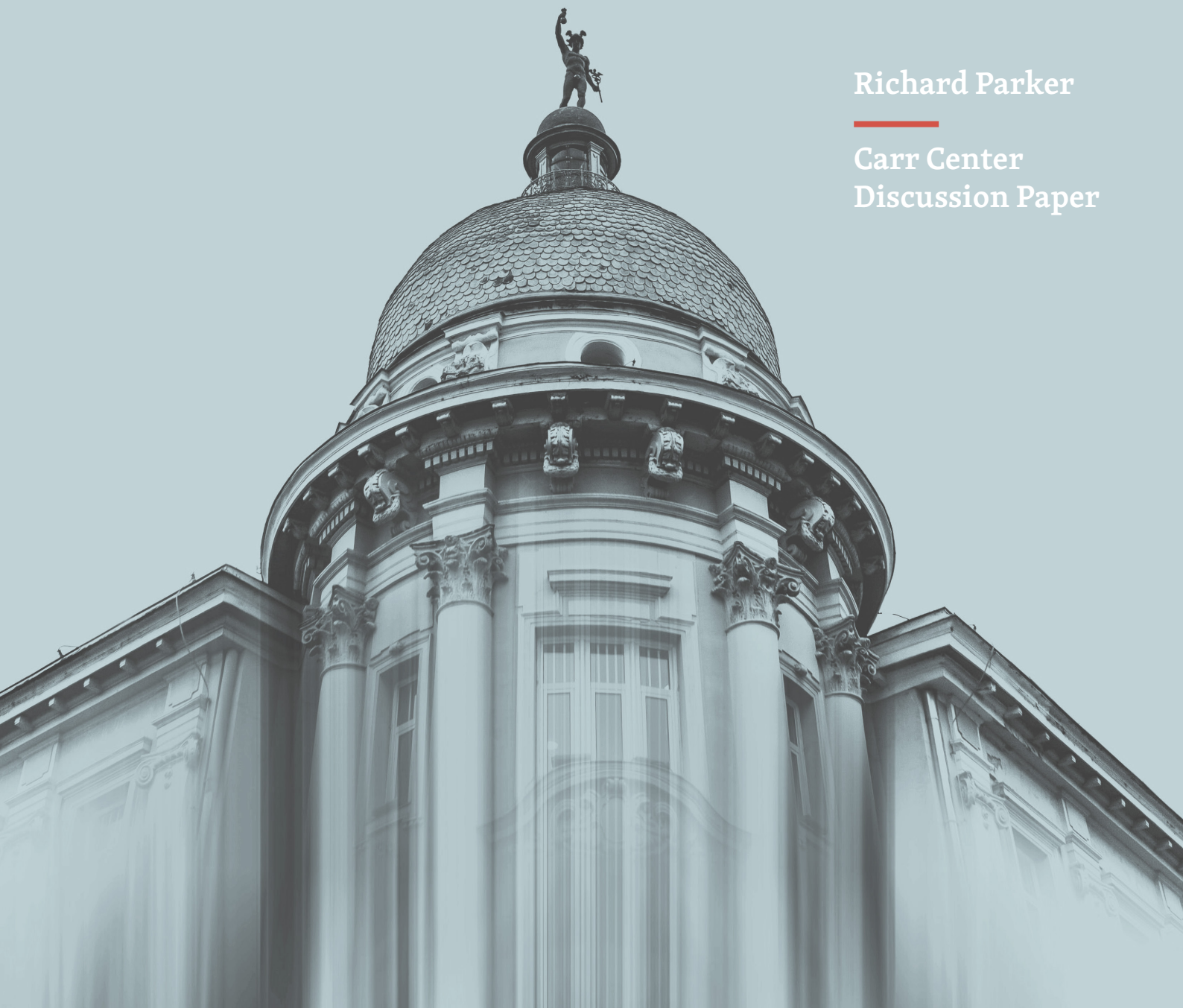


CARR CENTER FOR HUMAN RIGHTS POLICY HARVARD KENNEDY SCHOOL

Are Rights and Religion Orthogonal?

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Carr Center
Discussion Paper



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The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’

Justice Hugo Black, *Everson v. Board of Education* (1947)

Talking about “rights” is to talk about a fundamental cornerstone of our democracy, our system of law, our ethics, and—perhaps most deeply—our identity.

One of the rights we Americans customarily consider ours is “our right to religious freedom,” which, as enshrined in the First Amendment, is not one but two important correlate rights—our individual right to worship (or not) as we please, and our collective right (and duty) to prohibit any sort of government favoritism toward (or disfavoring of) any organized religion.

As an endless chorus of (mostly liberal) politicians, preachers, high school civics teachers, and newspaper editorialists constantly reminds us, America has generally maintained those rights by building what Thomas Jefferson in 1802 described to Connecticut Baptists as a “wall of separation” between the state and church.¹ Justice Black, quoted above, gives us a particularly eloquent precis of that view in the landmark 1947 *Everson* case.²

Yet it’s worth noting, for reasons I’ll explain shortly, that while that “wall of separation” might seem a long-established bedrock feature of American identity, a quite important community of what I’ll call “religious rights defenders” has nonetheless grown up since *Everson*—a community that didn’t really exist before then. Composed mainly of lawyers, judges, law professors, moral philosophers, political theorists, journalists (especially but not only opinion writers), and a diverse supporting troupe of what I’ll simply call “rights activists,” these religious rights guardians have appointed themselves watchmen along the parapets of that wall of separation, ever alert for dangers, ready to sound alarms and do battle as needed.³

If litigation is a measure, it turns out, these modern-day rights warriors, have found quite a number of such threats since *Everson*: the Supreme Court has ruled on literally dozens of religious rights issues since 1947—compared to hearing almost none in the century and a half before *Everson*.⁴ In other words, while many of us today may feel that the First Amendment’s religious freedoms have long been securely established, something about the years since World War II has created a battlefield concerning those freedoms that had no precedent in the 150 years between the passage of the Bill of Rights and *Everson*.

