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The Richard O’Sullivan Memorial Lecture

A New Great Awakening of Religious Freedom in America

John Witte, Jr.*

Abstract

Twenty years ago, American religious freedom was in trouble. The United States Supreme Court had weakened the First Amendment considerably, and religious freedom claims were often subordinated to sexual liberty and other rights claimants. States routinely denied funds and benefits to religious parties and removed traditional religious symbols and ceremonies from public life. Leading academics castigated religious group rights claimants given recent charges of sexual abuse and financial fraud in some churches. In 2000, religious freedom was a second class right.

No longer! The past decade has seen a great awakening of American religious freedom, led by the United States Supreme Court. In more than two dozen cases since 2012, the Court has strengthened the First Amendment to strike down public regulations and policies that discriminated against religion. It has granted religious individuals and groups exemptions from general laws that substantially burdened religious conscience, and strengthened the autonomy of religious groups to govern their own polity and property. The Court has underscored traditional protections against religious coercion and state hostility toward religion. And it has built strong new protections for the religious worship of prisoners, students, and teachers, and against state efforts to remove religious symbols, ceremonies, and statuary from public life.

This Article maps this new great awakening of religious liberty, but also warns about some of the ample challenges that remain. In particular, it argues that religious freedom is precious gift of God to protect, not a prerogative of one political party to brandish, and people of faith would do well to use this religious freedom wisely to love and serve all their neighbors, not least those of different faith.

Keywords: religious freedom; First Amendment; U.S. Supreme Court; great awakening; religious worship; equality; coercion; religious exemptions

Introduction

Religious freedom has reawakened in America over the past decade, and the loudest wake-up call has come from the United States Supreme Court.

Only a dozen years ago, American religious freedom was in trouble in several states and federal circuits. Old religious monuments were targeted for removal as badges of bigotry and religious favoritism.[1] Religious parties were excluded from state scholarships and other public programs and benefits.[2] State civil rights commissions penalized conscientiously opposed vendors for not servicing same-sex weddings,[3] religious pharmacists for not filling prescriptions for abortifacients,[4] religious schools for not teaching inclusive sexual ethics, and religious charities for discriminating in their delivery of services.[5] Some critics and legislators called for religious communities to be stripped of their tax exemptions, marital solemnization rights, teaching licenses, and social service contracts.[6] Several states enacted new anti-Sharia measures.[7] The Supreme Court, throughout the 1990s and 2000s, enforced religious freedom provisions relatively weakly, leaving most religious freedom questions for states and legislatures to work out in accordance with the Court's new devotion to federalism and separation of powers

There were many likely reasons for this turn against religion and religious freedom: 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 large tax-exempt institutions; and transparent political gamesmanship by some religious groups.[8] A stronger reason still was that some faith communities opposed the emerging constitutional rights of same-sex equality and marriage, and some also opposed constitutional rights to contraception and abortion.[9] Strong critics in the academy and the media now branded religion as an

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*John Witte, Jr., JD (Harvard), Dr. Theol h.c. (Heidelberg) is Robert W. Woodruff Professor of Law, McDonald Distinguished Professor of Religion, and Faculty Director of the Center for the Study of Law and Religion at Emory University, https://orcid.org/0000-0001-8929-0267. Portions of this text are drawn from and John Witte, Jr. and Eric Wang, The New Fourth Era of American Religious Freedom," *Hastings Law Journal* 74 (2023), 1813-1848 and John Witte, Jr., Joel A. Nichols & Richard W. Garnett, *Religion and the American Experiment*, 5th ed. (Oxford: Oxford University Press, 2022).

