funds upon school books based on Section 4 of Article 4 of the U.S. Constitution). Finally, see also cases in RCE 4th ed., *supra* note 46, at 111–15.

53. 310 U.S. 296 (1940).

54. 330 U.S. 1 (1947).

55. *See id.* at 13–15 (discussing state restraints and discrimination against religion following the First Amendment, and then stating that the Establishment Clause "means at least this: Neither a *state* nor the Federal Government can set up a church." (emphasis added)); *Cantwell*, 310 U.S. at 308 ("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.").

56. *See Cantwell*, 310 U.S. at 303 ("The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."); *Everson*, 330 U.S. at 8 (describing the First Amendment "as made applicable to the states by the Fourteenth").

For much of the next half century after 1940, the Supreme Court rigorously enforced both the Establishment and Free Exercise Clauses. Some eighty percent of its cases involved challenges to state and local government actions on religion, half of them finding violations.[57] The Court's Establishment Clause cases in this second era generally mandated a "strict" separation between religion and public education, and between state funds and religious schools and other institutions.[58] In its signature case of *Lemon v. Kurtzman* (1971), the Court insisted that to survive Establishment Clause scrutiny all laws must (1) have "a secular legislative purpose," (2) have a "primary effect . . . that neither advances nor inhibits religion," and (3) not foster "excessive government entanglement with religion."[59] The Court's free exercise cases, in turn, offered strong protections for religious expression, religious exemptions, and religious autonomy.[60] In *Sherbert v. Verner* (1963) and its progeny, the Court required that all laws that burdened religious exercise needed to serve a "compelling state interest" and be "the least restrictive means" to achieve that interest to survive review under the Free Exercise Clause.[61] This was a time of "strong" establishment and "strong" free exercise law, in Ira Lupu's apt phrase.[62]

C. THE THIRD ERA

The third era of American religious freedom jurisprudence began in the 1980s,[63] culminated in 1990,[64] and accelerated until its conclusion in 2010 with *Martinez*.[65] This era was a time of weak establishment and weak free exercise law. The Court stepped back from leadership in enforcing the First Amendment Religion Clauses, reflecting its new devotion to federalism and separation of

57. *See* RCE 5th ed., *supra* note 1, at app. 2, rows 48–246 (summarizing the issues and holdings of each Supreme Court religious liberty case since 1940).

58. *See* RCE 4th ed., *supra* note 46, at 173–80 (discussing cases from 1948 to 1987 on religion and public education where the Supreme Court employed a strict separationist reading of the Establishment Clause); *see also id.* at 192–96 (discussing strict separationist establishment cases from 1971 to 1985 on government and religious education).

59. 403 U.S. 602, 612–13 (1971); *see* RCE 5th ed., *supra* note 1, at 213–15, 232–42 (analyzing the cases in detail).

60. *See* RCE 5th ed., *supra* note 1, at 129–69 (mapping the doctrinal terrain for free exercise cases and then presenting a history of the Court's jurisprudence on religious expression, burdens on conscience, and religious exemptions).

61. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981); *see* Sherbert v. Verner, 374 U.S. 398, 403, 406–07; Hobbie v. Unemp. Appeals Comm'n, 480 U.S. 136, 140–41 (1987).

62. Ira C. Lupu, *Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 780 (1992).

63. *See generally* Widmar v. Vincent, 454 U.S. 263 (1981); Mueller v. Allen, 463 U.S. 388 (1983); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986).

64. *See generally* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

65. *See generally* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661 (2010).

powers.[66] The Court toughened its standing requirements to press Establishment Clause cases, discouraging litigation and leaving diverse lower court holdings in place.[67] The Court took the unusual step of reversing three of its second-era establishment cases, deeming them too hostile to religion and too unworkable to administer.[68] The Court further upheld new federal and state programs and policies concerning religion—even state funding for religious education—so long as the policies were "neutral with respect to religion."[69] In turn, the Court weakened the Free Exercise Clause in *Employment Division v. Smith* (1990), allowing neutral laws of general applicability to stand no matter how heavy a burden they imposed on religion.[70] *Martinez*, issued twenty years later, was a textbook application of the *Smith* test.

This pronounced weakening of both Religion Clauses left many religious freedom questions for the legislative branch and for the individual states to work out—with the Supreme Court providing only a safety net against bald preferences for[71] or bald prejudices against[72] religion that violated the baseline requirements of state "neutrality."

In response, Congress enacted several important new statutes, notably the 1993 Religious Freedom Restoration Act ("RFRA")[73] and the 2000 Religious Land Use and Institutionalized Persons Act ("RLUIPA").[74] Congress also amended several dozen other statutes and regulations to provide stronger

66. *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATE (2002) (providing a critical overview of third-era cases).

67. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5–7 (2004), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 592–93 (2007); Salazar v. Buono, 559 U.S. 700, 730–32 (2010) (Scalia, J., concurring); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 130, 133–46 (2011).

68. *See generally* Aguilar v. Felton, 473 U.S. 402 (1958), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Wolman v. Walters, 433 U.S. 229 (1977), *and* Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

69. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); *see Mitchell*, 530 U.S. at 809–14 (discussing neutrality).

70. *See* 494 U.S. 872, 878–80, 882–85 (1990); *see also* Bowen v. Roy, 476 U.S. 693, 703–09 (1986) (placing particular weight on the fact that "[t]he requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved."); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–53 (1988) (explaining that government programs incidentally burdening religion but neither coercing unfaithful conduct nor discriminating against religion can still stand).

71. *See* McCreary County v. ACLU, 545 U.S. 844, 850, 870 (2005) (highlighting two counties' "manifest" and "undeniable" religious objective in posting the Ten Commandments in their courthouses).

72. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 545 (1993) ("[E]ach of Hialeah's ordinances pursues the city's governmental interests *only against conduct motivated by religious belief*." (emphasis added)).

73. 42 U.S.C. § 2000bb.

74. *Id.* § 2000cc.

protections for religious parties.[75] Twenty-three states enacted their own state RFRAs alongside these federal laws, and nine other states crafted judge-made standards akin to RFRAs.[76] It was no small irony that by the early 2000s federal statutes and state laws provided a good deal more religious freedom protection than the First Amendment itself.[77]

In this same third era of 1990 to 2010, however, other states turned abruptly away from religious freedom and rejected local efforts to create more state RFRAs.[78] In a number of these states, religion became increasingly fair game for new state restrictions and pressures: Old religious monuments were targeted for removal as badges of bigotry and religious favoritism.[79] Religious parties were excluded from state scholarships and other public programs and benefits.[80] State civil rights commissions penalized conscientiously opposed vendors for not servicing same-sex weddings,[81] religious pharmacists for not filling prescriptions for abortifacients,[82] religious schools for not teaching inclusive sexual ethics,[83] and religious charities for discriminating in their delivery of

75. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992) (estimating more than 2,000 religious exemptions in state and federal statutes). *See generally* 3 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY, RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE, AND THE CULTURE WARS (2018) [hereinafter LAYCOCK, RELIGIOUS LIBERTY, VOLUME 3]; 4 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY, FEDERAL LEGISLATION AFTER THE RELIGIOUS FREEDOM RESTORATION ACTS, WITH MORE ON THE CULTURE WARS (2018); WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW (2d ed. 2017) (detailing the statutes governing religious organizations).

76. *Religious Freedom Restoration Act Informational Central*, BECKET L., https://www.becketlaw.org/research-central/rfra-info-central/ (last visited Aug. 23, 2023) (numbering twenty-three states with RFRAs).

77. Unlike the Free Exercise Clause as interpreted by *Smith*, RFRA and RLUIPA require strict scrutiny of neutral laws of generally applicability that impose a substantial burden on religion. *Compare* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 882–85 (1990) (declining to apply the *Sherbert* test or the requirement of a "compelling" government interest), *with* 42 U.S.C. § 2000bb-1(a)–(b), *and id.* § 2000cc-1(a) (requiring that any "substantial burden" on an individual's free exercise of religion be justified by "a compelling government interest" and be the "least restrictive means of furthering that . . . interest").