Why that should be so is an important issue I’ll explore—but first, here’s another. In the 1970s, a second competing group of religious rights defenders appeared. Insistent that they were just as keen to protect our First Amendment freedoms, they nonetheless held decidedly different ideas about what those rights are, who possesses them, and what the state (and we citizens) must do to protect them. Far more conservative in their reading of the First Amendment, the Founders’ debates about religion and the state, and the history of religion, politics, and law in America, these new guardians have come to interpretations that are not just diametrically but are bitterly opposed to the first group’s.

In the late 1970s, this new group seemed to view “religious rights” as one rallying cry among many meant to stir a much larger political revolt. Initially, their biggest and most visible issues involved opposition to abortion, homosexuality, and the Equal Rights Amendment, and support for school prayer. With charismatic conservative televangelists like Jerry Falwell, Pat Robertson, Donald Wildmon, and James Dobson

¹ I realize some may vehemently disagree with me. I’m prepared to defend my position, not against a perfect ideal, but the actual historical practice of the American government compared to European governments over the same time period. Religious conservatives since the 1980s, of course, have carried on an active battle against this “wall of separation” —and specifically deny it was part of the Framers’ intentions for a “Christian America.” We’ll discuss this later in the paper.

² I’ll explain what makes *Everson* a landmark later on.

³ Here I loosely mean members of well-known progressive “rights organizations” such as the ACLU, Americans United for the Separation of Church and State, People for the American Way, and internationally, Amnesty, Human Rights Watch, etc. For a much longer list of civil rights advocacy groups, see: https://en.wikipedia.org/wiki/Category:Civil_liberties_advocacy_groups_in_the_United_States

⁴ For a quick listing of nearly four dozen such cases since *Everson*, see <https://billofrightsinstitute.org/cases/>. For a longer list—over 90 rulings (all but two decided since *Everson*)—see: https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases_involving_the_First_Amendment

leading the way, this new group from the 1970s onward went about fundamentally realigning our political parties and in the process ushering in the partisan polarization which describes our public life today—and which has paved the way for Donald Trump’s election.⁵

Thousands of pages have been devoted to the Falwell-Robertson era of the Religious Right (roughly 1975-2000), so I’ll not repeat them; instead, let me explain why the second group of religious rights defenders has become so important, and how they’re trying to redefine our religious rights in the 21st century.

By 2020, the Religious Right of the Reagan years was, institutionally, gone. No powerful mass-member group funneled evangelical white Democrats into the GOP any longer as the Moral Majority or Christian Coalition once had done—in part, because that process is now complete. Second, the popular base of that older “Religious Right” has shape-shifted at least twice in the past 20 years. First, following the election of Barack Obama in 2008, many of its members transferred their activity and allegiance to the far more secular Tea Party, having been bitterly disillusioned by the failures of George W. Bush, their fellow evangelical.⁶ More recently, millions of them have migrated again, away from mass-based mediating institutions entirely to direct support of a revitalized Republican Party, and since 2016, to unquestioning support of Donald Trump, a figure who, whatever his protestations, by no stretch of the imagination can claim “religion” as motivation, means, or goal.

But if the mass base of America’s religious conservatives has shifted from institutional forums like the Moral Majority to direct support for the Republican Party (and now the presidency of Donald Trump), behind this macro-landscape of party and presidents, something quite important has happened: an elite group of conservatives, including religious conservatives, have developed their own tightly-structured and sophisticated networks of policy professionals and advocates. In this far smaller and more bounded world of their think tanks, their university scholars and seminars, and

their big-dollar foundation funders, a revolution has taken place. And the second group of religious rights defenders I described above is very much part of this smaller but ever-more-influential world, the intellectual vanguards of a powerful new wave of thought that is redefining the very concept of religious rights.

The issues that motivate these conservative intellectuals now range far beyond the old Religious Right’s evergreen list of abortion, homosexuality, etc.—and display keen attention to legal and constitutional rights reasoning that strongly resembles the earlier, more liberal rights arguments that emerged after *Everson*. Their field of interest and battle now encompasses not just abortion and homosexuality but science in biological (creationism) and environmental (anti-global-warming) terms, radical education reform (both in pressing for “more religion” to be taught and practiced in public schools and for a far more conservative parochial and charter school system as counterweight to the “failure” of public schools), and governmental inclusion of “faith-based” issues and criteria in social welfare provision.⁷

Under President Trump, they’ve been making highly visible gains in federal court appointments, from the Supreme Court on down. More quietly but no less impressively, they are making significant gains in the executive branch as well, as journalist Katherine Stewart recently highlighted:

In January 2018, the Trump administration established the Conscience and Religious Freedom Division in the Office for Civil Rights at the US Department of Health and Human Services. From the name of the new unit, a visitor from outer space might have supposed that the purpose of the office was to guarantee the rights of health care patients to enjoy equal care and respect, without regard to their religion or other matters of conscience. The actual mission of the office is not to protect patients but providers. Its goal is not to ensure that patients get care but that providers may deprive them of it when it suits those providers’ religious beliefs.

⁵ As well as the less well-known but often very important Focus on the Family, Family Research Council, and more recently the American Center for Law and Justice. Not all leaders of these groups were evangelical Protestants: Phyllis Schlafly, for example, head of the Eagle Forum, was a conservative Catholic who focused on “women’s issues” (she spearheaded the defeat of the ERA) and always worked uneasily with the televangelists. Jay Sekulow, a Jewish convert to evangelical Protestantism, serves as head of the ACLJ—and was Donald Trump’s lead attorney during the President’s impeachment trial.