1. See examples in American Legion v. American Humanist Association, 139 S. Ct. 2067, 2074–79 (2019).
2. See e.g., Locke v. Davey, 540 U.S. 712, 715–17 (2004); Christian Legal Society v. Martinez, 561 U.S. 661, 672–73, 683 (2010).
3. See, e.g., 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).
4. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).
5. See examples in Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021).
6. See examples in John Witte, Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge: Cambridge University Press, 2021), 196–226.
7. See examples in John Witte Jr. & Joel A. Nichols, "Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions," *Faulkner Law Review* 4 (2013), 321.
8. See John Witte Jr. & Joel A. Nichols, "Come Let Us Reason Together": Restoring Religious Freedom in America and Abroad," *Notre Dame Law Review* 92 (2016), 427.
9. See Thomas C. Berg, *Religious Liberty in a Polarized Age* (Grand Rapids, MI: Eerdmans, 2022); William N. Eskridge, Jr. & Robin Fretwell Wilson eds., *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge: Cambridge University Press, 2018); Frank Ravitch,

enemy of liberty, and decried religious freedom as a dangerous and outdated constitutional luxury.[10]

All that has changed dramatically in the past decade. While loud criticisms of religion continue to clatter in the media and the law reviews, the U.S. Supreme Court has led a great awakening of American religious freedom. In more than two dozen cases since 2011, the Court has used both the First Amendment and federal statutes to strengthen the rights of religious organizations to make their own internal decisions about employment and employee benefits.[11] 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.[12] The Court has used the Free Exercise Clause to enjoin several public regulations and policies that discriminated against religion, that penalized parties for taking religious stands, or that coerced parties to act contrary to their conscience.[13] 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.[14] The Court has used religious freedom statutes to give new protections to Muslim prisoners,[15] and insisted that death row inmates have access to their chaplains to the very end.[16] The Court has even allowed the collection of money damages from government officials who violated individuals' statutory protections of religious freedom.[17]

Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America (Cambridge: Cambridge University Press 2016).

10. See several examples in Witte and Nichols, "Come Let Us Reason Together."

11. *See* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School. v. Morrissey-Berru, 140 S. Ct. 2049 (2020; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020). See discussion in text as notes 60-61 below.

12. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022). See discussion of these cases in text at notes 38-42 below.

13. See cases in note 12 and Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874, 1881–82 (2021).

14. 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); Groff v. DeJoy, 143 S. Ct. 2279 (2023) (upholding the Title VII religious discrimination claim of a Sunday worker who was not accommodated); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015) (upholding a Title VII disparate treatment case for a Muslim job applicant who wore a headscarf for religious reasons).

15. See Holt v. Hobbs, 574 U.S. 352 (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).

16. 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).

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

These two dozen recent cases signal a marked return to America's founding axiom that religious freedom is the first freedom of our constitutional order, not a second class right. The eighteenth-century founders' vision was that religion is more than simply another form of expression and association; it deserves separate and special constitutional treatment. The founders thus placed the guarantee of freedom of religion before the freedoms of speech, press, and assembly in the First Amendment. That gave both religious individuals and groups special protections for their faith claims. All peaceable exercises of religion, whether individual or corporate, private or public, traditional or new, popular or reviled, properly deserve the protection of the First Amendment.[18] The current Supreme Court has seized on this traditional teaching with new alacrity.

The current Court has also increasingly embraced the traditional view that the First Amendment provides an interlocking and integrated shield of religious liberties and rights for all. The First Amendment Free Exercise clause outlaws government *proscriptions* of religion—government policies or actions that unduly burden the conscience, unduly restrict religious exercise, discriminate against religion, or invade the autonomy of churches and other religious bodies. The First Amendment Establishment Clause, in turn, outlaws government *prescriptions* of religion—government actions that unduly coerce the conscience, mandate forms of exercise, discriminate in favor of religion, or improperly ally the state with churches or other religious bodies. The First Amendment thereby provided complementary protections to the foundational principles of the American experiment—liberty of conscience, free exercise, religious equality, religious pluralism, separation of church and state, and no governmental establishment of religion.[19] In the 1940s, the Supreme Court had confirmed all these principles when it opened the modern era of religious freedom case law. But in the 1980s and 1990s, the Court gradually reduced the First Amendment to a mere guarantee of state neutrality toward religion.[20] That provided some protection, but not much. Today, the Court provides far more multi-principled and robust protection of religious freedom.

The Court's recent cases not only revive the founders' vision. They also offer fresh insights and accents that provide a more integrative approach toward religious freedom protection going forward. Five distinct teachings are worth highlighting.