78. LAYCOCK, RELIGIOUS LIBERTY, VOLUME 3, *supra* note 75, at 477–762.

79. *See generally, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074–79 (2019) (involving an Establishment Clause challenge to an eighty-nine-year-old cross honoring World War I soldiers).

80. *See e.g.*, Locke v. Davey, 540 U.S. 712, 715–17 (2004); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 672–73, 683 (2010).

81. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1725–27 (2018); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1209, 1237 (Wash. 2019) (holding that a wedding florist's refusal to service a same-sex couple violated the Washington Law Against Discrimination), *cert. denied*, 141 S. Ct. 2884 (2021); Elane Photography, LLC v. Willock, 309 P.3d 53, 58 (N.M. 2013) (holding that a photographer's refusal to serve a gay couple violated the New Mexico Human Rights Act).

82. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016); *see* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433–40 (Alito, J., dissenting from the denial of certiorari).

83. *See* Martha Fineman & George B. Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 70 ("The state fails when it does not effectively educate children about sexual, gender, and other forms of diversity . . . ."). *See generally* ASHLEY ROGERS BERNER, PLURALISM AND AMERICAN PUBLIC EDUCATION: NO ONE WAY TO SCHOOL (2017); MARGARET F. BRINIG & NICOLE STELLE

services.[84] Some critics called for religious communities that remained culturally out of step—particularly concerning sexual liberty norms—to be stripped of their tax exemptions, marital solemnization rights, teaching licenses, and social service contracts.[85] Several states enacted new anti-Sharia measures[86] in expression of growing anti-Muslim policies and growing nationalist xenophobia.[87]

There were many reasons for this change of legislative heart: worries about militant Islamism after 9/11, the exposures of massive sexual scandals and cover-ups within some churches, new media exposés on the luxurious lifestyles of some religious leaders occupying tax-exempt institutions, and transparent political gamesmanship by some religious groups.[88] A stronger reason still was that some faith communities opposed the emerging constitutional rights of same-sex equality and marriage, and some also opposed longstanding constitutional rights to contraception and abortion.[89] Strong critics in the academy and the media now branded religion as an enemy of liberty, and decried religious freedom as a dangerous and outdated constitutional luxury.[90] "Why tolerate religion?" at all, an influential text of 2013 was titled, given that religion is so intolerant, irrational, unscientific, and nonsensical.[91]

D. THE FOURTH ERA

As in the 1930s before *Cantwell* and *Everson*, so in the early 2000s, religious freedom was again subject to widely variant treatment among the fifty states and open to increasingly overt forms of anti-religious bigotry and

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GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA (2014) (providing further discussion on homeschooling and education policy).

84. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021); *see also id.* at 1888 (Alito, J., concurring) ("From 2006 to 2011, Catholic Charities in Boston, San Francisco, Washington, D.C., and Illinois ceased providing adoption or foster care services after the city or state government insisted that they serve same-sex couples.").

85. *See, e.g.*, WITTE, *supra* note 47, at 196–226 (addressing religious tax exemptions and their modern challenges).

86. *See generally* John Witte Jr. & Joel A. Nichols, *Who Governs the Family?: Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321 (2013) (addressing anti-Sharia laws in family law).

87. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2403, 2406–07 (2018) (challenging, on the part of the plaintiffs (including the Muslim Association of Hawaii), the Trump Administration's entry restrictions partially on the grounds that the restrictions were "motivated not by concerns pertaining to national security but by animus toward Islam").

88. *See generally* RCE 4th ed., *supra* note 46, at 280–88; John Witte Jr. & Joel A. Nichols, *"Come Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427 (2016).

89. *See generally* BERG, *supra* note 45; RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018); FRANK RAVITCH, FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (2016).

90. *See generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Further literature cited in RCE 4th ed., *supra* note 46, at 280–88.

91. BRIAN LEITER, WHY TOLERATE RELIGION*?* (2013).

discrimination in some quarters and religious favoritism in others.[92] In response, the Supreme Court again stepped in decisively to take control, ushering in a new fourth era of religious freedom jurisprudence. This new fourth era—manifest in two dozen Supreme Court cases since 2010 and rapidly counting[93]—features more rigorous application of the Free Exercise Clause and federal statutes like RFRA and RLUIPA, but more modest application of the Establishment Clause.[94]

Smith remains the formal free exercise test for now: neutral laws of general applicability that burden religion are constitutional, and not subject to strict scrutiny.[95] However, the Court has increasingly regarded any differential treatment or hostility to religion by the government as violations of these standards, and sufficient to trigger oft-fatal strict scrutiny analysis.[96] The Court has thus used the Free Exercise Clause to strike down state aid programs that exclude religion;[97] state health regulations that burden religion;[98] public forum regulations that deprecate religion;[99] and civil rights, employment, and welfare regulations that target religion.[100] RFRA and RLUIPA have turned up the strict scrutiny heat even higher by asking whether the government has a compelling state interest for applying the challenged law to "the *particular* claimant" whose religion is substantially burdened.[101]

Those two strict scrutiny standards might well be combined in whatever new free exercise test eventually emerges after *Smith*. This would produce a more rigorous "strict scrutiny" standard of free exercise, with the open questions being how substantial the burden on religion needs to be to press a prima facie constitutional case and whether judicial exemptions are the preferred remedy. If the Court combines (1) the hair-trigger standard of its most recent free exercise cases (demanding strict scrutiny whenever governments "treat *any* comparable

92. *See* BERG, *supra* note 45, *passim*.

93. *See* RCE 5th ed., *supra* note 1, at app. 2.

94. *See generally id.*

95. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–80, 882–85 (1990).

96. *See supra* notes 33–34; *infra* notes 243–63 and accompanying text.

97. *See id.*

98. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014).

99. *See, e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

100. *See e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1725–27 (2018); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055, 2066–69 (2020); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021); *Hobby Lobby*, 573 U.S. at 688–91.

101. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430–31 (2006) ("RFRA 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." (emphasis added)); Holt v. Hobbs, 574 U.S. 352, 362–63 (2015) ("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." (quoting v. *Hobby Lobby*, 573 U.S. at 726)).

secular activity more favorably than religious exercise"[102]) with (2) the searching analysis of its recent RFRA and RLUIPA cases (government must show a compelling state interest to apply this law to "the particular claimant"[103]), the new free exercise test might very well be "strict in theory and fatal in fact."[104]

While the Free Exercise Clause is now much stronger in this fourth era, the Establishment Clause is much weaker. The Court's most recent Establishment Clause opinions and concurrences have declared the *Lemon* test "dead" and "abandoned,"[105] and with it *Lemon*'s requirements of secular legislation, limited government "entanglement" with religion, and no state action "advancing" religion.[106] *Lemon* might again be resurrected, or variants of it like the endorsement test, since these tests have not been formally reversed by a clean majority of the Court.[107] But several Justices have been experimenting of late with an array of alternative approaches to Establishment Clause cases that reflect new concerns to respect tradition, foster equality, and prevent coercion—concerns that also have animated some of the Court's recent free exercise cases.[108] This approach has led the Court to reject Establishment Clause challenges to local legislative prayers,[109] an old religious symbol standing on government land,[110] a privately raised religious flag flying in a limited public forum,[111] and a public high school coach praying privately after football

102. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

103. *Gonzales*, 546 U.S at 430–31; *Holt*, 574 U.S. at 362–63.

104. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

105. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *see* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1604 (2022) (Gorsuch, J., concurring).

106. *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring) ("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?"); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266 (2020) (Thomas, J., concurring) (arguing that *Lemon*'s interpretation of the Establishment Clause "operates as a type of content-based restriction on the government" and that the "separationist view" of religious establishment was largely "motivated by hostility toward certain disfavored religions").