⁶ Here I follow Theda Skocpol’s pioneering research on the Tea Party and its fraught relations with the “Religious Right.” See https://scholar.harvard.edu/files/williamson/files/tea_party_pop_0.pdf (Williamson, Vanessa, et al. “The Tea Party and the Remaking of Republican Conservatism.” *Perspectives on Politics*, vol. 9, no. 1, Mar. 2011, pp. 25–43, doi:10.1017/S153759271000407X.), esp. p. 25: “In the aftermath of a potentially demoralizing 2008 electoral defeat, when the Republican Party seemed widely discredited, the emergence of the Tea Party provided conservative activists with a new identity funded by Republican business elites and reinforced by a network of conservative media sources. Untethered from recent GOP baggage and policy specifics, the Tea Party energized disgruntled white middle-class conservatives and garnered widespread attention, despite stagnant or declining favorability ratings among the general public” and this: “Although Tea Party activists themselves are often socially conservative and may be conservative Christians, the infrastructure of the Tea Party should be distinguished from the church-linked networks prominent in grassroots conservative mobilizations of recent decades” (3).

⁷ The White House Faith and Opportunity Initiative is the Trump Administration’s reborn—or rebranded— incarnation of this and oversees Faith and Opportunity offices in more than a dozen federal agencies. The initial impetus for this White House office was in the George H.W. Bush administration, with its “Thousand Points of Light,” was embraced for a time by the Clinton administration, and then with Charitable Choice became for a time a cornerstone of George W. Bush’s vision of social service delivery.

Then on May 2, 2019, after declaring a National Day of Prayer, President Trump proudly broadened the unit's mandate to cover essentially all health services and staff that receive federal funds. Announcing a new rule, known as Protecting Statutory Conscience Rights in Health Care, the Trump administration signaled that all health care industry personnel, from physicians and nursing staff to receptionists, ambulance drivers, ultrasound technicians, and schedulers would be permitted to refuse to serve or treat patients if doing so offends their personal "religious beliefs or moral convictions."⁸

Most of us at Harvard, I think it fair to say, strongly identify with the values of the post-*Everson* America as conceived by Justice Black rather than by Donald Trump. Thus we've also grown used to thinking that the Supreme Court has since World War II taken on a briar patch of "religious rights" issues and on balance has expanded the scope of "religious freedom," as part of its larger protection of the civil liberties (including religious rights) of Americans who are not Anglo-Protestants.

But in this paper, I'm going to raise a growing countervailing concern among court-watchers: that those Supreme Court rulings and "our" post-*Everson* America cumulatively bear great responsibility for provoking the rise of the second, far more conservative, "religious rights guardians"—and that we now face a challenge of no small scale because the sophisticated legal reasoning and constitutional scholarship that "liberal" guardians once used have been turned upside-down by conservative opponents, who are paving the way for the Court's approval once one or two of the current Justices leaves the bench. With the rapid appointment of new federal judges already underway, these observers worry, we may very soon find our liberal conceptions of religious liberties under relentless siege.

To understand how this has come about, I'm going to first turn backward before turning forward—as the French say, "reculer pour mieux sauter"—because I want to establish what I think is a very important but often overlooked point about "religious rights": that in the years since *Everson*, we've come to think about those rights almost entirely from the point of view of the individual citizen. That is not wrong, but I consider it incomplete because it fails to account for the varied ways in which citizens think about those rights, about how citizens then collect in politically-important groups (such as movements or parties), and why "seeing like a state"—that is, thinking about rights in terms of strengthening our democracy as a whole rather than measured by the impact on individuals—may be the important next step we need to take in reconceptualizing those rights.⁹

With the rapid appointment of new federal judges already underway, we may very soon find our liberal conceptions of religious liberties under relentless siege.

To do all that, I'm first going to touch on three specific periods in our history when issues of "religious rights" were clearly important but turn out to have been conceived differently than we're inclined to do. In particular, I'm going to quickly sketch out three stories—one about 17th century Massachusetts (and the 16th and 17th century England from which it came); a second about the Founders' late 18th century debates and their intentions concerning religious freedom; and a third about 19th century rights-and-religion issues that aren't often recognized as such today. I'll then contrast those periods with the period since *Everson* to highlight how I think our conceptualization of "religious rights" changed after World War II, why it has produced the conservative reactions it has, and how to move forward.

First, let's look at the 1500s and 1600s when the word "religious" often described what we today think of as "political" ideas quite separate from "religion"—that is, ideas about the nature of the state, who governed and why, and who could be a participant in that activity.

These were centuries when one's religious beliefs could invite execution if on the "wrong" side of the argument. In 16th century England, for example, Henry VIII's vehemently hostile initial response to Luther and the Reformation earned him the title "fidei defensor" from the Pope. That changed when Henry's petition to divorce Catherine of Aragon was rejected by Rome—and in a remarkably brief time led Henry to sever England's centuries-long fealty to Catholicism and replace it with the new Church of England with Henry at its head. The enormous wealth of the Catholic Church in England (by some estimates including as much as one-third of the kingdom's arable lands) was then confiscated, Catholic clergy were deported, imprisoned, or executed, and the public practice of Catholicism itself made a capital crime.