Respecting Historical Democratic Decisions

One teaching of the Court's recent cases is that a regime of religious liberty must respect historical democratic judgments about religion. In *Town of Greece v. Galloway* (2014), the Court used this argument to uphold a local community's decades-long

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[18] See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment,* 35-128.
[19] Ibid., esp. 59-92, 109-28.
[20] Ibid., 171-77, 217-27 discussing the development of the neutrality test prescribed for Free Exercise cases in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 877–79, 890 (1990) and for Establishment Clause cases in Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

practice of offering prayers by sundry invited local clergy to open its town council meetings. A local taxpayer thought this constituted an establishment of religion. The Court disagreed. The First Amendment "must be interpreted by reference to historical practices and understandings," Justice Kennedy wrote for the Court, particularly those that have "withstood the critical scrutiny of time and political change." "A test that would sweep away what has so long been settled" and accepted the community "would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[21]

The 2019 case of *American Legion v. American Humanist Association* (2019) used similar logic. That case featured a large Latin cross that had been privately erected in 1925 as a memorial for local soldiers who had died in World War I. But it now stood at a prominent intersection of two major public roads that had grown up around the monument in the intervening decades. The American Humanist Association thought this major Christian symbol constituted an establishment of religion and should come down. A 7-2 Court, led by Justice Alito, rejected this claim. The Court agreed that a cross is a poignant Christian symbol. But this Latin cross, Alito wrote, in place for nearly a century, had taken on independent value as an "embedded feature of the community's landscape and identity." For some, this cross was "a symbolic resting place for ancestors who never returned home." "For others, it [was] a place for the community to gather and honor all veterans and their sacrifices for our Nation. For still others, it [was] a familiar historical landmark." When the passage of time "imbues a religiously expressive monument, symbol, or practice" with "familiarity and historical significance," the *American Legion* Court concluded, that "gives rise to a strong presumption of constitutionality."[22]

The upshot of these and other recent cases is that the First Amendment does not give a disgruntled taxpayer a heckler veto over the longstanding democratic decisions the local community took to create and maintain a religious symbol or ceremony. Change might come, but that must be done by legislation not adjudication.

This argument is strong enough to support the continuation of chaplains and chapels in legislatures, military bases, state prisons, public hospitals, or embassies; old Decalogues, menorahs, creches, and ceremonial Indian mounds in state parks; religious figures, verses, and sayings on public monuments and documents; memorial crosses, stars, and other religious symbols in state cemeteries; ceremonial recitations of oaths, proclamations, and pledges that invoke the name of God and other religious language. So long as private parties are not coerced into participating in or endorsing 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.

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[21] 572 U.S. 565, 576-77 (2014).
[22] 139 S. Ct. 2067, 2084-85, 2090 (2019).

Yes, some old traditions, no matter how venerated, eventually do have to go when they no longer represent a community's values—as the nation has seen with 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. But many old, innocuous, and avoidable religious symbols and practices can and should stay.

No Religious Coercion

A second key corollary teaching of the Court's recent 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. The law is "absolute" in forestalling "compulsion by law of the acceptance of any creed or the practice of any form of worship," Justice Roberts wrote in *Cantwell v. Connecticut*, the 1940 case that inaugurated the modern era of religious freedom.[23] Later Free Exercise cases thus struck down compulsory flag salutes, mandatory recitations of the Pledge of Allegiance, and state-administered test oaths as forms of religious coercion.[24] Later Free Speech cases held repeatedly that government cannot induce or coerce private parties to express themselves contrary to their (religious) beliefs.[25] That proposition informed the Court's most recent Free Speech case of *303 Creative LLC v. Elenis* which protected a website designer from having to post information about same sex weddings to which she was conscientiously opposed. Even a party who operates in the stream of commerce cannot be forced to say or display something that violates their religious beliefs.[26]

Later Establishment Clause cases insisted that young, impressionable (state) public-school students who are required to attend school could not be coerced to participate in religious classes, prayers, Bible readings, religious symbols, or daily moments of silence as part of their classroom and curricular experience.[27] Even a one-

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[23] 310 U.S. 296, 303 (1940).