107. *See generally* Andrew Koppelman, *Religious Liberty as a Judicial Autoimmune Disorder: The Supreme Court Repudiates Its Own Authority in* Kennedy v. Bremerton School District, 74 HASTINGS L.J. 1751 (2023).

108. *See infra* notes 139–48, 166–80.

109. *See* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014) ("The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.").

110. *See Am. Legion*, 139 S. Ct. at 2089 (2019) (holding that "categories of monuments, symbols, and practices with a longstanding history" are constitutional when they are "following in [a] tradition" 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").

111. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

games—finding no evidence of religious coercion in any of these cases.[112] The Court has also insisted that the government must give religion equal protection, access, and treatment to generally available state benefits not merely as an indulgence under the Establishment Clause, but as a requirement of the Free Exercise and Free Speech Clauses.[113]

The questions of "what should replace"[114] *Smith* and *Lemon* will likely continue to generate ample heat for a time, with the Justices themselves setting the rhetorical heat rather high in several spirited opinions of late.[115] However, a number of broader teachings and trends in the Court's fourth-era cases are becoming clearer, cutting across the Court's recent cases on the Free Exercise, Free Speech, and Establishment Clauses, as well as federal religious freedom statutes.[116] We focus on three common teachings in Part III.

III. THREE COMMON TEACHINGS OF THE COURT'S FOURTH-ERA CASES

A. HISTORY AND TRADITION

The first key teaching to emerge in the Court's fourth-era cases is that a regime of religious liberty must respect history and tradition.[117] This includes attending to the original meaning of the First Amendment text,[118] which had already been a feature of some earlier-era cases.[119] In this fourth era, however, the Court has also used old precedents and practices to press for a more

112. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) ("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.").

113. *See infra* notes 212–30 and accompanying text (showing that *Trinity Lutheran*, *Espinoza*, and *Carson* all communicate that giving equal access to religion is not merely permissible but *required* under the Free Exercise Clause); *see also Shurtleff*, 142 S. Ct. at 1587 (finding that the Free Speech Clause required a private religious group to be able to equally access the opportunity to fly their flag as other private groups could).

114. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

115. *See supra* note 43 and accompanying text.

116. *See* RCE 5th ed., *supra* note 1, at 350–60.

117. For a recent discussion of the role of tradition in the Court's First Amendment jurisprudence, see Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 6, 1653–86 (2020); Marc O. DeGirolami, *Traditionalism Rising*, J. OF CONTEMP. LEGAL ISSUES (forthcoming).

118. *See Fulton*, 141 S. Ct. at 1889–1924 (Alito, J., concurring) (heavily analyzing the ordinary and original meaning of the Free Exercise Clause to call for an overruling of *Smith*); *see also id.* at 1882 (Barrett, J., concurring) ("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.").

119. *See e.g.*, Reynolds v. United States, 98 U.S. 145, 162–66 (1879); Everson v. Bd. of Educ., 330 U.S. 1, 13–15 (1947); Marsh v. Chambers, 463 U.S. 783, 786–92 (1983); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (relying on history to argue against incorporation of the Establishment Clause), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Van Orden v. Perry, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) (same). *See generally* RCE 4th ed., *supra* note 46, at 24–63; John Witte Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the first Amendment*, 47 BYU L. REV. 1303 (2022).

integrated application of the First Amendment Religion Clauses as well as a more deferential approach to old religious symbols and practices that have withstood the test of time.

1. Harmonizing the Clauses

The Court signaled this new emphasis in its first main fourth-era case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012).[120] Writing for a 9–0 Court, Chief Justice Roberts adduced the Magna Carta (1215) and a long series of English and American precedents over the next eight centuries to drive home the Court's judgment that "[t]he 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."[121] Unlike the *Martinez* Court two years earlier that had second-guessed CLS's membership criteria under general nondiscrimination norms, the *Hosanna-Tabor* Court now deferred to the internal rules and decisionmaking of this religious group. The Court simply ignored the *Smith* test that would have upheld the neutral employment laws at issue, and instead provided a special "ministerial exception" to religious groups in making their own internal employment decisions.[122] The Court also read the separation of church and state principle not as a mandate for "secular" legislation, but as a mantle to protect the corporate free exercise rights of the church from the state—an important teaching that later Free Exercise Clause and RFRA cases have fleshed out.[123]

The Court made a further harmonizing move a decade later in *Kennedy v. Bremerton School District* (2022) to uphold the private prayers of a public high school coach on the football field after each school game.[124] Since 1962, the Court had repeatedly found prayers in public schools to be in violation of the

120. 565 U.S. 171 (2012).

121. *Id.* at 184.

122. *See* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 834 (2012) ("Why, then, did the *Smith* rule not govern [in *Hosanna-Tabor*]? The Court provided this answer: '[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.' That answer is the entirety of the Court's treatment of *Smith*.").

123. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." (internal quotation marks omitted)); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) (explaining that the fiction of a corporate person in RFRA was designed to provide protections for human beings, given that a corporation "is simply a form of organization used by human beings to achieve desired ends"). On the broader and controversial development of corporate free exercise or religious groups' rights, see generally RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION (2015); THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman et al. eds., 2015).

124. 142 S. Ct. 2407, 2415–16 (2022).

Establishment Clause,[125] even when prayer-givers argued that such bans violated their free exercise and free speech rights.[126] Yet the *Kennedy* Court, with Justice Gorsuch writing for a 6–3 majority, called for a less "ahistorical" and a more "natural reading" of the First Amendment.[127] The Founders created the Establishment, Free Exercise, and Free Speech Clause guarantees with "complementary" purposes to maximize liberty for all, the Court argued.[128] They are not "warring" provisions "where one Clause is always sure to prevail over the others."[129] Here, while the Establishment Clause prevents government officials from coercing students and players to participate in prayers during school events,[130] the Free Exercise Clause protects a school coach's private right to bow a knee after the game is over[131]—just as the Free Speech Clause protects other private expressions by other coaching staff, let alone fans after the game.[132] These are but two of several fourth-era cases where the Court has adverted to "historic and substantial tradition"[133] to try to harmonize the various commands of the First Amendment.

2. Respecting Old Democratic Judgments

Other fourth-era cases pressed arguments from tradition to uphold historical practices and symbols—not so much as "historical easement[s]"[134] of Founding era practices on otherwise impermissible constitutional grounds, but as a way of respecting the democratic decisionmaking of earlier generations.[135]

125. *See generally* Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting public schools from having official school prayers); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (prohibiting state from requiring public schools to open each day with Bible readings and prayer); Lee v. Weisman, 505 U.S. 577 (1992) (prohibiting public schools from having a rabbi pray at public middle school graduation ceremony); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down a public high school's policy permitting students to open football games with prayer); Wallace v. Jaffree, 472 U.S. 38 (1985) (prohibiting the state from requiring a moment of silence).

126. *See e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 (mentioning the school district's arguments that the Free Speech and Free Exercise Clauses protect "*private* speech endorsing religion"); *id.* at 324 (Rehnquist, C.J., dissenting) (arguing that the student-selected or student-created pregame prayers were *private* speech protected by the Free Exercise and Free Speech Clauses).

127. *Kennedy*, 142 S. Ct. at 2421 (2022) (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019)); *id.* at 2426.

128. *Id.* at 2426.

129. *Id.*

130. *See supra* note 125 and accompanying text.

131. *See Kennedy*, 142 S. Ct. at 2421–23, 2433.

132. *See id.* at 2424–25, 2433.

133. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2002 (2022) (internal quotation marks omitted) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020)).

134. *See* Paul Horwitz, *The Religious Geography of* Town of Greece v. Galloway, 2014 SUP. CT. REV. 243, 250.

135. *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.").