The important point I want to make here is about the way in which "religion" was understood and used by governing elites on all sides of this political-ecclesial revolution—which in my

⁸. See Stewart, Katherine. "The Real Meaning of 'Religious Liberty': A License to Discriminate." *The New York Review of Books*, Feb. 2020, <https://www.nybooks.com/daily/2020/02/28/the-real-meaning-of-religious-liberty-a-license-to-discriminate/>. For a sobering overview of Trump's war against the federal bureaucracy, see Packer, George. "The President Is Winning His War on American Institutions." *The Atlantic*, Apr. 2020, <https://www.theatlantic.com/magazine/archive/2020/04/how-to-destroy-a-government/606793/>.

⁹. In the phrase "seeing like a state," I'm alluding to James Scott's *Seeing Like a State* (Yale University Press, 1998) which in some ways has a far darker view than mine about the potential of a democratic state. His challenging ideas about the legibility of citizens and high-modernist ideology have nonetheless been influential in shaping my thoughts about religion and rights.

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mind had little to do with classic features of “religion” such as theology, religious practice, and the “interior” spiritual life of believers. Instead, although “religion” was narratively everywhere in the Tudor and Stuart years, to me it seems clear that the bedrock issue of the times was about the state’s power, with “religion’s” role as the institutional one vindicating the kingdom’s legitimacy.

We all of course know that such legitimation is a common characteristic of the religion(s) a state has legalized; in fact, it’s central to the dialectic institutional relationship between organized states and organized religion. But when we speak of “religion” and of “religious rights” and the import of the First Amendment, it’s important to specify which particular attributes, roles, or powers of religion we’re considering. What I want to stress is that one sees in the Tudor and Stuart years how the state’s power and the quest for legitimacy determined the “religious” narrative of the times. I also want you to understand that the state’s interest in religion for the state’s own purposes is fundamental when we talk about “religion” and “rights”—and that the state’s interests are complex, and not necessarily in opposition to the citizen’s.

Under the Tudors in the 16th century and then under the Stuarts in the 17th century, England’s public “religious life”—to the extent that religion was entwined in legitimizing or delegitimizing the power of the monarch and the state—was without question brutally unforgiving of dissent from the state’s reigning interests. Henry, Mary, and Elizabeth all killed their Tudor-era opponents often using quite nasty means such as beheadings, burnings at the stake, or dismemberment and disembowelment of victims while still alive. And when we talk about “religious intolerance” in the early years of the Thirteen Colonies, it’s important to recognize that “religion” was practiced under the Stuarts amidst an almost continuous brutal political struggle over who would rule England, and simultaneously whether England’s powerful foreign enemies—France and Spain in particular—would defeat and even dismember her.

At the center of all this stood the question of England’s government and who would control it. The Stuarts were inclined to monarchic absolutism, while the Parliament was not, and by 1640 when grievances against Charles I precipitated the English Civil War, and the war then birthed the extraordinary Commonwealth of Oliver Cromwell, “religion” was invoked by all sides to legitimize their own particular claims to power. Although the Commonwealth’s collapse in 1659 briefly led to the Stuarts’ restoration, “religious” debates over their legitimacy continued until Stuart misrule produced a second uprising, known ever since to the English

as “The Glorious Revolution,” that installed not only a new dynasty but fundamentally restructured the division of power between the monarchy and the Parliament, and codified an unprecedented level of “religious tolerance” as a means less about religion and more about calming the turbulent political currents of the time.

The impact of all this 17th century tumult on faraway Massachusetts was enormous: Puritan leaders from the very moment of their arrival in New England in the 1620s were keenly aware of all the arguments for and against Stuart rule—and when civil war came in the 1640s, they showed a decided preference for the Commonwealth and Cromwell. (In fact, several thousand New England men sailed back to fight alongside Cromwell—and several Massachusetts men were among those who signed the Commonwealth’s official order to execute King Charles.)¹⁰

All this tumult in 17th century England played a crucial role in what is taught today as two of the era’s most famous examples of “religious intolerance,” as we innocently like to imagine it: the persecution of Anne Hutchinson and the execution of four Quakers—the so-called “Boston Martyrs” —a decade later. Yet I think a closer examination of both cases shows how vastly more attention was being paid to protecting the state’s power than to settling theological or ecclesial disagreements as such.

Hutchinson’s arrest, conviction, and expulsion from Massachusetts took place in 1637, just as the furious conflicts between Charles and his Parliamentary opponents were reaching a crescendo that would soon erupt in a civil war. Puritan leaders in Massachusetts, keenly aware of what was going on back in England, had interwoven their secular authority over the colony with their religious beliefs, so to them what was most threatening about Anne Hutchison was not simply her “religious” beliefs about grace, predestination, and the like but her continued defiance of that authority.¹¹ In other words, once again the real issue was the legitimacy of state power —and “religion” was of importance only when it was interpreted as delegitimizing the state.

The same holds true of the execution of four Quakers in Boston a decade later. The crime of the “Boston martyrs” was not simply that of being Quakers (as so much of our modern retelling has emphasized), but again the greater crime was challenging the authority of the colonial government at a moment when, back in England, the Puritan Commonwealth was collapsing, with foreseeably dangerous consequences for the colonies that had supported it. Add to this the Quakers’ fierce opposition to tithing and titles, and a

¹⁰. On the Americans who signed the warrant of execution, and the escape of several of them back to New England, where they successfully evaded arrest by the British, see: <https://www.theguardian.com/books/2019/jul/31/charles-killers-in-america-matthew-jenkinson-review>

¹¹. James I suspended Parliament in 1630, Laud became Archbishop of Canterbury in 1633, and Scottish Presbyterians —set in motion the countdown to England’s civil war (and its risks for New England) by refusing to use the Anglican liturgy in 1637—the year of Hutchinson’s trial.

collision with Boston authorities had always been guaranteed. Turning to our second period: Philadelphia in the 1780s, when America's new leaders were trying to draft a constitution by which to govern their new republic. In particular, let's consider Thomas Jefferson and James Madison, the two founders most responsible for the First Amendment's guarantees of our "religious liberties."