[24] See, e.g., West Virginia State Board of Education 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 violated the "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).

[25] See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); 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.").

[26] 143 S. Ct. 2298 (2023).

[27] See cases discussed in Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment,* 232-42.

time invocation at a public middle school graduation ceremony was judged to be coercive to a graduating student.[28]

The Court's recent cases have confirmed this prohibition on religious coercion. But the Court has also raised the threshold on when freedom from religious coercion can be successfully claimed under the Establishment Clause. In *Town of Greece*, the Court made clear that the "brief, solemn, and respectful prayer" offered by an array of local pastors before the town council began its meeting was not religious coercion. It was, the Court said, simply a way "to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens." No citizens were coerced or compelled "to engage in a religious observance." They could readily skip the brief prayer before entering the meeting, or simply ignore any prayer they may have heard with impunity.[29]

Yes, some secular citizens might be offended by the very presence of these old religious ceremonies, Justice Kennedy continued for the *Town of Greece* Court, just as some religious citizens might be offended by new secular and sometimes anti-religious messages. Enduring blasphemies of various sorts is the cost we must all bear for robust protections of freedom of speech. But, the Court continued, offense "does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views."[30]

Five years later, Justice Gorsuch made a similar argument in his lengthy concurrence in *American Legion*. Indeed, 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. "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," cover her ears, or pursue a political option.[31]

In his concurring opinions both in *Town of Greece* and later in *American Legion*, Justice Thomas went still further and called for proof of "actual legal coercion" to press a prima facie case under the Establishment Clause. By that he meant the "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." The "characteristics of an establishment as understood at the founding," he wrote, were that

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[28] Lee v. Weisman, 505 U.S. 577 (1992).
[29] 572 U.S. 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.").
[30] Ibid., 589.
[31] 139 S. Ct. at 2067, 2102–03 (2019) (Gorsuch, J., concurring) (internal citations omitted).

"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." 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. 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."[32]

Justice Kavanaugh's concurring opinion in *American Legion* proposed a new test as a way of combining the Court's twin concerns of respecting democratic traditions 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.[33]

It is unclear from these recent 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. It is also unclear how claims of religious coercion might be treated if pled under the Free Exercise Clause instead. As we'll see in a moment, 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.[34] 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.

Equality Not Just Neutrality

A third key teaching of the Court's recent cases is that religion deserves not just state neutrality, but equal treatment and protection by government. The Court has not formally rejected the 1990 *Smith* free exercise test that neutral, general applicable laws are constitutional no matter what burden they impose on religion. But the Court now judges differential treatment of religion as fatal religious discrimination under the Free

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[32] *Town of Greece*, 572 U.S. at 608, 610 (Thomas J. concurring); *American Legion*, 139 S. Ct. at 2095-96 (Thomas, J., concurring).
[33] 139 S. Ct. at 2093 (Kavanagh, J. concurring).
[34] See Eric Wang, "To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion," *Emory Law Journal* 72, 2023, 723, 729–51 & tbl. 1 (discussing the different types of "substantial burdens" as well as discriminatory treatment against religion that triggers strict scrutiny).

Exercise Clause or fatal viewpoint discrimination under the Free Speech Clause. And the Court has repeatedly rejected government's argument that differential treatment of religion is needed to avoid establishing religion. Disfavorable treatment of religion by government is unconstitutional discrimination – full stop.