In earlier cases, the Court used arguments from tradition to uphold religious tax exemptions,[136] Sabbath day laws,[137] and legislative prayers[138]—all of which were commonplace in the Founding era. In *Town of Greece v. Galloway* (2014), however, the argument from tradition alone became the key basis for upholding a local community's more recent tradition of offering prayers by sundry invited local clergy to open its town council meetings.[139] As Justice Kennedy wrote for the Court, the First Amendment "must be interpreted by reference to historical practices and understandings,"[140] particularly those that have "withstood the critical scrutiny of time and political change."[141] "A test that would sweep away what has so long been settled," Justice Kennedy continued, "would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[142]

In *American Legion v. American Humanist Ass'n* (2019), the Court reasoned similarly to uphold a large Latin cross that was privately erected in 1925 as a memorial for local soldiers who had died in World War I.[143] Here, Justice Alito wrote for a 7–2 majority, echoing his earlier concurring opinions that had supported upholding an old cross and a Decalogue display on public land.[144] As he reasoned, while a cross is clearly a powerful Christian symbol, this cross had become one of the "embedded features of a community's landscape and identity."[145] For some, the cross was "a symbolic resting place for ancestors who never returned home."[146] "For others, it [was] a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it [was] a historical landmark."[147] When the passage of time "imbues a religiously expressive monument, symbol, or practice" with

136. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) ("Grants of exemption *historically* reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers." (emphasis added)). See further discussion in WITTE, *supra* note 47, at 196–202, 215–26.

137. *See* McGowan v. Maryland, 366 U.S. 420, 433–49 (1961).

138. *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983).

139. *See* 572 U.S. at 577 ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.").

140. *Id.* at 576 (internal quotation marks omitted) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989)).

141. *Id.* at 577.

142. *Id.*

143. *See* 139 S. Ct. 2067, 2074 (2019).

144. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 470–81 (2009) (discussing the history of government using monuments to speak to the public and that the monuments at issue represented government speech not subject to the Free Speech Clause's scrutiny); Salazar v. Buono, 559 U.S. 700, 723–29 (2010) (Alito, J., concurring in part and concurring in the judgment) (discussing the history behind a public cross and the cross's significance in honoring World War I veterans).

145. *Am. Legion*, 139 S. Ct. at 2084.

146. *Id.* at 2090.

147. *Id.*

"familiarity and historical significance," that "gives rise to a strong presumption of constitutionality."[148]

Many areas of American law respect the power and passage of time.[149] Historical preservation and zoning rules "grandfather" older uses of property that do not comport with current uses. "Adverse possession" and "prescription" rules of property allow an open, continuous, and notorious use of a property to vest in the user. Statutes of limitations and res judicata rules promote finality and the closure of old disputes. The equitable doctrine of laches bars claims from parties who sit on their rights too long. Similarly, in constitutional law, tradition serves effectively as a null hypothesis, requiring that a challenged practice or policy be overcome by strong constitutional arguments rather than discarded by simple invocations of principle.[150] As Oliver Wendell Holmes, Jr. once put it: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the [Constitution] to affect it."[151] So long as private parties are not coerced to participate in or endorse this religious iconography, and so long as government strives to be inclusive in its depictions and representations, there is nothing wrong with a democratic government reflecting and representing the traditional religious values and beliefs of its people.

Yes, some old traditions, no matter how venerated, eventually must go when they no longer represent a community's values—as the nation has seen with the removal of Confederate flags from Southern capitol buildings or the renaming of structures built on the backs of slaves and named for their abusive masters.[152] Nonetheless, many old, innocuous, and avoidable religious symbols and practices can and should stay.

Accommodating old religious traditions in modern American public life can sometimes be messy or clumsy, and it is tempting to start over. But as Justice Souter reminded us, "[t]he world is not made brand new every morning."[153] In a rule-of-law state, each generation is called to respect precedents and traditions, and to reform them with caution and prudence and full awareness of the risks. The late great sociologist of religion, Robert Bellah, put this well:

> One of the earliest thinkers to express the modern criticism of inherited institutions was René Descartes in the seventeenth century. At the beginning of the Second Part of one of the founding documents of modernity, *The Discourse on Method*, Descartes describes the typical European town of his

148. *Id.* at 2084–85.

149. The next four paragraphs are adapted from RCE 5th ed., *supra* note 1, at 352–54.

150. *See supra* note 148 and accompanying text.

151. Jackman v. Rosenbaum, 260 U.S. 22, 31 (1922).

152. *See*, *e.g.*, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More Than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM), https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remain.

153. McCreary County v. ACLU, 545 U.S. 844, 866 (2005).

> day. Such a town is simply a hodge-podge, a jumble of buildings from different eras, in different styles, of different forms and shapes, and the streets on which they are situated are often crooked, narrow and inconvenient. How much better, says Descartes, if we could just tear the whole thing down and start over, putting up orderly buildings on straight streets with proper right angles. In other words, Descartes's idea of an ideal town is not one inherited from the past, but one designed anew from a rational blueprint. For Descartes the town was a metaphor for our inherited institutions and ways of thought, but in the twentieth century the Romanian dictator Ceausescu actually did pull down much of old Bucharest and erect "orderly" buildings in its place, with a result that was not charming at all.[154]

B. NO RELIGIOUS COERCION

A second key corollary teaching of these fourth-era cases is that government may not coerce parties into supporting or participating in religion—even old and venerable religious traditions and practices that may have won widespread democratic approval. This is, in part, a time-honored First Amendment teaching.[155] The law is "absolute" in forestalling "compulsion by law of the acceptance of any creed or the practice of any form of worship," wrote Justice Owen Roberts in 1940 to open the Court's second-era cases.[156] Using the Free Exercise Clause in a series of cases, the Court thus struck down compulsory flag salutes, mandatory recitations of the Pledge of Allegiance, and state-administered test oaths as forms of religious coercion.[157] The Court's free speech cases further underscored that government cannot coerce or compel private parties to express themselves contrary to their (religious) beliefs.[158] That proposition was just confirmed anew in the Court's most recent free speech case of *303 Creative LLC v. Elenis*.[159]

Using the Establishment Clause, in turn, earlier Courts had insisted that young, impressionable public school students under mandatory school

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154. Robert N. Bellah, *Marriage in the Matrix of Habit and History*, *in* FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 21, 21 (Steven M. Tipton & John Witte, Jr. eds., 2005) (citing RENÉ DESCARTES, DISCOURS DE LA MÉTHODE (Librarie Larousse 1934) (1637)).

155. *See* RCE 5th ed., *supra* note 1, at 61–62.

156. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

157. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding compulsory flag salutes and pledges to violate the First Amendment); Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (finding a religious test for public office as unconstitutionally invasive upon "appellant's freedom of belief and religion"); First Unitarian Church v. County of Los Angeles, 357 U.S. 545, 546–47 (1958) (finding that government may not require a party who is conscientiously opposed to swear a loyalty oath as a condition for receiving tax exemption).

158. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 706–07 (1977); *see also* Rumsfeld v. FAIR, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.").

159. 143 S. Ct. 2298 (2023).

attendance orders could not be coerced to participate in religious teaching, prayers, Bible readings, or religious symbols as part of their classroom and curricular experience.[160] Coercion concerns also informed the Court's earlier religious symbolism cases in *County of Allegheny v. ACLU* (1989)[161] and *McCreary County v. ACLU* (2005).[162] Citizens required to visit the county courthouse to get their licenses or answer their subpoenas or jury summons could not be forced to read prominent religious signs in the courthouse ordering them to "Give glory to God in the Highest"[163] or to "Remember the sabbath day, to keep it holy."[164]

The fourth-era cases have confirmed this prohibition on religious coercion, but also raised the threshold on when freedom from coercion can be successfully claimed under the Establishment Clause. In *Town of Greece*, as we saw, the Court rejected an Establishment Clause challenge to prayers offered by local clerics before town council meetings.[165] There, Justice Kennedy repeated that the "elemental First Amendment principle [is] that government may not coerce its citizens 'to support or participate in any religion or its exercise.'"[166] But the "brief, solemn, and respectful prayer" at issue was not religious coercion, he argued.[167] Any "reasonable observer" could see that this prayer was designed not to establish religion but "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens."[168] No citizens were coerced or compelled "to engage in a religious observance."[169] They could readily skip the brief prayer before entering the meeting, or simply ignore a prayer they may have heard with impunity.[170]

Yes, some secular citizens might be offended by these old religious ceremonies and practices, Justice Kennedy continued for the *Town of Greece* Court, just as some religious citizens might be offended by various new secular and sometimes anti-religious messages. But offense "does not equate to coercion. Adults often encounter speech they find disagreeable; and an

160. *See supra* note 125 and accompanying text.