The civics textbook reading of these men's intentions and what they achieved is almost always framed as a triumph for their Enlightenment-era doubts about religion as a way of seeing the world generally. For both men, we learn, organized religion had been supplanted by benign deism that at most admired the moral teaching of Jesus but had no faith whatsoever in the miraculous aspects of Christianity, including the central miracle of the Resurrection, or for that matter the church's legitimation of the state.

That framing isn't false, but it's incomplete and misfocused. A more careful reading of Jefferson's "Bill for Establishing Religious Freedom" in Virginia and Madison's "Memorial and Remonstrances Against Religious Assessments," as well as Jefferson's early drafts of the Declaration of Independence provide a deeper insight into their authors' hopes and intentions.

Jefferson and Madison were baptized Anglicans (Jefferson was a vestryman for many years) who saw the Anglican church in Virginia as a direct threat to the new nation they hoped the Constitution (and Bill of Rights) would create.

The Anglicans were the colony's "established" church, and like in England they enjoyed state financial support and privileges not accorded other denominations. But thanks to the First Great Awakening that preceded the Revolution, Virginia's common folk had gone through an evangelical explosion that pushed Baptist membership past the elitist Anglicans, even though for years the Baptists had been actively harassed by Virginia's colonial government.

The legislatures of the thirteen colonies, including Virginia, would need to ratify the Constitution—and with large numbers of non-Anglicans now seated in its House of Burgesses, Jefferson and Madison knew that Virginia's ratification very likely would not happen without Anglican disestablishment. In short, the prospect of Virginia (the new nation's largest state) approving the Constitution was compromised by inter-denominational competition and resentments between the Anglicans (by then, Episcopalians) and the Baptists and their evangelical allies. Thus to Jefferson and Madison, organized religion above all represented a mortal threat to the building of the new American nation—and disestablishment was the only feasible solution to that threat.

Disestablishment nationally, after the Constitution was approved, would also give the two men a second, very political benefit, one that would strike at the theocratic ambitions of the New England states, most especially Massachusetts and Connecticut. New England's Federalists were the chief opponents of Jefferson's Democrat-Republicans, and so in 1802, when President Jefferson first used the phrase "a wall of separation between Church & State," he did so in a letter to Baptists in Danbury, Connecticut who were chafing under the

Income and wealth inequality have reached unprecedented heights while religious affiliation and attendance are at historic lows.

established church of the Congregationalists. Jefferson had no power to overturn the state's establishment law but he knew full well the political value of chastising his Federalist opponents in their very heartland.

From later diary entries, we know that Jefferson viewed his Danbury letter as part of his ongoing campaign, after "disestablishment" successfully severed organized religion from close allegiance with the state, to "privatize" religion by effectively limiting its realm to the pastoral care of its followers and removing it from decisive power over both the state and markets, a power which Jefferson adamantly believed should be left to a "public morality" formed by the democratic discourse of an educated citizenry.

As both Tocqueville and Marx both later observed, the disestablishment of religion thus advanced Jefferson's and Madison's efforts to forge a new, democratic polity that wasn't forever entangled in sectarian competitions. At the same time, by making America's numerous Protestant denominations part of, and subordinate to, a larger civil society rather than the opposite (which had been the European model), disestablishment allowed what neither Jefferson nor Madison anticipated or sought: an unprecedented explosive growth of competing denominations that were initially all Protestant but by the end of the 19th century encompassed, with a remarkable degree of at least mutual tolerance, more religious variety than existed in any other nation on earth.

Disestablishment also (quite importantly) produced something akin to a sacred ideal of America as a nation—the Union—a fact that would show its own decisive power when the issue of slavery in 1860 thrust Americans into civil war. Benedict Anderson has called nations "imagined communities," but "communities of faith" may be as accurate a description of what Jefferson and Madison were working to build as a new nation—or as the historian Sam Haselby explains it,

Because nations are impossible to experience in any direct, tangible way, they depend on faith, in the scriptural sense. Patriots must believe in the "evidence of things not seen, the substance of things hoped for," as the scriptures define faith. The bonds of belief among nationalists are vital, especially early in national movements. This mystical quality inherent within "we hold these truths to be self-evident" helps

account for its status as a patriot proverb. It does not represent an argument, or even an idea, but a statement of belonging to what Ernest Renan called “the spiritual family” of the nation.¹²

To me, the important point to take away is once again the importance of the specific role religion plays in relationship to the (here nascent) state’s quest for its own effective identity and political power, in this case through the formulation of the First Amendment. Rather than “protecting religion from the state,” it seems to me that the amendment, in essence, protected the infant federal state from the jealous demands of competing denominations and regions by diffusing the energy of the churches into an endless evangelical campaign to bring the citizenry, once individually redeemed, rather than the state, into a perfected condition of grace and concord with God as the new Chosen People in their new Promised Land.

Now let’s turn to 19th century America to see how Jefferson’s and Madison’s conception of “religious liberty” fared in practice as the country exploded in terms of territory, population—and what today we’d call multicultural identities.