State Aid to Religious Education. This focus on equality over neutrality is clearest in recent Supreme Court cases on state aid to religious education. Such aid has long been a vexed topic. Before 1940, thirty-five of the then 48 states had passed state constitutional prohibitions on government funding of religious education.[35] After 1940, when the Supreme Court began applying the First Amendment to state and local governments, it struck down many forms of direct and indirect state aid to religious schools, parents, and children as violations of the Establishment Clause.[36]

That has changed dramatically in the most recent cases. The Court now holds that state aid to religious education is not only *permissible* under the Establishment Clause but sometimes *required* by the Free Exercise Clause to ensure equal treatment of religion. *Trinity Lutheran Church v. Comer* (2017) was the first of a trio of cases to open this new regime. 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. 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. That had long been the standard response to religious schools that sought government funding. The church school sued, claiming religious discrimination in violation of the Free Exercise Clause. The *Trinity Lutheran* Court agreed. 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." 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. A general concern about violating state or federal prohibitions on religious establishment was not compelling enough.[37]

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. 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. Parents whose children could not get scholarships to attend a Christian school filed suit under the Free Exercise Clause, claiming religious discrimination. The *Espinoza* Court agreed. This program "bars religious schools from public benefits solely because of the religious character of the

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[35] See John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment,* 4th ed. (Oxford: Oxford University Press, 2016), Appendix 2 (listing all the relevant state statutes prohibiting state aid to religion).

[36] See cases in Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment,* 261-67.

[37] 137 S. Ct. at 2012, 2017–18, 2021-24.

schools," and such discrimination cannot be justified by the state's "interest in separating church and State 'more fiercely' than the Federal Constitution."[38]

Carson v. Makin (2022) repeated this demand for equality. 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. However, the state would provide this assistance only if the chosen school was not "sectarian" based on the state's review of the school's curriculum, practices, character, and mission. The Court struck down this policy too. 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. The state may not "exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[39]

Free Speech and Equality. The recent Court has also used the equality principle in Free Speech cases. 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. 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.[40] In the 2022 case of *Shurtleff v. City of Boston* (2022), municipal authorities had allowed nearly 300 private groups over the prior 15 years to gather in the City Hall Plaza for their own events, and to fly their own flags on one of the city flag poles during these events. 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. Shurtleff claimed religious discrimination under the Free Speech Clause. Another unanimous Court, now led by Justice Breyer, agreed that Boston had committed viewpoint discrimination against religion.[41]

Covid Regulations and Equality. 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. The Court upheld the restrictions when they fell equally on religious and nonreligious parties but enjoined them when religion was treated differently.

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. "Red zones" restricted religious worship gatherings to ten persons; "orange zones" set the

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[38] 140 S. Ct. at 2246, 2251-55, 2262-63.
[39] 142 S. Ct. at 1987, 1993-94, 1997–98, 2000-02.
[40] 576 U.S. 155, 159, 163–65, 171 (2015).
[41] 142 S. Ct. at 1583, 1588-89, 1593.

capacity limit at twenty-five. 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. Moreover, these regulations placed no capacity limits on purportedly "essential" businesses, which explicitly included acupuncture facilities, campgrounds, garages, transportation facilities, and manufacturing plants, among other businesses. 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 thus issued an injunction.[42]

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. House-church worshippers challenged the orders. 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." Because California imposed a flat limit on religious gatherings but allowed for "myriad exceptions and accommodations for comparable activities," the Court enjoined its regulations.[43]

No Government Hostility 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. As a result, the Colorado Civil Rights Commission found that Phillips violated the state's anti-discrimination law and sanctioned him. In a public hearing, 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 uses of religion and religious freedom "to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust." The baker claimed violations of his free exercise rights.[44]

A 7–2 Court agreed, led by Justice Kennedy, who had authored several of the Court's opinions supporting same-sex equality and marriage. 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." 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." 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. This

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[42] 141 S. Ct. 63, 65–66 (2020) (per curiam).
[43] 141 S. Ct. 1294, 1296-98 (2021) (per curiam).
[44] 138 S. Ct. at 1719, 1723–29.

animus against Phillips, together with the unequal treatment of discrimination claims brought against other bakers, violated the Free Exercise Clause.[45]

Concern for animus against religion also informed the Court's opinion in *Kennedy v. Bremerton School District* (2022). In that case, a public high school coach was fired for offering private prayers after the school's football game, even though every other form of speech was allowed, not least loud whooping and hollering in support of the winning time. The coach claimed religious discrimination in violation of the Free Exercise Clause, and the Court found in his favor. Justice Gorsuch wrote for the Court:

> 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.[46]

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[45] Ibid., 1724, 1729-31.
[46] 142 S. Ct. 2407, 2415–16, 2432-33 (2022)

Exemptions for Religion

A fourth teaching of these cases is that sometimes equality is not good enough to guarantee religious freedom. In those cases, both legislative and judicial exemptions from compliance with general laws are needed.