161. *See* 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in part and dissenting in part).

162. *See* 545 U.S. 844, 882–83 (2005) (Connor, J., concurring) ("Government may not coerce a person into worshiping against her will . . . .").

163. *County of Allegheny*, 492 U.S. at 598.

164. *McCreary County*, 545 U.S. at 852.

165. Town of Greece v. Galloway, 572 U.S. 565, 569–70 (2014).

166. *Id.* at 586 (quoting *County of Allegheny*, 492 U.S. at 659).

167. *Id.* at 587.

168. *Id.*

169. *Id.*

170. *See id.* at 588 ("The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.").

Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views. . . ."[171]

Five years later, Justice Gorsuch made a similar argument in his lengthy concurrence in *American Legion*. Specifically, he argued that, without proof of actually being religiously coerced, "offended bystanders" should not even have standing to press Establishment Clause cases against government actions or expressions that offend them.[172]

> 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 option.[173]

In his concurring opinions both in *Town of Greece* and later in *American Legion*, Justice Thomas went further and called for proof of "actual legal coercion" to press a prima facie case under the Establishment Clause.[174] By that he meant the "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[175] The "characteristics of an establishment as understood at the founding," he wrote, were that "attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church."[176] For Justice Thomas, *that* was the actual legal coercion that the Establishment Clause was created to prevent, and it should be the standard used by courts today.[177] Merely opening legislative sessions with prayers that can be skipped, or having crosses on public land that can be ignored, does not reflect "the historical characteristics of an establishment of religion."[178]

Justice Kavanaugh's concurring opinion in *American Legion* suggested that coercion might be one factor among others to help determine whether government has established religion. He identified five main clusters of Establishment Clause cases involving: "(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3)

171. *Id*. at 589.
172. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2102–03 (2019) (Gorsuch, J., concurring).
173. *Id.* at 2103 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)).
174. *Town of Greece*, 572 U.S. at 610 (Thomas, J., concurring).
175. *Id.* at 608 (quoting Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).
176. *Am. Legion*, 139 S. Ct. at 2096 (Thomas, J., concurring).
177. *See id.* at 2095.
178. *Id.* at 2096.

government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums."[179] After sifting through these cases, Justice Kavanaugh proposed a new test as a way of combining the Court's twin concerns of respecting tradition and preventing coercion:

> 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.[180]

It is unclear from these fourth-era cases whether religious coercion—hard or soft, alone or with other factors—will become the Court's preferred test for future Establishment Clause cases, or simply part of the "injury in fact" proof needed to gain standing to press such cases.[181] It is also unclear how claims of religious coercion might be treated if pled under the Free Exercise Clause instead. Recent free exercise cases now require only minimal proof of unequal treatment or government hostility to religion to trigger strict scrutiny analysis—a much easier threshold to meet than the harder coercion requirement of recent Establishment Clause cases.[182] This suggests that victims of government coercion of religion might well fare better today if they sue under the Free Exercise Clause (or a religious freedom statute), rather than under the Establishment Clause.

However, the free exercise remedy available today for victims of religious coercion is unclear. In second-era free exercise cases involving religious coercion, the Court often provided parties with judicial exemptions from compliance with these laws, while leaving the general laws intact.[183] Exemptions provided parties who had religious scruples with an oasis of

179. *Id.* at 2092 (Kavanagh, J., concurring).

180. *Id.* at 2093.

181. In *American Legion*, Justice Gorsuch argued against the "offended observer" theory of standing, reasoning that it fails to satisfy the injury-in-fact prong of standing. *See id.* at 2098–2103 (Gorsuch, J., concurring). Then, in *Kennedy*, Justice Gorsuch wrote that coercion was "among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." 142 S. Ct. 2407, 2429 (2022). Thus, we know that for Justice Gorsuch, the offended observer theory is insufficient to confer Article III standing and that coercion seems sufficient to suggest an Establishment Clause violation. The question remains, however, whether a plaintiff must allege coercion to satisfy the injury-in-fact requirement for standing necessary to launch an establishment challenge.

182. *See generally* Eric Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 729–51 & tbl. 1 (2023) (discussing the different types of "substantial burdens" as well as discriminatory treatment against religion that triggers strict scrutiny).

183. *See id.*; *see also* Sherbert v. Verner, 374 U.S. 398, 408–09 (1963); Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 719–20 (1974); Hobbie v. Unemp. Appeals Comm'n, 480 U.S. 136, 146 (1987).

nonconformity—a space to follow the dictates of their conscience or the commandments of their faith community—so long as this exemption did not undermine compelling public interests.[184] Historically, various Christian and self-professed atheist parties received protection under this regime.[185] The 1990 *Smith* case that opened the third era of religious freedom cases largely closed the door on these judicial exemptions.[186] This left the anomaly that a nonreligious claimant could use the Establishment Clause to have a federal court overturn a carefully calibrated local law and practice that felt mildly coercive or offensive,[187] while a religious claimant could not even get an exemption from a neutral general law or policy, regardless of how coercive or burdensome that law was to their religious exercise.[188]

Not only has the Court mitigated this anomaly in recent cases by toughening the requirements to press an Establishment Clause case and weakening its scrutiny of these claims,[189] but today, the Court has also been more rigorous in enforcing RFRA, RLUIPA, and other religious freedom statutes that provide legislatively created exemptions.[190] The Court has interpreted RFRA to exempt not only religious individuals, but also religiously motivated business *corporations* from neutral and generally applicable laws.[191] The Court has interpreted RLUIPA not only to exempt inmates from some generally applicable requirements that burden their religion,[192] but also to *require prisons* to permit chaplains to pray for and lay hands on Muslim believers on death row.[193] In both these RFRA and RLUIPA cases, the Court has made it easier for claimants to prove the "sincerity" of their religion and the "substantiality" of the burden on its exercise.[194]

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184. *See Hobbie*, 480 U.S. at 146.

185. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 489 (1961); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 830–31 (1989).

186. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–80, 882–85 (1990) (refusing to apply strict scrutiny to neutral laws of general applicability that incidentally burdened religion).

187. *See generally* RCE 4th ed., *supra* note 46, at 156–58.

188. *Id.* at 157.

189. *See supra* notes 165–80 and accompanying text.

190. *See infra* notes 191–94 and accompanying text.

191. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) (explaining that the fiction of a corporate person in RFRA was designed to provide protections for human beings, given that a corporation "is simply a form of organization used by human beings to achieve desired ends").

192. *See* Holt v. Hobbs, 574 U.S. 352, 355–56 (2015).

193. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1272, 1277–81 (2022).

194. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2390 (2020) ("It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct."). In *Holt*, a RLUIPA case, the lower district court had tried to rely on testimony that "not all Muslims believe that men must grow beards" to challenge the sincerity of a religious prisoner's belief that Islam compelled him to grow a half-inch beard in violation of the prison's policies. 574 U.S. at 362. The Court not

As the fourth-era Court continues to strive for a harmonized and "complementary"[195] First Amendment jurisprudence that maximizes religious liberty for all, it will be wise to read this exemption regime back into the Free Exercise Clause. Federal and state statutes have proved to be valuable temporary refuges for religious freedom.[196] But statutes often vary in their treatment of this fundamental right of religious freedom, and can be repealed when legislatures change their minds. Moreover, it would be wise to consider use of the Free Exercise Clause rather than the Establishment Clause to guarantee protection from religious coercion for theistic, nontheistic, and atheistic claimants alike. That would allow any coerced party of whatever religion or nonreligion the opportunity to seek exemptions from compliance with general laws that burden their conscience, but it would leave these general laws intact if they cause little or no harm or coercion for others.

C. EQUALITY, NOT JUST NEUTRALITY

A third key teaching of the Court's fourth-era cases that has emerged, especially in the last five years, is that religion deserves not just neutrality but equal treatment and protection by government. While the Court has not formally rejected the *Smith* neutrality test, it has treated any differential treatment of religion as fatal religious discrimination under the Free Exercise Clause,[197] or fatal "viewpoint discrimination" under the Free Speech Clause.[198] In these cases, the Court has repeatedly held that government's general concern to avoid establishing religion or to promote separation of church and state was not enough to justify unequal treatment of religion.[199]

1. State Aid to Religious Education

This focus on equality over neutrality is clearest in the Court's recent cases on state aid to religious education.[200] Such aid has long been a vexed topic in American history. In the first era of American religious freedom before 1940, thirty-five states had passed state constitutional prohibitions on such state funding of religion, especially religious education.[201] In the second era after

only responded by asserting that the belief that a beard was compelled was common to Islam, but it also emphasized that the Free Exercise Clause protects beliefs unshared by members of the religious sect. *See id.* In other words, although many other Muslims did not share the religious claimant's beliefs, the Court took the claimant at his word, finding him sincere.

195. *See supra* note 128 and accompanying text.

196. *See supra* notes 73–77, 101, 191–94 and accompanying text.

197. *See infra* notes 212–30 and accompanying text.

198. *See infra* notes 232, 241 and accompanying text.

199. *See infra* notes 218, 233, 239–41 and accompanying text.

200. *See infra* notes 212–30 and accompanying text.

201. *See* RCE 4th ed., *supra* note 46, at app. 2.

1940, the Court struck down many forms of state aid to religious schools, parents, and children as violations of the Establishment Clause.[202]

In the third era, which featured greater judicial deference to legislatures, the Court held that state aid to religious education was neither *prohibited* by the Establishment Clause nor *required* by the Free Exercise Clause. It was no violation of the Establishment Clause, the Court held repeatedly, for a state to give parents vouchers or tax relief to foster greater educational choice;[203] to give students state-funded scholarships and disability services to attend public or private schools of their choosing;[204] or to provide "secular, neutral, and nonideological" aid to public and private schools alike.[205] In turn, it was no violation of the Free Exercise Clause for the state to condition or withdraw this aid to religious education as it saw fit.

Locke v. *Davey* (2004) drove home the Court's more deferential approach to state legislation.[206] There, the state granted merit-based scholarships for students to attend any accredited private or public university or college in the state, so long as they did not major in "devotional theology."[207] When Davey chose a theology major, he lost his scholarship.[208] He sued under the Free Exercise Clause but lost.[209] This case falls into the "play in the joints" between the Religion Clauses, Chief Justice Rehnquist wrote for a 7–2 Court.[210] It was

202. *See* Comm'n for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795–98 (1973) (striking down provisions of a New York statute aiding private religious schools via maintenance and repair grants, tuition reimbursements, and income tax benefits); Aguilar v. Felton, 473 U.S. 402, 404, 414 (1985) (striking down a program using federal funds to support programs sending public school employees to religious schools), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); RCE 5th ed., *supra* note 1, at 263–65.

203. *See* Mueller v. Allen, 463 U.S. 388, 390, 394–403 (1983) (concluding that Minnesota's tax deduction program did not violate the Establishment Clause); Zelman v. Simmons-Harris, 536 U.S. 639, 643–44, 662–63 (2002) (holding that the Establishment Clause was not violated by Ohio's scholarship program designed to give parents educational choice).

204. *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (upholding aid under a state vocational rehabilitation program "to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director"); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (holding that the Establishment Clause did not preclude the state from providing an interpreter to accompany a deaf student to classes at a sectarian school); *see also* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).

205. Mitchell v. Helms, 530 U.S. 793, 802–03 (2000); *see Zelman*, 536 U.S. at 652 ("[Previous cases] thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").

206. 540 U.S. 712 (2004).

207. *Id.* at 715–17.

208. *Id.* at 717.

209. *Id.* at 718, 725.

210. *Id.* at 719.

up to the state legislature to decide whether to give, condition, or withhold its state funding to religious education.[211]

That deferential "play in the joints" posture of the third-era cases has changed dramatically in the fourth era with the Court now demanding equal treatment of religion under the Free Exercise Clause. *Trinity Lutheran Church v. Comer* (2017) was the first of a trio of cases to open this new regime, with Chief Justice Roberts writing for the majority each time. There, the State of Missouri excluded a church school from a state program that reimbursed schools for the costs of resurfacing their playgrounds with a new rubber surface supplied by the state's recyclers.[212] The church school applied on time and easily qualified for the funds, but the state denied them funds because its state constitution prohibited funding religious education.[213] The church school sued, claiming religious discrimination in violation of the Free Exercise Clause.[214] The *Trinity Lutheran* Court agreed.[215] Writing for a 7–2 majority, Chief Justice Roberts concluded that the church school "was denied a grant simply because of what it is—a church."[216] State laws that impose "special disabilities on the basis of . . . religious status" alone are permissible only if the state has a "compelling interest" for doing so.[217] A general concern about violating state or federal prohibitions on religious establishment was not compelling enough.[218]

Similarly, in *Espinoza v. Montana Department of Revenue* (2020), Montana offered its citizens state tax credits for donations to nonprofit organizations that awarded scholarships for private school tuition.[219] But Montana would not allow these scholarships to go to religious-school students, for that would violate the state constitutional prohibition on state aid to religious education.[220] Parents whose children could not get scholarships to attend a Christian school filed suit under the Free Exercise Clause, claiming religious discrimination.[221] The *Espinoza* Court agreed.[222] This program "bars religious schools from public benefits solely because of the religious character of the

211. *See id.* at 719, 721, 725. *Christian Legal Society v. Martinez* held similarly. *See* 561 U.S. 661, 683 (2010) (distinguishing between the state's sticks and carrots).

212. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017–18 (2017).

213. *Id.*

214. *Id.* at 2018.

215. *Id.* at 2017, 2024.

216. *Id.* at 2023.

217. *Id.* at 2021.

218. *Id.* at 2023–24.

219. 140 S. Ct. 2246, 2251 (2020).

220. *Id.* at 2252.

221. *Id.* at 2252–53.

222. *Id.* at 2262–63.

schools,"[223] and such discrimination cannot be justified by the state's "interest in separating church and State 'more fiercely' than the Federal Constitution."[224]

Carson v. Makin (2022) repeated this demand for equality.[225] Maine allowed parents who lived in thinly populated rural school districts without their own public high school to use public funds to attend a public or private school of their choice, including schools outside Maine.[226] However, the state would provide assistance only if the chosen school was not "sectarian" based on the state's review of the school's curriculum, practices, character, and mission.[227] The Court struck down this policy too.[228] These private schools were disqualified from state public funds "solely because they are religious," Chief Justice Roberts again wrote, and this was unconstitutional religious discrimination.[229] The state may not "exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[230]

2. Equal Treatment of Religious Speech

This trio of new cases—*Trinity Lutheran*, *Espinoza*, and *Carson*—helped to integrate the equality norms of the Free Exercise and Free Speech Clauses in the Court's education cases. Already in the third era, several Free Speech cases held that religious parties must be given equal access to facilities, forums, and funds in public schools that were open to like-positioned nonreligious parties.[231] To exclude religion was impermissible "viewpoint discrimination" in violation of the Free Speech Clause,[232] the Court held repeatedly, and that discrimination could not be justified by the state's concerns to avoid establishing religion in public schools.[233] This trio of new Free Exercise cases has now applied this same equality principle to state funding of private religious schools too, again overriding state concerns about establishing religion or violating their own state constitutions.[234] Today, in private school cases, it is the Free Exercise Clause that guarantees religious equality in access to generally available state benefits;

223. *Id.* at 2255.