As legal historians know, the Supreme Court didn’t consider the religious rights of the First Amendment deserving of its attentions for the 150 years that passed from the adoption of the Bill of Rights to the *Cantwell* decision just before World War II, and then *Everson* shortly after. Why? Because the courts—and the country in general—presumed that the First Amendment applied to the federal but not to state or local government.¹³

Thus, individual state governments were left free for several decades after the adoption of the Constitution to continue their colonial-era practice of taxing citizens, regardless of their beliefs, for support of the locally-“established” denomination such as the Congregationalists in New England.¹⁴ And although the Constitution itself prohibited a “religious” test for federal office-holders, the courts allowed many of the states to ban Catholics (also Jews in some cases, and in a

few rare cases, Muslims) as office-holders—and sometimes, though more rarely, as voters.¹⁵

But the states’ preferencing of certain denominations had also died a fairly quick death early in the 19th century: in 1785, only six of the thirteen states prohibited establishment; by 1800, the number had risen to 11, and the last holdouts held out only a little longer. Connecticut repealed its establishment in 1818 and Massachusetts in 1833. Perhaps more interestingly, it seems that the few states that practiced “establishment” had actually done so in a broad (and rather loose) variety of forms: some states, for example, for a time, collected fees for support of the favored denomination but allowed taxpayers to name the denomination his or her fees would support, while some states allowed citizens to opt-out of such payments entirely by filing exemption notices, and had uniformity of enforcement that was apparently far from exacting.¹⁶

Meanwhile, at the federal level, the famous Jeffersonian “wall of separation” the First Amendment had supposedly created, contained some surprisingly open doors in that wall throughout the 19th century.

For example, beginning in 1820, Congress began paying certain denominations for their “missionizing” of Native American tribes—a practice which continued (and even grew, albeit unevenly) for the rest of the century, as Washington went back and forth, formulating, enforcing, modifying, and abandoning various schemes meant to make “Indians into Americans.” Specific tribes were assigned to specific denominations—including from the program’s very beginning in the 1820s, not just Protestant denominations but the Catholic church as well.

After the Civil War, federal support for this religious “missionizing” grew larger and more systematic, with Washington using a combination of secular education and religious training, both supervised by churches paid for their efforts.¹⁷ To me, it is noteworthy that the 19th century

¹² Haselby, Sam. “The Powers of the Earth: Secularism and American Nationalism.” *The Origins of American Religious Nationalism*, Oxford University Press, 2015.

¹³ The Court’s *Cantwell v. Connecticut* decision in 1940 said that state and local governments had become bound by the Bill of Rights as a result of the Fourteenth Amendment, adopted in 1868. See McCarthy, Mary. “Application of the First Amendment to the States by the Fourteenth Amendment of the Constitution.” *Notre Dame Law Review*, vol. 22, no. 4, May 1947, p. 400.

¹⁴ Esbeck, Carl H., and Jonathan J. Den Hartog, editors. *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833*. University of Missouri Press, 2019.

¹⁵ Race was from nationhood forward always the more durable basis for the denial of rights and citizenship: America’s first immigration law in 1790 granted naturalization rights only to “free white persons.” In 1808 the federal government went further, banning the importation of African slaves, and then after the California gold rush in 1849, systematically began to discriminate against Asian-Americans.

¹⁶ N.A. “Religion and the Founding of the American Republic: Religion and the State Governments.” Library of Congress, <https://www.loc.gov/exhibits/religion/rel05.html>.

¹⁷ On the pre-Civil War period, see Berkhofer, Jr., Robert F. “Salvation and the Savage: An Analysis of Protestant Missions and American Indian Response, 1787-1862: University of Kentucky Press, 1965. On the late 19th century, see Provenzo, Eugene F., and Gary N. McCloskey. “Catholic and Federal Indian Education in the Late 19th Century: Opposed Colonial Models.” *Journal of American Indian Education*, vol. 21, no. 1, 1981, pp. 10-18. www.jstor.org/stable/24397361

Supreme Court never thought to find Washington's "missionizing" policies at odds with the First Amendment, either in terms of "establishment" (in this case, the government financing Christian—mainly Baptist and Methodist—missionaries) or "free exercise," regarding Native Americans' right to practice their own traditional faiths without aggressive and often coercive intervention by white Christians.

In fact, the Court's quite distinctive interpretation of "separation" and "free exercise" went further. In 1832, *Worcester vs. Georgia* overturned a state law that prohibited missionaries from evangelizing Native Americans without first getting a license issued by the state to do so.¹⁸ When the Supreme Court took up the case, the issue of a church-state "wall of separation" (at least as we know it today) was never even considered; rather, as Justice Marshall and his court ruled, Georgia's attempt to license missionaries was a jurisdictional encroachment on the federal government's treaty relations with the tribes.¹⁹

It's worth pausing for a moment to recognize once again the clear rationale at work here—one that views "religion" not as a sphere or domain of individual conscience, belief, or practice but as an instrument of *state or nation building*.

That same logic runs through the most celebrated (or perhaps "notorious") of the few 19th century "religious rights" cases the Supreme Court did take up, its *Reynolds* decision in 1878. This was a hard-fought case involving one of the century's newest and most controversial denominations, the Mormons. The issue was whether polygamy, which Mormons believed was a practice sanctioned by their God, was a practice protected by religious belief and the First Amendment. The Supreme Court, in rejecting the claim, made clear that it would distinguish religious beliefs from practices or actions based on those beliefs, and that when such actions were judged to be "in violation of social duties or subversive of good order," Congress could intervene to declare such a marital practice illegal. In short, we see again that in the 19th century, what today might come before the Court again to be argued as an issue of individual rights protected by the First Amendment, the issue was framed instead by an overarching concern for the idea of nation-building as the priority.

Now let me try to use all my backward-looking at these historical episodes to say something about the future of "religious rights" in the 21st century.

Looking over the literally dozens of cases the Supreme Court has ruled on since *Everson*, to me, there has been a fundamental shift in the Court's "perspective." As I read it, the centrality of the state's interests in how those rights are exercised was steadily reduced for roughly three decades while the priority of individuals' rights has grown.