This too was traditional constitutional lore. Already the eighteenth-century founders recognized that exemptions provided parties who had religious scruples with an oasis of nonconformity—a space to follow the dictates of their conscience or the commandments of their faith community. The founders thus granted religious parties exemptions from religious taxes, religious incorporation requirements, oath swearing, and military service.[47] These exemptions continued in both state and federal statutes through the nineteenth and twentieth centuries -- statutes which the courts tended to enforce generously for religious claimants.

In the 1963 case of *Sherbert v. Verner*, the Court went further to create judicial exemptions to relieve religious parties from substantial burdens on their faith imposed by otherwise appropriate statutes. In that case, a Seventh Day Adventist was fired from her private job for refusing to work on Saturday, her sabbath. The state denied her unemployment compensation benefits because the applicable statute allowed no benefits for applicants who were fired for cause. Sherbert sued under the Free Exercise Clause, arguing that this ruling forced her to choose between her state benefits and her religious observance. The *Sherbert* Court agreed and granted her a judicial exemption from this specific rule, even while leaving the unemployment statute in place.[48] The Court thereafter gave judicial exemptions from general laws to Saturday sabbatarians, Amish ascetic parents, Jehovah's Witness pacificists, and similar parties whom the legislatures had not accommodated.[49]

The 1990 *Smith* neutrality test largely closed the door to these judicial exemptions. That triggered an explosion of hundreds of federal and state statutes and amendments providing exemptions for religious parties.[50] The recent Court has interpreted these statutes broadly to grant relief and exemptions to both religious individuals and groups. Most notably, in the 2014 case of *Burwell v. Hobby Lobby* the Court used the federal Religious Freedom Restoration Act to grant a closely-held private business corporation an exemption from full compliance with the Affordable Health Care Act that mandated employee insurance that covered abortifacients. Because this was contrary to the owners' religious beliefs about the sanctity of life, the

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[47] See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment,* 60-66, 104-09.
[48] 374 U.S. 398, 401-06 (1963).
[49] See Witte, Nichols, and Garnett, *Religion and the American Constitutional Experiment,* 161-68.
[50] See, e.g., James E. Ryan, "*Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment," 78 *Virginia Law Review* 78 (1992), 1407, 1445 (1992) (estimating more than 2,000 religious exemptions in state and federal statutes); Douglas Laycock, *Religious Liberty, Volume 3: Religious Freedom Restoration Acts, Same-Sex Marriage, and the Culture Wars* (Grand Rapids, MI: Eerdmans, 2018); Douglas Laycock, *Religious Liberty, Volume 4: Federal Legislation After the Religious Freedom Restoration Acts, with More on the Culture Wars* (Grand Rapids, MI: Eerdmans, 2018).

corporation was exempted from full compliance with the statute.[51] Similarly, the Court has interpreted the federal Religious Land Use and Institutional Persons Act generously to exempt prisoners from grooming requirements that burdened their religion,[52] and to permit chaplains to lay hands on death row prisoners at the time of their execution contrary to the usual rules.[53] The Court has further used Civil Rights Act prohibitions on religious discrimination to protect a Muslim job applicant from prejudicial hiring practice[54] and a Sunday sabbatarian from retaliatory firing for refusing to work on the Sabbath.[55] And in its most recent cases, the Court has again resumed the practice of granting judicial exemptions to general statutes.