224. *Id.* at 2260 (quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mo. 2018)).

225. *See* 142 S. Ct. 1987, 1997–98 (2022).

226. *See id.* at 1993–94.

227. *See id.*

228. *Id.* at 2002.

229. *See id.* at 2000 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)); *see also id.* at 1998, 2000–02 (further explaining why Maine's nonsectarian requirement was unconstitutionally discriminatory).

230. *Id.* at 1998.

231. *See* cases cited *supra* note 13.

232. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845 (1995); Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2107 (2001).

233. *See Rosenberger*, 515 U.S. at 835–46; *Good News Club*, 121 S. Ct. at 2103–07.

234. *See supra* notes 212–30 and accompanying text.

in public school cases, it is the Free Speech Clause that continues to guarantee religious equality.[235]

The Court has also used the equality principle of the Free Speech Clause to uphold private religious expression in other contexts. In *Reed v. Town of Gilbert* (2015), the Court struck down a town ordinance that placed stricter time, place, and manner regulations on directional signs to a church service than on various "political" or "ideological" signs.[236] A unanimous Court, led by Justice Thomas, held that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional," and that violation was easy to find there.[237] Later in *Shurtleff v. City of Boston* (2022), Boston had allowed 284 private groups over the past twelve years to gather in the City Hall Plaza for their own events and ceremonies and to fly their own flags on those occasions.[238] When Shurtleff and his Christian group sought to use the plaza, however, the city refused to allow them to fly their Christian flag for fear of violating the Establishment Clause.[239] Shurtleff claimed religious discrimination under the Free Speech Clause.[240] A 9–0 Court, led by Justice Breyer, agreed that Boston had committed viewpoint discrimination against religion contrary to the demands of equality.[241]

3. Equal Treatment in COVID-19 Regulation

The Court's insistence on equality has also guided its review of free exercise challenges to COVID-19 regulations. Beginning in the spring of 2020, numerous new state and local public health laws placed restrictions on public gatherings, movements, and activities, including those of religious groups.[242] The Court upheld the restrictions when they fell equally on religious and nonreligious parties, but enjoined them when religion was treated differently.[243]

In *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020), for example, Catholic and Jewish groups challenged a New York state executive order that created different tiers of restrictions on public gatherings, depending on local pandemic levels.[244] "Red zones" restricted religious worship gatherings to ten

235. *See supra* notes 212–32 and accompanying text.
236. 576 U.S. 155, 159, 164–65, 171 (2015).
237. *Id.* at 163.
238. 142 S. Ct. 1583, 1588 (2022).
239. *Id.*
240. *Id.* at 1589.
241. *Id.* at 1593.
242. *See infra* notes 244–45, 249 and accompanying text.
243. The next three paragraphs are largely abridged from RCE 5th ed., *supra* note 1, at 183–88. For a strong and critical overview of these cases, see generally Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 32 (2022).
244. 141 S. Ct. 63, 65–66 (2020) (per curiam).

persons; "orange zones" set the capacity limit at twenty-five.[245] The plaintiffs argued that the Governor and other state officials had made disparaging remarks about Orthodox Jewish communities, and that they had gerrymandered the restrictive zones to ensure that they covered those religious communities.[246] Moreover, these regulations placed no capacity limits on "essential" businesses, which explicitly included acupuncture facilities, campgrounds, garages, transportation facilities, and manufacturing plants, among other businesses.[247] In a per curiam 5–4 opinion, the Court concluded that this law "single[d] out houses of worship for especially harsh treatment" that could not be justified, and issued an injunction.[248]

Similarly, *Tandon v. Newsom* (2021) involved state and county orders that effectively prevented more than three households from gathering for prayer and Bible study, even though they allowed larger gatherings for business and other secular purposes.[249] House-church worshippers challenged the orders.[250] Writing for a 5–4 majority, Justice Gorsuch applied what he now called "the clear" rule that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[251] Because California imposed a flat limit on religious gatherings but allowed for "myriad exceptions and accommodations for comparable activities," the Court enjoined its regulations.[252]

4. No Government Animus Against Religion

With equal treatment as a centerpiece of its free exercise jurisprudence, the Court has been especially sensitive to state hostility against religion. For example, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018), Jack Phillips, a cakeshop owner, refused to bake a wedding cake for a same-sex couple on the grounds that doing so violated his religious beliefs.[253] As a result, the Colorado Civil Rights Commission, after holding a series of public hearings, found that Phillips violated Colorado's Anti-Discrimination Act and sanctioned him.[254] In a public hearing of the Colorado Civil Rights Commission, one commissioner characterized the baker's views as "one of the most despicable pieces of rhetoric that people can use," and compared it to past

245. *Id.* at 66.
246. *Id.*
247. *Id.*
248. *Id.*
249. 141 S. Ct. 1294, 1297 (2021) (per curiam).
250. *See id.* at 1296–98.
251. *Id.* at 1296.
252. *Id.* at 1298.
253. 138 S. Ct. 1719, 1723–24 (2018).
254. *Id.* at 1725–27.

uses of religion and religious freedom "to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust."[255] The baker claimed violations of his free exercise rights.[256]

A 7–2 Court agreed, led by Justice Kennedy, who had authored several earlier opinions supporting same-sex equality and marriage.[257] The Free Exercise Clause outlaws "religious hostility on the part of the State itself," he wrote, and here the Commission betrayed "clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips's] objection."[258] Such hostile remarks in an adjudicatory proceeding "may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion."[259] Moreover, the Commission "sen[t] a signal of official disapproval of Phillips's religious beliefs" by favorably treating bakers who refused to bake cakes with messages that the *Commission* deemed offensive.[260] This animus against Phillips, together with the unequal treatment of discrimination claims brought against other bakers, violated the Free Exercise Clause.[261]

Concern for animus against religion also informed the Court's opinion in *Kennedy v. Bremerton School District* (2022), which upheld a public high school coach's private prayers after a football game.[262]

> Respect for religious expression 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.[263]

255. *Id.* at 1729.

256. *Id.* at 1727.

257. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

258. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1729.

259. *Id.* at 1730.

260. *Id.* at 1730–31. As the Court elaborated, "[a] principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. . . . [I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Id.* at 1731.

261. *Id.* at 1729–31.

262. 142 S. Ct. 2407, 2415–16 (2022).

263. *Id.* at 2432–33.