During the 1960s and 1970s, for example, the Court paid close attention to the presence of "religion" in public schools in cases like *Engel v. Vitale*, *Abington v. Schempp*, and *Epperson v. Arkansas*. The thrust of those decisions was to sternly delineate a high "wall of separation" in public education meant to guarantee that students would never feel "coerced" by majoritarian views about religious beliefs, a position the Court then (only partly successfully) tried to codify through the three-part test it established in *Lemon v. Kurtzman*. It has also perennially wrestled with the issue of public aid to church-related schools, an issue that has been continuously fought over since the early 19th century when Catholics first sought taxpayer support for parochial schools as an alternative to the "too Protestant" public schools.

At times, the rulings have led to an almost comic splitting of hairs—determining why, for example, local government could fund buses that carried students to parochial schools but couldn't fund textbooks in those schools, or more recently why a state government could fund the rubberizing of a daycare program's playground even though the program operated on the grounds of a church.

But since the 1980s, "religious rights" cases have taken on aspects of the larger political struggles that now so deeply divide the nation. With the rise of the Christian Right and the consequent hyper-polarization of the political parties, more and more often cases like the rubberizing of a playground have effectively become proxies for much a larger judicial battle between liberal "separationists" and more conservative "accommodationists," the two philosophical poles between which the courts now more and more gyrate. It's a legal battle that in turn resonates out from the deep conflicts about American cultural values that have always been the animating logic of so many of our political disagreements.

The new frontier of these battles in legal terms increasingly seems to pivot, often rather independently of one another, around the First Amendment's two correlate rights of disestablishment and free exercise. For the "disestablishment" issues, the new battle lines have been drawn most aggressively by conservatives seeking to draw religious groups into the delivery of public services that have for years been largely provided by the government itself. The "Charitable Choice" clause in the Clinton Administration's welfare reforms, in particular, opened a floodgate of interest in the 1990s among conservatives that under George Bush then became a systematic attempt to channel billions of federal dollars into church-based programs that offered everything from drug counseling to jobs training to prison education.

While the constitutional issues are large—perhaps the most important being whether religious groups, for example, can discriminate while using federal funds in ways that would

¹⁸. Loesch, Martin. "The First Americans and the 'Free' Exercise of Religion." *American Indian Law Review*, vol. 18, no. 2, Jan. 1993, p. 313. <https://digitalcommons.law.ou.edu/ailr/vol18/iss2/2>

¹⁹. The constitutional rights of Native Americans—and whether they were even American citizens—has fluctuated repeatedly over the years and is a fraught and daunting subject far too vast for this paper.

By the mid-2010s the majority of Americans were no longer white and Christian for the first time in our national history.

otherwise be manifestly illegal—the reality is that after three decades, the conservatives’ push to engage churches in the delivery of social services has turned out to be a bust. Of the 400,000 congregations in the US, fewer than 1,000 are currently receiving such funding—and reports of service denial based on religiously-informed discrimination have been strikingly few. It turns out that, contrary to conservative claims, few congregations are interested in taking on large-scale welfare delivery, and even fewer have the personnel or administrative capacities to do so.

In matters involving the “free exercise” clause of the First Amendment, the Court’s decision in *Employment Division v. Smith* seemed to augur a revolution in constitutional reasoning at least as important as “charitable choice” had first seemed to be in “disestablishment” cases. The court unexpectedly used *Smith* to set a new standard for the state’s control of religious practices by affirming Oregon’s right to fire two state employees who had ingested peyote as part of a Native American religious ceremony. According to the court, the government only needed to show that its prohibition of drug-taking by its employees had some rational basis—not compelling but merely reasonable—and that its prohibition did not specifically target a religious group. In other words, the government had the power to dictate a minority religion’s practices as long as the standard wasn’t specifically directed at the group—a clear echo of the Court’s 19th century decision in *Reynolds* to prohibit Mormon polygamy.

Although *Smith* still remains the judicial standard in such matters—despite Congress’s passage of the Religious Freedom Restoration Act that in effect overturned the Court’s decision²⁰—no cases of broad consequence have come before the Court to test further application of the ruling.

Where “free exercise” has taken a decidedly new turn is in the conservatives’ advocacy of so-called “non-discrimination principles” that would treat religious individuals and groups the same as non-religious groups.

Thus, for example, if non-religious student groups could meet in school classrooms, so could student religious groups; or if public vouchers are given to parents to pay for charter schools, private religious schools could not be excluded.

In recent years, this “non-discrimination” doctrine has found its way into a novel range of situations. The “Colorado wedding cake” case—in which an evangelical cake-baker refused to bake a wedding cake for a gay couple—is perhaps the best known, but just one of several frontiers on which conservatives are testing what amounts to new ground in terms of legal arguments. More recently, the issue has begun to be tested around the perennial issue of abortion, with conservatives seeking to carve out the right for Catholic hospitals and conservative Catholic health workers to provide abortion-related services as a matter of individual conscience.

Needless to say, “non-discrimination” in cases such as these, looks to liberals like overt discrimination against gays or women seeking abortions—and to some liberals, it looks like a major new battleground on the frontiers of the religion-politics controversies that have characterized America for centuries.

But here is where I want to pose a different view, based on what I’ve concluded from the historical examples I’ve laid out in this paper. The view can be expressed straightforwardly:

America has long been an unusual place in terms of faith, because compared to other affluent Western countries, it has long maintained a much higher level of expressed religiosity.

Over the past 25 years, however, a striking new demographic reality has emerged: Americans are disavowing religious affiliation of all kinds at an unprecedented rate. At the start of the 21st century, for example, barely 7% of us self-identified to pollsters as “nones”—i.e., not in their minds affiliated with any organized religious tradition. Today, two decades later, that percentage is approaching 25%—and among those under 30, it has already passed 40%.

Pollsters tracking this unprecedented collapse of religious identity are already reporting that we had reached a dramatic cross-over point by the mid-2010s when the majority of Americans were no longer white and Christian for the first time in our national history. Moreover, white evangelical Protestants—who represent a near-majority of Republican voters—are facing their own affiliation crisis. In 2006, 26% of Americans identified as white evangelicals; by 2018, the percentage was 17%.²¹

That rapidly changing demography has caused me to reconceive many of my own views about religion and rights and to situate how I think about them in a far more

²⁰. The Court overturned RFRA, noting that Congress lacked the jurisdictional power to overturn the Court’s ruling with a constitutional amendment.

²¹. See Cox, Daniel. “Are White Evangelicals Sacrificing The Future In Search Of The Past?” *FiveThirtyEight*, at <https://fivethirtyeight.com/features/are-white-evangelicals-sacrificing-the-future-in-search-of-the-past/>.

Americans are disavowing religious affiliation of all kinds at an unprecedented rate.

political-historical rather than ahistorical legal context. Since the 1940s, we've lived through a long period of unprecedented judicial activism on the religion-and-rights front. But that long period, as I argued at the start of this paper, has had two competing eras defined by the relative political strength of the "separationist" versus the "accommodationist" camps in the law, and a larger change in political eras from a long Rooseveltian cycle to a long Reaganesque one. In other words, from the 1940s through the 1970s, the Court ruled from a largely "separationist" viewpoint, and since the 1980s, it has swung to a more consistently "accommodationist" stance.

To me, this illustrates and underscores the importance of situating our thinking about "religious rights" not just in a legal-constitutional framework but in a larger political context, one in which (as I've tried to suggest) America's controversies about "religion" have been most important when tethered to issues of state power and nation-building. What has made the post-*Everson* period so distinctive has been the ascendancy of "individual rights" rather than "state rights" as standards for deciding the juridical frame of reference.

There are several arguments about why this came to be.

One is that as America matured, the law and the courts became more confident about the security of the American state. That is, we passed from a rural, agrarian, and culturally (and religiously) homogeneous majority at the start of the 19th century to an urban, industrial (and now post-industrial), and culturally and religiously far more heterogeneous one by the mid-20th century. Over this long period, American law found itself heavily focused on issues of property and the demands that capitalism placed on a legal system deeply rooted in pre-capitalist models. Thus, for much of the 19th century, courts were preoccupied with the crucial emergence of corporate law, securities law, bankruptcy, and liability law (and eventually in the 20th century, labor and consumer law). For much of this period, issues that we consider today "individual rights" were themselves interpreted through the lens of property law—slavery as a property question, women's rights as an issue of men's property rights over them, and Native American rights as an extension of treaties preoccupied with the transfer of property into white hands.

By the mid-20th century, however, this vast reorientation of the law to the capitalist economic system in which it was located was secure. Socialism and other left economic-political challenges to that system had been defeated at home (with the threat now seen to be external, based on the Soviet challenge to America's new hegemonic "Free World" ambitions). Under such conditions, given the powerful Rooseveltian cast to the politics of the era, the distinctive features of our political life were now concerned with the

ascendency of a large and interventionist government as a regulator—but not a challenger or planner/administrator—of that capitalism.

Rooseveltian politics has raised the idea of group rights and the need for their "balancing" after the explosive arrival of capitalism in the 19th and early 20th centuries. The government in the 1930s and 1940s asserted its right to protect and extend the rights of labor, farmers, consumers, and small (versus big) businesses, and with the arrival of Keynesianism, its right to macro-manage the business cycle. But one group remained categorically excluded from the benefits of those changes: African Americans. Thus, when America entered "the Civil Rights Era" of the 1950s and 1960s, the courts' willingness to use the law to finally extend inclusion to African Americans became the template for a far broader extension of protection to minorities of various kinds, including religious minorities. By the late 1960s, those groups included women, gays and lesbians, Native Americans, Hispanics, and Asian-Americans, as well as African Americans.

But that "rights extension" process—which in the case of religious rights meant a "separationist" push to remove the state's myriad forms of support, active and passive, from white Protestant Christianity—of course, produced a powerful political reaction, as the white South pushed back against desegregation, and then as that failed, shifted the moral framing of its resistance to new *de facto* race-based rights constructed as arguments for the protection of conservative evangelical values as normative for the whole culture.

The explosive appearance of a new conservative era in the 1980s, the shift of the white South to the GOP, the rise of the Christian Right, and the shift of the Democrats to a market-favoring neo-liberalism—and the shift of the courts toward religious-rights accommodationism—were the result. Today, 40 years later, in the midst of the presidency of Donald Trump, the question is how to think about the decades ahead. My view is that we are actually at a moment when "religious rights" will begin to play an ever-smaller role in our public life as more and more Americans leave organized religion behind.

What we also know about that abandonment process is that among the young it is being accompanied by an embrace of diversity and tolerance that demographically threatens the evangelical-Republican partnership that has been so prominent since the Reagan years. In brief, I think we're entering a new period in American politics and culture when the whole issue of "religious rights" is about to decline in prominence, to be replaced by a new debate over the distribution of fundamental economic benefits and the role government will play in that distribution.

A significant wing of the Democratic party has already begun moving back toward its Rooseveltian roots and Donald Trump's idiosyncratic conservatism contains a striking level of populist redistributionist rhetoric that marks a shift for the Republicans as well. Income and wealth inequality have reached unprecedented heights while religious affiliation and attendance are at historic lows. In such a world, it's hard to see how "religious rights" can maintain the unprecedented attention the courts and a concerned public gave it in the wake of *Everson*.

But we shall see.

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