In a world of growing religious pluralism and anti-religious animus, exemptions are important tools for the protection of religious freedom. They have long been controversial, however, because they seem to favor religion over non-religion in defiance of the Court's principled insistence on equality, protecting religious individuals or groups more than their secular counterparts. What has made them more controversial of late is when majority faiths seek judicial exemption rather than legislative exemptions. Judicial exemptions used to be justified as a suitable refuge for religious minorities from the tyranny of the legislative majority. What has also made them more controversial is that some exemptions can force third parties to forgo services they find important to access whether website designs or wedding cakes for same-sex weddings or medical procedures for artificial reproduction, contraception, abortion, or sexual transition. Those controversies are mitigated when alternative and equally priced service providers are easily at hand. But they become more acute when there are no easy alternative service providers at hand or no time or funds to access them. They become even more acute when the exempt service provider has government licensing or funding.

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[51] 134 S. Ct. at 2751, 2779. See also *Little Sisters,* 140 S. Ct. at 2384 (holding that federal agencies properly promulgated religious and moral exemptions for health plans that include contraceptive coverage under the Affordable Care Act).
[52] *Holt*, 574 U.S. at 352.
[53] *Ramirez*, 142 S. Ct. at 1264.
[54] *Abercrombie & Fitch*, 575 U.S. at 768.
[55] *Groff*, 143 S. Ct. at 2279.

Separation of Church and State

A final teaching of the Court's recent cases is that the principle of separation of church and state is no longer the secular be-and-end-all of the First Amendment as it had become in the last half of the twentieth century. Separation of church and state is an ancient principle of religious freedom.[56] It needs to be retained, particularly for its enduring insight of protecting religious communities and organizations from political intrusion and interference. Today, as much as in the past, governmental officials have no constitutional business interfering in the internal polity and property of religious bodies, determining its membership and leadership, or dictating its doctrines and liturgies.

The Court embraced this view of separation of church and state firmly in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012). In that case, a Lutheran church school had dismissed a "called religious teacher" from her employment because her conduct defied the church's internal procedures of dispute resolution. The teacher claimed this was a retaliatory firing. The Court rejected her claim. Adducing the historical principle and precedents of separation of church and state, going back to Magna Carta, Chief Justice Roberts wrote for the Court: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[57] Later Free Exercise and RFRA cases have fleshed out this separatist principle in other religious employment cases.[58]

But the recent Court has retreated from its earlier insistence on maintaining "a high and impregnable wall of separation between church and state," whose "slightest breach" was said to trigger an establishment clause violation.[59]. Not only was this earlier teaching based on selective history and suspect jurisprudence that has now been thoroughly debunked by the majority of the Justices. But absolute separation of church and state is impossible to put in practice today. Ours is not a distant "night watchman" state, content to limit its activities to defense, policing, postal service, and road maintenance. Today's modern welfare state is an intensely active and ambitious sovereign from whom complete separation is impossible for any religion that forms even the smallest community. Today's governments not only enact and enforce thousands of laws, but they also make grants, extend loans, confer licenses, enter contracts, and control access to the civic and economic arenas. And so, both confrontation and cooperation with the modern welfare state are almost inevitable for any organized

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[56] John Witte, Jr., "Facts and Fictions About the History of Separation of Church and State," *Journal of Church and State* 48 (2006), 15.
[57] 565 U.S. at 189, 702-03, 707-09.
[58] See, e.g., *Our Lady of Guadalupe*, 140 S. Ct. at 2060 ("[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).
[59] Everson v. Board of Education, 330 U.S. 1, 18 (1947).

religion. When a state's regulation imposes too heavy a burden on a particular religion, the Free Exercise Clause should provide a pathway to relief. When a state's appropriation imparts too generous a benefit to religion alone, the Establishment Clause should provide a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, and when governments cooperate with religious agencies to accomplish secular purposes and promote the common good, Establishment Clause objections are unavailing and Free Exercise rights are vindicated.

Concluding Reflections

"Constitutions work like clock[s]," American founder John Adams reminds us. To operate properly, their "pendulums must swing back and forth."[60] We have certainly witnessed wide pendular swings in First Amendment religious freedom jurisprudence over the past century. But the Supreme Court has quietly ended the long constitutional swing of cases away from religious liberty protection from 1985 to 2010 and is now leading a strong pendular swing back. Since 2010, almost every one of the two dozen Supreme Court on point have advanced the cause of religious freedom, and those cases have been echoed, elaborated, and sometimes extended in scores of lower federal court cases. The Court has not always produced clean, clear, clockwork logic, nor settled on a grand unified theory that some Justices and academics have advocated. But it has produced a hard swing in favor of religious freedom, even if sometimes wobbly.

This has been a good movement. Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down. And religious freedom litigation is too critical a forum for social stability to be scorned or ignored. In centuries past—and in many regions of the world still today—disputes over religion and religious freedom have often led to violence, and sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process.

As this this process continues to unfold, it is essential, in my view, that the full range of founding religious freedom principles remain in operation – liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion by law. Religious freedom norms should not be reduced to neutrality or equality norms alone, and not weakened by too low a standard of review or too high a law of standing.

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[60] Letter to William Pym (Jan. 27, 1766), in George W. Carey ed., *The Political Writings of John Adams* Washington, DC: Regnery, 2000), 644, 647.

It is essential that America addresses the glaring blind spots in our religious liberty jurisprudence—particularly the long and shameful treatment of Native American Indian claims.[61] It is essential that we show our traditional hospitality and charity to the "sojourner[s] who [are] within [our] gates"[62]—migrants, refugees, asylum seekers, and others—and desist from some of the outrageous nativism that have marked too much of our popular and political speech of late. It is essential that religious freedom advocates show compassion for other freedom claimants, including those pressing for various sexual freedoms, and find responsible ways of living together with all our neighbors.

It is essential that we Christians today, who have won most of the recent cases, remain gracious in victory especially to those who do not share their faith. This is not only the heart of the Golden Rule. But sociological studies make clear that Christians who have long enjoyed majority status will soon be in the minority even in the United States.[63] Religious freedom may be rising, but Christian allegiance is falling rapidly, much as it has fallen in Europe. We need to remember that the precedents and policies that we craft now for religious and cultural minorities are the rules that will govern the religious liberty of our grandchildren. Doing unto others what is loving and just is not only right, but expedient.

It is essential that Christians today treat religious freedom as a precious gift of God to protect, not a prerogative of one political party to brandish. "Put not your faith in princes,"[64] the Bible tells us, and by extension do not let religious freedom become a political plaything.

Finally, and related, it is essential that we Christians use our religious freedom to discharge our most cardinal callings of preaching the word, administering the sacraments, catechizing the young, caring for the poor and needy, and prophesying against injustice. Like all other human institutions, many American Christian churches have been devastated by human sinfulness. Think of the clerical abuse of minors. The embezzlement of tithes and gifts. The degradation and mistreatment of women. Indifference to the poor and needy. A lack of compassion in matters of sexual orientation. Racially and economically segregated congregations. Inhospitality toward immigrants and foreigners. Naked political pandering. Our failure as Christians to live up to our own truths and values not only undercuts our moral authority and spiritual efficacy in the eyes of others. It also weakens the case for religious freedom for all faiths including our own.

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[61] See case analysis in https://pluralism.org/religious-freedom-for-native-americans; Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 Am. Indian L. Rev. 253 (2012).
[62] Exodus 20:10.
[63] https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/; Robert P. Jones, *The End of White Christian America* (New York: Simon & Shuster, 2016).
[64] Psalm 146:3.

Martin Luther King Jr. once said that the church "is not the master or the servant of the state, but rather the conscience of the state."[65] When their own houses are in good order, churches are still well situated to play this important role, even in our late modern intensely pluralistic societies. To quote Dr. King again:

> If the church will free itself from the shackles of a deadening status quo, and, recovering its great historic mission, will speak and act fearlessly and insistently in terms of justice and peace, it will enkindle the imagination of mankind and fire the souls of men, imbuing them with a glowing and ardent love for truth, justice, and peace. Men far and near will know the church as a great fellowship of love that provides light and bread for lonely travellers at midnight.[66]

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[65] Martin Luther King, Jr., "A Knock at Midnight," in James M. Washington, ed., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* (San Francisco: Harper and Row, 1986), 501.
[66] Ibid.