CONCLUSION

The Supreme Court has entered decisively into a new fourth era of American religious freedom. In the first era, from 1776 to 1940, the Court largely left governance of religious freedom to the individual states and did little to enforce the First Amendment Religion Clauses. In the second era, from 1940 to 1990, the Court "incorporated" the First Amendment into the Fourteenth Amendment Due Process Clause[264] and applied both a strong Free Exercise Clause and a strong Establishment Clause against federal, state, and local governments alike,[265] most paradigmatically through cases such as *Sherbert*[266] and *Lemon*.[267] In the third era, from the mid-1980s to 2010, the Court softened the review available under both Religion Clauses,[268] allowing neutral laws of general applicability to pass First Amendment challenges, even if they heavily burdened religion.[269] But since the early 2010s, while the Court has maintained a weaker Establishment Clause, it has strengthened the grip of the Free Exercise Clause, the Free Speech Clause, and federal statutes applied to religion.[270] These moves have shrunk the range of government activity prohibited by the Establishment Clause but expanded the areas of religious activity protected by the Free Exercise and Free Speech Clauses.[271]

This Essay has documented these pronounced doctrinal shifts in the Court's fourth-era cases and has highlighted three common teachings that cut across the establishment and free exercise cases. First, the fourth-era Court has taught that a religious liberty regime must respect the centuries of American history and tradition surrounding religion. History and tradition, the Court has taught, call for a First Amendment with "complementary" rather than "warring" provisions.[272] The Establishment Clause prohibits the state from appointing ministers, while the Free Exercise Clause prohibits it from preventing a religious institution from appointing its own.[273] The Establishment Clause prohibits the state from coercing public school students to pray, while the Free Exercise and Free Speech Clauses prohibit the state from coercing public school coaches and students *against* private prayer.[274] History and tradition, the Court has further taught, imbue old religious symbols and practices with cultural value well

264. *See supra* note 56 and accompanying text.
265. *See supra* notes 57–62 and accompanying text.
266. Sherbert v. Verner, 374 U.S. 398 (1963).
267. Lemon v. Kurtzman, 403 U.S. 602 (1971).
268. *See supra* notes 66–70 and accompanying text.
269. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).
270. *See supra* notes 139–48, 165–80, 191–94, 212–30, 236–63 and accompanying text.
271. *See supra* notes 139–48, 165–80, 191–94, 212–30, 236–63 and accompanying text.
272. *See supra* notes 128–29 and accompanying text.
273. *See supra* note 121 and accompanying text.
274. *See supra* notes 130–32 and accompanying text.

beyond their original or ongoing religious message,[275] saving them from offended heckler's vetoes under the Establishment Clause.[276] History and tradition strengthen corporate religious free exercise rights for religious groups to make their own peaceable decisions about members and ministers,[277] sparing these groups from second-guessing or interference by the state if they act peaceably. Furthermore, history and tradition treat the principle of separation of church and state as a protection for churches from the state, not a prescription for the secularization of society or its laws.[278]

Second, the fourth-era Court has taught that government cannot coerce parties to participate in or to forgo religious activity. In its recent Establishment Clause cases, the Court has emphasized that a party's mere offense in witnessing old public religious practices or symbols does not amount to coercion that deserves constitutional relief[279]—perhaps not even standing to sue under the Establishment Clause.[280] But in its recent free exercise cases, the Court has held that even the discriminatory withholding of discretionary benefits to religion or evidence of government hostility to religion constitute state burdens on religion that trigger strict scrutiny.[281] Moreover, in its RFRA and RLUIPA cases, the Court has held that religious individuals and business corporations alike can suffer an injury when general regulations burden their consciences or beliefs,[282] or when these religious parties are fined or sanctioned for noncompliance with these general regulations.[283] By requiring strong proof of coercion under the Establishment Clause but easier proof of a burden under the Free Exercise Clause, the Court has given further priority to free exercise claims.

Third, the Court has taught that the government must give equal treatment to religious and nonreligious parties and interests.[284] The Court has rigorously enforced these new equality norms, even if that has meant that government sometimes must *support* religion. Once the government chooses to provide tax benefits or public funds, or chooses to open public forums or programs to its citizens, similarly situated religious and nonreligious parties must be treated equally.[285] This is a striking new approach. Second-era cases, particularly after the *Lemon* test became law in 1971, held that the Establishment Clause

275. *See supra* notes 145–48 and accompanying text.
276. *See supra* notes 148, 171 and accompanying text.
277. *See supra* note 121 and accompanying text.
278. *See supra* notes 121, 123 and accompanying text.
279. *See supra* note 171 and accompanying text.
280. *See supra* note 172 and accompanying text.
281. *See supra* notes 212–30 and accompanying text.
282. *See supra* notes 191–93 and accompanying text.
283. *See supra* notes 191–93 and accompanying text.
284. *See supra* notes 212–63 and accompanying text.
285. *See supra* notes 212–30, 234–41 and accompanying text.

prohibited various forms of state aid to religious schools.[286] Third-era cases like *Locke v. Davey* held that religious access to general state funding for religious education was *permitted* but not required, especially if state constitutions prohibited state aid to religion.[287] These fourth-era cases hold that the Free Exercise Clause and Free Speech Clause *require* forms of state aid or access for religion to meet the demands of equality[288] and that concerns over violating state or federal establishment prohibitions are insufficiently compelling to escape these requirements.[289]

The Court's new fourth-era cases—featuring softer establishment and stronger free exercise and free speech norms—have been criticized by dissenters on the Court and in the academy. How can the weakening of one First Amendment clause and the strengthening of other First Amendment clauses be considered "complementary" or coherent? Why should religious employers, in Justice Sotomayor's words, be given "free rein to discriminate"[290] under the First Amendment in a way that no other employer has license to do? How can a state's decision to withhold *benefits* from religion constitute a "burden" on the free exercise of religion when the Establishment Clause uniquely forbids government from supporting religion? Indeed, why do the government and all taxpayers have to "pay" for a private party's "free" exercise of religion?

Other critics, however, have argued that the Court has not gone far enough in reforming and integrating its religious freedom jurisprudence. While the Court has powerfully applied equality principles in its recent cases, is the Free Exercise Clause really reducible to a prohibition on discrimination alone, Justice Barrett asked recently in *Fulton v. City of Philadelphia*?[291] Clearly not, Justice Alito thunderously proclaimed in his lengthy *Fulton* concurrence, arguing that it was time to overturn *Smith* and return to a *Sherbert*-style regime where strict scrutiny applied even when the laws burdening religious exercise were neutral and generally applicable.[292] In turn, while the Court has already elevated "coercion" requirements in its recent cases, can this standard alone be applied to deal with the full range of establishment cases, as Justice Kavanaugh asked in *American Legion*? Clearly not, Justice Thomas has repeatedly argued, in an effort to de-incorporate the Establishment Clause altogether.[293] Nonetheless,

286. *See supra* notes 59–61, 202 and accompanying text.

287. *See supra* notes 207–11 and accompanying text (describing how *Locke v. Davey* fell into the "play in the joints"—state legislatures were neither prohibited from nor required to extend their scholarship program to students like Davey, who sought to use the funds to support his education as a theology major).

288. *See supra* notes 212–30, 236–41 and accompanying text.

289. *See supra* notes 218, 224, 239–41 and accompanying text.

290. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting).

291. *See* 141 S. Ct. 1868, 1882 (Barrett, J., concurring).

292. *Id.* at 1889–1924 (Alito, J., concurring).

293. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring).

most other current Justices seem inclined to follow Justice Kavanagh in combining concerns for coercion, equality, and tradition to judge the range of Establishment Clause questions that have and will continue to arise.

Many criticisms and challenges remain in this perennially contested field of religious freedom. However, it is worth noting that the fourth-era Court has done a better job than some earlier Courts in vindicating time-honored religious freedom principles that harken back to the nation's Founding.[294] The Court has vindicated founding principles of *religious equality* and *religious pluralism* by not merely permitting but requiring the state to treat religious groups equally, and by permitting religious speech, practices, and symbols to stand publicly, even if others might disagree. The Court has vindicated Founding principles of *liberty of conscience* and *free exercise* by granting individual and corporate religious practitioners significant exemptions, autonomy, and access to public spaces and funds on both statutory and constitutional grounds. Furthermore, the Court has vindicated Founding principles of *separation of church and state* and *no establishment of religion* by using history and tradition to determine what constitutes impermissible state support for or intrusion upon religion. Finally, through application of these religious freedom principles together, the Court has expanded the space for religion to flourish in private and in public more equally, more freely, and more fully. Certainly, challenges and concerns remain to be tackled, but the Court has ushered in a new and promising era for religious freedom.

294. *See* RCE 5th ed., *supra* note 1, at 59–92 (discussing six principles of religious freedom that were present in the Founding era and have affected American religious freedom jurisprudence: liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment).