

# CARR CENTER FOR HUMAN RIGHTS POLICY HARVARD KENNEDY SCHOOL

# Religious Freedom

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Reimagining Rights  
& Responsibilities  
in the U.S.



## **Reimagining Rights & Responsibilities in the United States: Religious Freedom**

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## Introduction

The complicated relationship of religion and government predates the founding of the United States. The Founders grappled with this dilemma for years before compromising on the final language of the First Amendment. Even then, the issue was far from settled: the US has struggled since its founding to reconcile the right of religious freedom with the reality of governing a pluralist democracy with an increasingly diverse population.

Today, a struggle over the scope of religious freedom is taking place in politics, the courts, and across American society. Claims of religious freedom are increasingly receiving preferential treatment in both political discourse and in the courts when religious beliefs come into conflict with other rights. That is particularly true for women's reproductive rights and the rights of individuals to non-discrimination on the basis of their sexual identity.

At the same time, a controversy has emerged over the meaning of the Establishment Clause of the First Amendment, in which recent Supreme Court cases have pitted the prohibition on establishment of religion against the right of religious free exercise. The central question over religious rights today is how to strike an appropriate balance between rights when they come into conflict. This question has troubled the American Republic since its formation.

## History

While it may seem self-evident that religious freedom and the separation of church and state are core rights and responsibilities in the United States, this has not always been the case. Throughout American history, a tension has existed between the ideal of religious freedom and the actual practice of governance and the protection of other rights.

A common narrative of the country's founding tells the story of two groups—the Pilgrims and Puritans—seeking religious freedom after persecution in England. But, the real story is more complex. While the narrative of a search for religious freedom holds true for the Pilgrims, the Puritans are a different story. The Puritans fled England not only for religious liberty, but also to establish an ideal state in which their own orthodox version of Christianity was the law of the land.<sup>1</sup> Their mission was to create a Puritan society based on the principle of a pure populace. Practitioners of other faiths, such as Quakers or Baptists, were banned from living in Massachusetts, under threat of brutal punishment.<sup>2</sup>

The concept of “religious liberty” was born out of circumstances in the Massachusetts Bay Colony, where its denial was the norm. Some Puritans, such as Anne Hutchison and Roger Williams, challenged this denial.<sup>3</sup> Williams, for example, made a revolutionary argument that the civil authorities of Massachusetts should not be involved in matters of religion, and religious tolerance was not only moral, but civically constructive as well.<sup>4</sup>

James Madison and Thomas Jefferson led the development of religious liberty, shifting the debate from toleration to free exercise, and advocating for religious diversity and dis-establishment. Inspired by the persecution he had witnessed Virginia's Baptists suffer at the hands of the colony's Anglican establishment, Madison succeeded in including a religious freedom clause in Virginia's new Declaration of Rights.<sup>5</sup> It read: “religion...and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion.”<sup>6</sup> In subsequent years, other colonies adopted similar language.<sup>7</sup> Madison argued that governments should adopt an entirely hands-off approach to religion, neither helping nor hindering it.<sup>8</sup>

1. Roos, Dave. “What’s the Difference Between Puritans and Pilgrims?” *History.com*, 31 July 2019, <https://www.history.com/news/pilgrims-puritans-differences>. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 13. And, Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 7.

2. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, pp. xi, 9.

3. *Ibid.*, p. 9.

4. Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>. And, Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p.18.

5. The historical evidence indicates Madison was also inspired by his own spiritual journey and by the influence of Enlightenment thinkers like David Hume and John Locke. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 26-27.

6. *Ibid.*, pp. 26-27, 30). And, “The Virginia Declaration of Rights.” *National Archives*, 12 June 1776, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>.

7. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 115.

8. The petition was entitled “Memorial and Remonstrance Against Religious Assessments.”

In 1789, the Constitution of the United States broke with tradition and forbade the use of religious tests for public office in the national government, a necessary accommodation given the diverse array of Christian denominations the colonies represented.<sup>9</sup> In arguments over the Bill of Rights, Madison again led the efforts to secure religious free exercise and non-establishment.

The debate over the First Amendment primarily came down to two questions: whether the national government could support religion and whether individual states could regulate religion as they saw fit.<sup>10</sup> After a lengthy debate in the House of Representatives, Madison won the first argument. The final wording of the religious freedom section of the First Amendment read as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>11</sup> During a second debate in the Senate, however, states were granted the right to regulate or support religion within their borders.<sup>12</sup> Not until 1868, with the passage of the Fourteenth Amendment, did states also become subject to the Bill of Rights and its prohibitions on religious establishment or suppression of free exercise.

The US has long struggled to live up to these ideals. First and foremost, Protestant Christianity remained the *de facto* established religion of the new republic. Native Americans were pressured to assimilate to Christian traditions, via indoctrination in US government-funded boarding schools and prohibitions on practicing their native religions.<sup>13</sup> African American slaves—approximately one in five of whom were Muslim—were prevented from practicing their native religions and often forcibly converted.<sup>14</sup>

Catholics were victims of nativist movements and were excluded from mainstream politics for nearly two centuries. For example, the Know-Nothing Party rode a wave of anti-Catholic sentiment into considerable political power in the 1840s and 50s, ultimately peaking by placing 43 representatives in Congress by 1855.<sup>15</sup> Mormons were regularly discriminated against as well, including an infamous incident where the governor of Missouri gave an order in 1838 that all Mormons be either expelled from the state or “exterminated.”<sup>16</sup> Jewish Americans have faced discrimination throughout American history and, around 1900, began to be depicted as a racial threat, culminating with the lynching of Jewish businessman Leo Frank in Atlanta in 1915.<sup>17</sup> American Muslims regularly faced negative stereotypes portraying them as “violent and hedonistic.”<sup>18</sup> In the anti-Chinese fervor in the late 19<sup>th</sup> and early 20<sup>th</sup> century, Buddhism came to be regarded not as a religion, but as a “dangerous cult.”<sup>19</sup> These and many other examples of past religious discrimination continue to color the current debate over the right to religious freedom.

**The debate over the First Amendment primarily came down to two questions: whether the national government could support religion and whether individual states could regulate religion as they saw fit.**

9. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 130.

10. *Ibid.*, pp. 144-151.

11. “The Constitution of the United States: A Transcription.” *National Archives*, 1789, <https://www.archives.gov/founding-docs/constitution-transcript>. Accessed 27 Dec. 2020.

12. It had passed in the House. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, pp. 150-151.

13. “Freedom of Religion.” *History.com*, <https://www.history.com/topics/united-states-constitution/freedom-of-religion>. Updated 21 Aug. 2018

14. Sometimes, even those who converted to Christianity were prevented from practicing freely. Gottschalk, Peter. “Hate Crimes Associated with Both Islamophobia and Anti-Semitism Have a Long History in America’s Past.” *The Conversation*, 3 June 2019, <https://theconversation.com/hate-crimes-associated-with-both-islamophobia-and-anti-semitism-have-a-long-history-in-americas-past-116255>.

15. Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>. “Know-Nothing Party.” *Encyclopedia Britannica*, 22 Mar. 2007, <https://www.britannica.com/topic/Know-Nothing-party>.

16. “Extermination Order.” *Church of Jesus Christ of Latter-Day Saints*, <https://www.churchofjesuschrist.org/study/history/topics/extermination-order?lang=eng>. Accessed 27 Dec. 2020.

17. Gottschalk, Peter. “Hate Crimes Associated with Both Islamophobia and Anti-Semitism Have a Long History in America’s Past.” *The Conversation*, 3 June 2019, <https://theconversation.com/hate-crimes-associated-with-both-islamophobia-and-anti-semitism-have-a-long-history-in-americas-past-116255>. And, Grubin, David. “The Jewish Americans.” *PBS*, [https://www.pbs.org/jewishamericans/jewish\\_life/anti-semitism.html](https://www.pbs.org/jewishamericans/jewish_life/anti-semitism.html). Accessed 27 Dec. 2020.

18. Gottschalk, Peter. “Hate Crimes Associated with Both Islamophobia and Anti-Semitism Have a Long History in America’s Past.” *The Conversation*, 3 June 2019, <https://theconversation.com/hate-crimes-associated-with-both-islamophobia-and-anti-semitism-have-a-long-history-in-americas-past-116255>. More on this in Section 4b.

19. Anningson, Ryan. “Before Americans Turned to Buddhism for Life Hacks, They Treated it Like a Dangerous Cult.” *Quartz*, 15 Mar. 2018, <https://qz.com/work/1225207/buddhism-in-america-before-mindfulness-was-popular-the-religion-was-considered-a-cult/>.

## The Text

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”*<sup>20</sup>

These 16 words consist of two, independent but interrelated clauses: the “Establishment” Clause and the “Free Exercise” Clause. At a minimum, the first clause prevents any government from declaring any one faith to be the official religion of the United States or any individual state or municipality. Throughout history, the courts have generally interpreted it to mean governments cannot directly support religion at all—including promotion, encouragement, or financing. This hands-off approach stems from Madison’s fear of slippery slopes: he worried giving the government power to help a religion, even if for initially innocuous reasons, meant implicitly granting it power to regulate religion *in general*, thereby creating an unacceptable risk that this regulatory power could be used for more sinister purposes.<sup>21</sup>

The Supreme Court has generally interpreted the Establishment Clause to require “benevolent neutrality” on the part of the government.<sup>22</sup> This understanding relies on a balance in which government allows religious exercise but prevents government sponsorship.<sup>23</sup> A seminal 1971 Supreme Court case, *Lemon v. Kurtzman*, provided the opportunity to put this balance into action. The Court created the so-called Lemon test, whereby a government policy must meet three criteria to be considered constitutional under the Establishment Clause. It must: “Have a non-religious purpose; not end up promoting or favoring any set of religious beliefs; and not overly involve the government with religion.”<sup>24</sup> Since then, recognizing that the Lemon test is perhaps

too rigid in some cases, the Supreme Court has experimented with different interpretations of “neutrality,” but has never managed to precisely define what is and is not “establishment.”<sup>25</sup>

The Free Exercise Clause prohibits the government from interfering with the private religious beliefs of American citizens. There are, however, circumstances in which practices stemming from those beliefs may be proscribed.<sup>26</sup> This battle has played out frequently in the legislative arena and in the courts. Since *Sherbert v. Verner* in 1963, the Supreme Court has generally used a “compelling interest test” to resolve difficult cases.<sup>27</sup> Under this test, the government—in order to interfere with religious practice—must prove two things: (1) that doing so is in the name of a compelling interest of the “highest order,” and (2) that there is no other, less restrictive, means to achieve the same outcome.<sup>28</sup> If the law or policy cannot pass the test, the government cannot regulate the religious practice in question.

One case that illustrates the compelling interest test in action is *Sherbert v. Verner*, the first free exercise case where the Court used the test as the “standard of review.”<sup>29</sup> In 1962, a Seventh-Day Adventist named Adele Sherbert quit her factory job because it required her to work on Saturdays, which Adventists consider to be the Sabbath. But, when she applied for unemployment benefits from South Carolina, the state rejected her application because she had quit voluntarily and rejected other opportunities that also required work on Saturday. Even though her actions were guided by her legitimate religious beliefs, the state law at the time prohibited her from claiming the benefits. She disputed the

20. “The Bill of Rights: A Transcription.” *National Archives*, 1789, [www.archives.gov/founding-docs/bill-of-rights-transcript](http://www.archives.gov/founding-docs/bill-of-rights-transcript). Updated 28 Oct. 2020.

21. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 130.

22. In 1953, Earl Warren became Chief Justice of the Court, triggering a “constitutional revolution” based on two core notions: “The first was the idea of a living constitution: a constitution that evolves according to changing values and circumstances. The second was marked by the reemergence of the discourse of rights as a dominant constitutional mode.” This new iteration of the Court was increasingly willing to hear cases on core rights like free exercise. Horowitz, Morton J. “The Warren Court and the Pursuit of Justice.” *Washington and Lee Law Review*, Vol. 50, Issue 1, Winter 1993, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1814&context=wlur>.

23. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 199. And, Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>.

24. “Your Right to Religious Freedom.” *ACLU*, <https://www.aclu.org/other/your-right-religious-freedom>. Accessed 27 Dec. 2020.

25. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 207.

26. Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>.

27. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 209.

28. Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>. Evans, Bette Novit. “Religious Freedom vs. Compelling State Interests.” *Kripke Center for the Study of Religion and Society*, Spring 1998, <http://moses.creighton.edu/csrs/news/s98-1.html>. For fundamental rights, the burden of proof of constitutionality shifts to the lawmakers, as opposed to the party challenging the law. This is similar to the legal concept of “strict scrutiny.” “Strict Scrutiny.” *Legal Information Institute*, Cornell Law School, [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny).

29. Kelly, Kathleen P. “Abandoning the Compelling Interest Test in Free Exercise Cases.” *Catholic University Law Review*, Vol. 40, Issue 4, Summer 1991, <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1763&context=lawreview>.



decision, and the case went to the Supreme Court. The Court ruled 7-2 to require South Carolina to provide unemployment to Ms. Sherbert. Why? Because South Carolina had failed the compelling interest test: it could not prove that refusing to accommodate Ms. Sherbert's religious practice was in the name of a "compelling state interest."<sup>30</sup> In a similar case in 1972, *Wisconsin v. Yoder*, the Court again applied the compelling interest test, this time to a Wisconsin law requiring school attendance after eighth grade. The Court decided that Amish students should be allowed to stay out of school, because "ensuring universal school attendance" was not a compelling state interest sufficient to override Amish religious expression.<sup>31</sup>

The Supreme Court has always decided what constitutes a "compelling" government interest on a case-by-case basis and has never precisely defined it. Some legal scholars argue that it "is obviously intended to be a higher interest than 'legitimate' or 'important,'" while others have described it as "'necessary' or 'crucial,' meaning more than an exercise of discretion or preference."<sup>32</sup>

A compelling interest exists in "complying with constitutional obligations, such as not violating the establishment clause."<sup>33</sup> In other words, a law or policy that restricts free exercise is legally acceptable if it is enacted to uphold a "constitutional obligation." It is less clear whether restricting free exercise can be done in order to secure a *different* fundamental right. The debate over this matter is the most pressing challenge in the area of religious freedom today.

## Challenges, Tensions, and Themes

Challenges to, or stemming from, religious freedom are generally related to either the Establishment Clause or the Free Exercise Clause.

### THE ESTABLISHMENT CLAUSE

The battle over when, where, how, and to what degree the government may support religion has been fought on many fronts. Public schools are a common battleground. Although they are government-run and therefore prohibited from explicitly promoting "religious beliefs or practices as part of the curriculum," many legal conflicts have been fought in the gray areas.<sup>34</sup> Such challenges have included whether public school students may miss class to receive religious instruction elsewhere; whether it is constitutional for the words "under God" to appear in the Pledge of Allegiance; whether it is constitutional to hold prayers in classrooms or during graduation ceremonies; and many others.<sup>35</sup>

Another frequent area of tension concerns the display of religious symbols on public grounds. The Supreme Court, seeking to find the proper balance between non-establishment and the reasonable need to give religion room for public expression, has been inconsistent.<sup>36</sup> In two prominent cases, religious displays were ruled constitutional.<sup>37</sup> In pair of similar cases, the displays were ruled unconstitutional.<sup>38</sup> In one particularly striking scenario, Justice Stephen Breyer voted on opposite sides of the issue on *the same day*. While the cases did have some debatable divergences

30. "Sherbert v. Verner." Oyez, <https://www.oyez.org/cases/1962/526>. Accessed 27 Dec. 2020.

31. "Wisconsin v. Yoder." Oyez, <https://www.oyez.org/cases/1971/70-110>. Accessed 27 Dec. 2020.

32. Steiner, Ronald. "Compelling State Interest." *The First Amendment Encyclopedia*, Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest>.

33. Ibid. The Court also ruled in such a manner in *Estate of Thornton v. Calder*. United States, Supreme Court. *Estate of Thornton v. Calder*, Inc. 472 U.S. 703. 1985. *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/472/703>.

34. "Your Right to Religious Freedom." *ACLU*, <https://www.aclu.org/other/your-right-religious-freedom>. Accessed 27 Dec. 2020.

35. "Zorach v. Clauson." Oyez, <https://www.oyez.org/cases/1940-1955/343us306>. Accessed 27 Dec. 2020. And, Jain, Kalpana. "How the Religious Right Shaped American Politics: 6 Essential Reads." *The Conversation*, 21 Dec. 2017, <https://theconversation.com/how-the-religious-right-shaped-american-politics-6-essential-reads-89005>. In 1954, President Eisenhower signed a bill adding the words "under God" to the Pledge of Allegiance. This has been challenged multiple times but never ruled unconstitutional. Bomboy, Scott. "The History of Legal Challenges to the Pledge of Allegiance." *National Constitution Center*, 14 June 2019, <https://constitutioncenter.org/blog/the-latest-controversy-about-under-god-in-the-pledge-of-allegiance>. However, in *Lee v. Weisman* (1992), the Court ruled that it was unconstitutional to have clergy offer prayers at official public school ceremonies. "Lee v. Weisman." Oyez, <https://www.oyez.org/cases/1991/90-1014>. Accessed 27 Dec. 2020.

36. *Sacred Liberty* provides an account of the history of Supreme Court 'tinkering' in trying to find the right balance. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 205-208.

37. McGovern, Geoff. "Lynch v. Donnelly (1984)." *The First Amendment Encyclopedia*, Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/737/lynch-v-donnelly>. In *Van Orden v. Perry*, the Supreme Court declared that religious displays in Texas State Capital declared were constitutional. "Van Orden v. Perry." Oyez, <https://www.oyez.org/cases/2004/03-1500>. Accessed 27 Dec. 2020.

38. In *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, the Supreme Court ruled that religious displays outside Allegheny courthouse and City-Council buildings were unconstitutional "County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter." Oyez, <https://www.oyez.org/cases/1988/87-2050>. Accessed 27 Dec. 2020. And, in *McCreary County v. American Civil Liberties Union of Kentucky*, the Supreme Court declared that religious displays in Kentucky courthouses were unconstitutional. "McCreary County v. American Civil Liberties Union of Ky." Oyez, <https://www.oyez.org/cases/2004/03-1693>. Accessed 27 Dec. 2020.

(which Breyer used to explain the apparent contradiction) legal scholars have criticized him for contributing to a broader trend of the Court blurring the line separating church and state.<sup>39</sup>

Other areas of government activity, such as the military and taxation, also present challenges. In the case of military service, the Supreme Court struck down a law in 1965 requiring conscientious objectors to prove their refusal to go to war was based on the belief in a “Supreme Being”—as opposed to an aversion towards violence based on some secular philosophy.<sup>40</sup> On taxation, tax-exempt religious groups have occasionally violated the requirement that tax-exempt organizations must abstain from electoral politics, prompting the IRS to withdraw their tax-exempt status.<sup>41</sup> In a less straightforward matter, the issue of whether religious organizations, particularly schools, may benefit from taxpayer-funded government programs has been an increasing area of controversy in recent years.<sup>42</sup>

## THE FREE EXERCISE CLAUSE

The debate over the Free Exercise Clause is equally complex. The central challenge is in deciding when certain forms of religious practice become unacceptable, requiring government regulation. For example, what happens if religious free exercise violates the law? Or, what happens when a practice that some citizens view as free exercise denies or imposes a burden on the rights of other citizens?

Such questions were also traditionally decided by the “compelling interest test.” In 1990, however, the Supreme Court’s ruling in *Employment Division v. Smith* complicated the matter by rejecting the need to apply the test at all. The case came about when a

Native American named Al Smith was fired from his job at a rehabilitation center for having ingested peyote, an illegal drug, during a religious ceremony. Smith argued that his dismissal—and the subsequent refusal of the state of Oregon to provide unemployment benefits—was an unconstitutional violation of his religious freedom.<sup>43</sup> Rather than applying the compelling interest test, the Court instead decided, according to Justice Antonin Scalia’s majority opinion, that the test was too demanding because it risked granting too many exemptions for religious practice, which would encourage too many people to try to opt out of perfectly valid laws—leading, in Justice Scalia’s view, to “anarchy.”<sup>44</sup>

The Court not only ruled against Al Smith, but it also went further, making it easier for governments to regulate religious practice in general. Whereas previously the government had to satisfy the compelling interest test before doing so, now the Court said the government only needed to use the test if the regulation in question *specifically* targeted a religious practice, or if it infringed upon “an additional constitutional right, such as free speech.”<sup>45</sup> Because Oregon’s law prohibiting the use of peyote was a general law that had nothing to do with religion and was simply a public health measure, it could not be subject to the compelling interest test.<sup>46</sup>

But the debate was not over. The *Employment Division* ruling provoked a strong negative response from conservatives and liberals alike. The former were aghast at the apparent threat to religious liberty, while the latter saw it as another in the long line of discriminatory rulings where minority religious practices were viewed as illegitimate. As a result of this bipartisan consensus, Congress passed the Religious Freedom Restoration Act (RFRA) three years later.<sup>47</sup>

39. O’Connell, Tyson Radley. “How Did the Ten Commandments End Up on Both Sides of the Wall of Separation Between Church and State?: The Contradicting Opinions of *Van Orden v. Perry* and *McCreary v. ACLU*.” *Montana Law Review*, Vol. 6, Issue 1, Winter 2008, <https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2065&context=mlr>.

40. “United States v. Seeger.” *Oyez*, <https://www.oyez.org/cases/1964/50>. Accessed 27 Dec. 2020.

41. Untiedt, Whitney. “Lighting the Way: The Johnson Amendment Stands Strong Against Dark Money in Politics.” *Emory Corporate Governance and Accountability Review*, Vol. 6, Issue 1, 2019, <http://law.emory.edu/ecgar/content/volume-6/issue-1/essays/lighting-way-johnson-amendment-dark-money-politics.html>. And, Fischer, Brendan. “Destroying the Johnson Amendment: How Allowing Charities to Spend on Politics Would Flood the Swamp That President Trump Promised to Drain.” *The Campaign Legal Center*, [https://campaignlegal.org/sites/default/files/Johnson%20Amendment%20White%20Paper\\_0.pdf](https://campaignlegal.org/sites/default/files/Johnson%20Amendment%20White%20Paper_0.pdf). Accessed 27 Dec. 2020.

42. Tebbe, Nelson, et al. “The Quiet Demise of the Separation of Church and State.” *New York Times*, 8 June 2020, <https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html?referringSource=articleShare>. This will be discussed in greater detail in Section 4c.

43. “Employment Division v. Smith.” *Oyez*, <https://www.oyez.org/cases/1989/88-1213>. Accessed 27 Dec. 2020.

44. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 211. While it may seem contradictory for Justice Scalia to rule against religious freedom, given his conservative reputation, there is an explanation stemming from another aspect of his judicial philosophy: he believed that the courts should not be the ones to decide how to protect religious freedom—that was a job for legislatures. It would be an overreach, in his view, for the Court to carve out exceptions from an otherwise benign, generally applicable law. Thaper, Amul R. “Smith, Scalia, and Originalism.” *Catholic University Law Review*, Vol. 68, Issue 4, Fall 2019, <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3521&context=lawreview>.

45. Haynes, Charles C. “History of Religious Liberty in America.” *Freedom Forum Institute*, 26 Dec. 2002, <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/>.

46. This is also called a law of “general effect.”

47. The Senate voted 97-3 to pass the law. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 212.



The RFRA reinstated the requirement to satisfy the compelling interest test for *all* laws or policies where religious exercise was burdened “even if the burden results from a rule of general applicability.”<sup>48</sup> The Supreme Court struck back in 1997 in *City of Boerne v. Flores*, conceding that Congress was entitled to enact the RFRA, but that it could not “determine the manner in which states enforce the substance of its [Congress’] legislative restrictions.”<sup>49</sup> In other words, Congress could mandate the use of the compelling interest test in all cases concerning *federal* law, but could not force the states to do the same.

## Current Issues in Religious Freedom

Due to concerted lobbying by the religious right, and with support of the Trump administration, the balance today seems to be shifting in favor of a preeminent status for religious free exercise over other rights. It must be noted, however, that the latter only holds true for certain religions. For American Muslims, who are increasingly the victims of discrimination, free exercise is not even secure, much less preeminent.

The increasing power of the religious right in mainstream politics is a significant factor in these trends. It should be emphasized here that, while it is certainly not objectionable for religious Americans to advocate for their values, it is problematic when they begin to use the tools of government for that purpose, since doing so threatens the Establishment Clause.

## THE RELIGIOUS RIGHT

The role of the religious right as an organized part of modern US politics dates back to the late-1970s.<sup>50</sup> After decades of withdrawal from mainstream American civic life, the 1970s saw a gradual political awakening of this movement.<sup>51</sup> In subsequent presidential elections, conservative evangelical Christians were recognized as a powerful voting bloc to be courted.<sup>52</sup> Although their mobilization stemmed generally from a belief that American society was becoming too secular, the immediate trigger was a series of court rulings that went against evangelical preferences.<sup>53</sup> The matter came to a head in 1976 when the IRS revoked the tax-exempt status of a prominent evangelical institution, Bob Jones University in South Carolina, because of its policies allowing racial discrimination.<sup>54</sup> In 1979, this network of organizations finally became organized into “the political movement of the Religious Right.”<sup>55</sup>

Subsequent decades saw increased activity from religious right organizations which had previously stayed out of politics, particularly Protestant evangelical groups such as Jerry Falwell’s Moral Majority.<sup>56</sup> Their rise to prominence was facilitated by a number of trends, including innovative methods of fundraising, changes in the television landscape, and a more permissive legal framework on political expenditures. Through the 1980s and 1990s, the functional merger between this network and the Republican Party increased.<sup>57</sup> Their primary power, in addition to fundraising and advertising, lay in voter mobilization, which

48. “H.R. 1308.” *Congress.gov*, <https://www.congress.gov/bill/103rd-congress/house-bill/1308>. Accessed 27 Dec. 2020.

49. “*City of Boerne v. Flores*.” *Oyez*, <https://www.oyez.org/cases/1996/95-2074>. Accessed 27 Dec. 2020.

50. Although, they could trace their spiritual ancestry back to America’s original evangelicals during “The Great Awakening.” Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 21-22.

51. During that time, fundamentalist evangelical Christians created an “alternative religious subculture largely insulated from broader secular trends.” McVicar, Michael J. “The Religious Right in America.” *Oxford Research Encyclopedia*, <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>. Updated 26 Feb. 2018.

52. Haberman, Clyde. “Religion and Right-Wing Politics: How Evangelicals Reshaped Elections.” *New York Times*, 28 Oct. 2018, <https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html>. McVicar, Michael J. “The Religious Right in America.” *Oxford Research Encyclopedia*, <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>. Updated 26 Feb. 2018. And, Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 233.

53. Flory, Richard. “Revisiting the Legacy of Jerry Falwell Sr. in Trump’s America.” *The Conversation*, 10 July 2017, <https://theconversation.com/revisiting-the-legacy-of-jerry-falwell-sr-in-trumps-america-79551>. And, McVicar, Michael J. “The Religious Right in America.” *Oxford Research Encyclopedia*, <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>. Updated 26 Feb. 2018. Three cases in the 1960s were particularly galling: *Engel v. Vitale* (1962), *Murray v. Curlett* (1963), and *Abington School District v. Schempp* (1963). These effectively “ended the practice of prayer and Bible reading in public schools.” Leaming, Jeremy. “The Religious Right.” *The First Amendment Encyclopedia*, Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/1375/religious-right>. Regarding *Roe v. Wade*, a woman’s “constitutionally protected right to terminate a pregnancy” is coterminous with the right to privacy under the Due Process Clause. “*Roe v. Wade*.” *Oyez*, <https://www.oyez.org/cases/1971/70-18>. Accessed 27 Dec. 2020.

54. More specifically, banning interracial dating. The IRS was simply enacting the DC District Court ruling in the 1973 case of *Green v. Connally*. Flory, Richard. “Revisiting the Legacy of Jerry Falwell Sr. in Trump’s America.” *The Conversation*, 10 July 2017, <https://theconversation.com/revisiting-the-legacy-of-jerry-falwell-sr-in-trumps-america-79551>. And, Balmer, Randall. “The Real Origins of the Religious Right.” *Politico*, 27 May 2014, <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>.

55. McVicar, Michael J. “The Religious Right in America.” *Oxford Research Encyclopedia*, <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>. Updated 26 Feb. 2018.: “Jerry Falwell’s Moral Majority, Tim LaHaye’s Council for National Policy, Beverly LaHaye’s Concerned Women for America, and Ed McAteer’s Religious Roundtable.”

56. Haberman, Clyde. “Religion and Right-Wing Politics: How Evangelicals Reshaped Elections.” *New York Times*, 28 Oct. 2018, <https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html>.

57. Adams, Mason. “Flashback 1990: George H.W. Bush Delivers Liberty University Commencement Speech.” *Roanoke.com*, July 13, 2012, [www.roanoke.com/news/politics/flashback-george-h-w-bush-delivers-liberty-university-commencement-speech/article\\_f5946d53-3c6e-594f-8b4a-3d0d2af32801.html](http://www.roanoke.com/news/politics/flashback-george-h-w-bush-delivers-liberty-university-commencement-speech/article_f5946d53-3c6e-594f-8b4a-3d0d2af32801.html).

often tipped elections to their preferred candidates.<sup>58</sup> The rise of the religious right also served to bridge the historical Protestant-Catholic divide, bringing together conservatives in their opposition to issues like abortion.<sup>59</sup> Although its relative influence has waxed and waned over the years, the religious right remains politically powerful today.<sup>60</sup>

At present, the movement is driven by a sense of the diminishing importance of religion in American public life.<sup>61</sup> This belief has some basis in fact: in 1972, only five percent of Americans described themselves as atheists, agnostics, or people “not affiliated” with any religion. By 2016, that number had risen to 23%, including 39% of people ages 18 to 29.<sup>62</sup> Furthermore, demographic shifts have, for the first time, made the country no longer a majority white, Christian nation.<sup>63</sup> In addition, court rulings and government regulations reinforced the separation of church and state, creating fear on the religious right that religious expression is becoming unwelcome in American public life.<sup>64</sup> Conservative media outlets have fanned this fear by exaggerating the scope and severity of the changes.<sup>65</sup>

Another recent development is an intensification of the relationship between the religious right and the Republican Party under the Trump administration. In recent years, the

**In this political environment, the free exercise of religion, especially by Christians, is becoming preeminent over other constitutional rights and principles.**

mission to promote conservative Christian values has begun to employ the tools of government, thereby seeming to contradict the Establishment Clause. President Trump’s relationship with the religious right began with the 2016 election, where white evangelical Christians helped deliver candidate Trump his victory with a striking 81% of their vote.<sup>66</sup> They were such an important bloc of voters that, according to a study from the Association for the Sociology of Religion, “the single most important determinant of Trump support was whether voters expressed what the authors called ‘Christian nationalism.’”<sup>67</sup> Since then, the Trump administration has fulfilled many aspects of the religious right’s agenda, such as:<sup>68</sup>

58. “[I]n party primaries, local elections, and national congressional mid-term elections where voter turnout and razor-thin margins decided outcomes, the organs of the Religious Right could prove decisive.” McVicar, Michael J. “The Religious Right in America.” *Oxford Research Encyclopedia*, <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>. Updated 26 Feb. 2018.

59. As Waldman notes, this is consistent with a trend throughout American history: “... whenever the majority has been on the verge of losing control it has shape-shifted, reassembling in order to maintain its dominant size. Whereas Protestant denominations warred with each other in the eighteenth century, they coalesced as a Protestant majority when combatting Catholics in the nineteenth century. In the twentieth century, they invited in Catholics and even Jews to become Judeo-Christian majority.” Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 233-237.

60. Leaming, Jeremy. “The Religious Right.” *The First Amendment Encyclopedia*, Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/1375/religious-right>. There was some overlap with the Tea Party movement as well, but it was an imperfect alignment. “The Tea Party and Religion.” *Pew Research Center*, 23 Feb. 2011, <https://www.pewforum.org/2011/02/23/tea-party-and-religion/>.

61. A feeling that “the country they know is slipping away — if not already lost.” Haberman, Clyde. “Religion and Right-Wing Politics: How Evangelicals Reshaped Elections.” *New York Times*, 28 Oct. 2018, <https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html>.

62. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 241-242. Even amongst believers, the share of white evangelical protestants has dropped: from 23% in 2006 to 17% just 11 years later.

63. Wilson, Jason. “We’re at the End of White Christian America. What will that Mean?” *The Guardian*, 20 Sept. 2017, <https://www.theguardian.com/us-news/2017/sep/20/end-of-white-christian-america>.

64. For a list of such rulings/ regulations see Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 241.

65. *Ibid.*, pp. 243-244. “Many of the instances in which modern Christians claim victimhood are ‘accommodation’ cases, which is to say that they’re being harmed only incidentally, as a by-product of some secular law that wasn’t targeting them. We have to come to think of this new kind of religious freedom as the moral equivalent of earlier claims against overt oppression.” *Ibid.*, p. 254.

66. Wehner, Peter. “The Deepening Crisis in Evangelical Christianity.” *The Atlantic*, 5 July 2019, <https://www.theatlantic.com/ideas/archive/2019/07/evangelical-christians-face-deepening-crisis/593353/>. And, Hafner, Josh. “Meet the Evangelicals Who Prophesied a Trump Win.” *USA Today*, 10 Nov. 2016, <https://www.usatoday.com/story/news/nation-now/2016/11/10/meet-evangelicals-prophesied-trump-win/93575144/>.

67. “The voters who supported him most strongly responded affirmatively to all of these statements: ‘The federal government should declare the United States a Christian nation. ‘The federal government should advocate Christian values’... The federal government should allow prayer in public schools.” Whitehead, Andrew L., et al. “Make America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election.” *Sociology of Religion*, Vol. 79, No. 2, 2018, pp. 147-71. And, Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 246-47.

68. Bettis, Kara. “Who are the Evangelicals?: Frances FitzGerald Studied American History to Explain.” *Religion Unplugged*, 15 Feb. 2019, <https://religionunplugged.com/news/2019/2/12/who-are-the-evangelicals-frances-fitzgerald-studied-american-history-to-explain>.

- appointing individuals into positions of power in his administration who are religious right leaders, including Betsy DeVos as Secretary of Education and Jerry Falwell, Jr., an evangelical leader and son of the founder of Moral Majority, as head of an education reform task force;<sup>69</sup>
- appointing judges with views in line with the religious right;<sup>70</sup>
- criticizing the Supreme Court's decision in *Obergefell v. Hodges*, the ruling that secured marriage equality for same-sex couples;<sup>71</sup>
- pledging to repeal the Johnson Amendment, legislation that prevents tax-exempt nonprofit organizations from endorsing political candidates;<sup>72</sup>
- recognizing Jerusalem as the capital of Israel, a long-held goal of evangelical Christians;<sup>73</sup> and
- allowing Attorney General Barr to use the Department of Justice to test the limits of the Establishment Clause.<sup>74</sup>

## CHALLENGES TO FREE EXERCISE

In this political environment, the free exercise of religion, especially by Christians, is becoming preeminent over other constitutional rights and principles.

At the same time, discrimination against the free exercise of religion by American Muslims has intensified.<sup>75</sup> There has been a marked increase in Islamophobic, as well as anti-Semitic, hate crimes.<sup>76</sup> Last year, the Washington Post reported a “spate of arsons and bombings that has plagued mosques across America” since 2016.<sup>77</sup> Anti-Muslim activists and local governments have sought to prevent the construction of mosques or Islamic cemeteries.<sup>78</sup> Furthermore, social media has become a vehicle for spreading extreme Islamophobic views.<sup>79</sup> (See, “Hate Crimes”).

There has also been legislative discrimination against Muslim Americans. Since 2009, 43 states have enacted statutes making

69. Flory, Richard. “Revisiting the Legacy of Jerry Falwell Sr. in Trump’s America.” *The Conversation*, 10 July 2017, <https://theconversation.com/revisiting-the-legacy-of-jerry-falwell-sr-in-trumps-america-79551>. For Barr, see the final bullet point in this section. For Flynn, see footnote 106. For Pompeo, look to the construction of the State Department’s new “Commission on Unalienable Rights.” Gessen, Masha. “Mike Pompeo’s Faith-Based Attempt to Narrowly Redefine Human Rights.” *New Yorker*, 10 July 2019, <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights>).

70. Greenhouse, Linda. “Religious Crusaders at the Supreme Court’s Gates.” *New York Times*, 12 Sept. 2019. Wheeler, Russell. “Judicial Appointments in Trump’s First Three Years: Myths and Realities.” *Brookings*, 28 Jan. 2020, <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/>. Hulse, Carl. “Trump and Senate Republicans Celebrate Making the Courts More Conservative.” *New York Times*, 6 Nov. 2019, <https://www.nytimes.com/2019/11/06/us/trump-senate-republicans-courts.html>. Itkowitz, Colby. “1 in Every 4 Circuit Court Judges Is Now a Trump Appointee.” *Washington Post*, 21 Dec. 2019, [https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fale98-2336-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fale98-2336-11ea-bed5-880264cc91a9_story.html). And, Luthi, Susanna. “How Trump Is Filling the Liberal 9th Circuit with Conservatives.” *Politico*, 22 Dec. 2019, <https://www.politico.com/news/2019/12/22/trump-judges-9th-circuit-appeals-court-08883>.

71. Tiven, Rachel B. “If Abortion Rights Fall, LGBT Rights Are Next.” *Washington Post*, 22 Feb. 2017, [www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61\\_story.html](http://www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61_story.html).

72. Gryboski, Michael. “Congress Fails to Repeal Johnson Amendment in Tax Bill.” *Christian Post*, 18 Dec. 2017, <https://www.christianpost.com/news/congress-fails-repeal-johnson-amendment-tax-bill-210538/>. The House tried to include a repeal of the Amendment in the 2017 tax bill, but the Senate ultimately took it out before it could become law.

73. Jain, Kalpana. “How the Religious Right Shaped American Politics: 6 Essential Reads.” *The Conversation*, 21 Dec. 2017, <https://theconversation.com/how-the-religious-right-shaped-american-politics-6-essential-reads-89005>.

74. Stewart, Katherine, and Caroline Fredrickson. “Bill Barr Thinks America Is Going to Hell.” *New York Times*, 29 Dec. 2019, <https://www.nytimes.com/2019/12/29/opinion/william-barr-trump.html?smid=nytcore-ios-share>. For example, “[t]he U.S. Department of Justice has thrown its support behind a small group of Maine parents who have filed a federal lawsuit seeking reimbursement for their children’s religious school tuition.” Anderson, J. Craig. “Justice Department Backs Parents Suing Maine Over Tuition for Religious Schools.” *Portland Press Herald*, 11 June 2019, <https://www.pressherald.com/2019/06/11/doj-expresses-support-for-plaintiffs-in-maine-religious-school-tuition-case/>. Toobin, Jeffrey. “William Barr’s Wild Misreading of the First Amendment.” *New Yorker*, 17 Oct. 2019, <https://www.newyorker.com/news/daily-comment/william-barrs-wild-misreading-of-the-first-amendment> (“Barr portrays these efforts as the free exercise of religion when, in fact, they are the establishment of religion”). And, Odell, Catherine M. “Notre Dame Adjunct Rebuts Barr’s Contentious Talk on Religious Freedom.” *National Catholic Reporter*, 22 Nov. 2019, <https://www.ncronline.org/news/people/notre-dame-adjunct-rebuts-barrs-contentious-talk-religious-freedom>.

75. For a longer account of the cultural shift, see Beinart, Peter. “When Conservatives Oppose ‘Religious Freedom.’” *The Atlantic*, 11 Apr. 2017, <https://www.theatlantic.com/politics/archive/2017/04/when-conservatives-oppose-religious-freedom/522567/>.

76. Recent years have seen an increase in anti-Semitic and Islamophobic hate crimes. Gottschalk, Peter. “Hate Crimes Associated with Both Islamophobia and Anti-Semitism Have a Long History in America’s Past.” *The Conversation*, 3 June 2019, <https://theconversation.com/hate-crimes-associated-with-both-islamophobia-and-anti-semitism-have-a-long-history-in-americas-past-116255>.

77. Uddin, Asma. “The Baffling Argument that Has Become Mainstream Under Trump: ‘Islam Is not a Religion.’” *Washington Post*, 19 Mar. 2019, [www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/](http://www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/).

78. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 273-75. Local governments often denied the permits to Muslims even as they granted them to Christian churches. The most famous case was the Cordoba House, an Islamic center that was planned to be built in New York City—near the former site of the World Trade Center—before intense opposition and harassment of the Imam leading the project caused it to be effectively cancelled. *Ibid.*, pp. 284-85.

79. *Ibid.*, pp. 290-91.



the practice of any form of Islamic law (“Sharia”) illegal, even for its common usage in inter-personal or community arbitration.<sup>80</sup> The fear is that American Muslims are somehow attempting to covertly implant Islamic law into the American legal system, despite the lack of any evidence to support this claim.<sup>81</sup> As commentators have noted, this is clear discrimination: “Arbitration law followed by other religious groups—such as Orthodox Jews and Christian groups...is common and a fairly uncontroversial form of religious exercise, but the laws single out Muslims for suspicion.”<sup>82</sup>

Previous administrations of both parties have made significant efforts to counter Islamophobia.<sup>83</sup> This is not so for the current administration.<sup>84</sup> As a candidate, Donald Trump rhetorically conflated radical Islamist extremism with Islam in general, and did not correct explicitly Islamophobic comments by his supporters.<sup>85</sup> He also regularly repeated the false claim that he had personally witnessed Muslims cheering in New Jersey following the 9/11 attacks.<sup>86</sup> President Trump has used his bully pulpit—and his

Twitter account, in particular—to support Islamophobic rhetoric, as when he defended Fox News host Jeannine Pirro for saying Rep. Ilhan Omar (D-MN) is opposed to the US Constitution because she wears a headscarf.<sup>87</sup>

The administration has gone beyond rhetoric. The most prominent example is the executive order creating a travel ban from 13 predominantly Muslim countries. The ban, which the administration argued was necessary on national security grounds, has survived several legal challenges, including in the Supreme Court, and has recently been expanded.<sup>88</sup> In a 5-4 vote in *Trump v. Hawaii*, the Court chose not to apply the compelling interest test and accepted the government’s contention “that the Proclamation was not based on anti-Muslim animus and was instead based on ‘a sufficient national security justification.’”<sup>89</sup> This decision came despite the fact that the first version of the ban included an explicit preference for Christian refugees over Muslims, “even if the lives of both groups were equally in

80. Uddin, Asma. “The Baffling Argument that Has Become Mainstream Under Trump: ‘Islam Is not a Religion.’” *Washington Post*, 19 Mar. 2019, <https://www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/>. Tennessee passed a bill that created a 15-year prison sentence for, “anyone who helped a ‘Sharia organization,’ which was defined as two or more people acting to ‘support’ Sharia.” Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 275-280.

81. Bier, David. “Muslims Rapidly Adopt U.S. Social Views.” *Cato Institute*, 13 Oct. 2016. Rheault, Magali, and Dalia Mogahed. “Majorities See Religion and Democracy as Compatible.” *Gallup Polls*, 3 Oct. 2007. And, Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 275-280.

82. Uddin, Asma. “The Baffling Argument that Has Become Mainstream Under Trump: ‘Islam Is not a Religion.’” *Washington Post*, 19 Mar. 2019, <https://www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/>. For a further comparison of Sharia with Orthodox Jewish ‘Halacha’ rules see Goldberg, Jeffrey. “Sharia Does not Mean What Newt Gingrich Thinks it Means.” *The Atlantic*, 15 July 2016, <https://www.theatlantic.com/international/archive/2016/07/gingrich-nice-sharia/491471/>: “Sharia, in many ways, is analogous to Jewish law, or ‘halacha.’ (Both words mean, more or less, ‘the way,’ or ‘the pathway.’) There are several schools of sharia thought, that range from fundamentalist to liberal in approach. The conservative, Hanbali, interpretation, when stringently applied in matters of punishment for criminal and sexual transgressions, is very harsh by Western standards, but sharia, as Muslims understand the term, is not merely about punishment. Islam, like Judaism, is a law-based religion, and Islamic law concerns itself with all aspects of human existence: from marriage and divorce to economics and commercial law to personal behavior and hygiene.” For additional information see Corkery, Michael, and Jessica Silver-Greenberg. “In Religious Arbitration, Scripture Is the Rule of Law.” *New York Times*, 2 Nov. 2015, <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>. And, Brody, Michael. “Criticisms of Religious Arbitration.” *Washington Post*, 28 June 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/28/criticisms-of-religious-arbitration/>.

83. “‘Islam is Peace’ Says President.” *White House Archives*, 17 Sept. 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>. And, Ortiz, Erik. “President Obama Asks All Americans to Fight Islamophobia During First Mosque Visit.” *NBC News*, 3 Feb. 2016, <https://www.nbcnews.com/politics/white-house/president-obama-first-visit-u-s-mosque-call-religious-tolerance-n510296>.

84. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 311-312. And, Beinart, Peter. “The Denationalization of American Muslims.” *The Atlantic*, 19 Mar. 2017, <https://www.theatlantic.com/politics/archive/2017/03/frank-gaffney-donald-trump-and-the-denationalization-of-american-muslims/519954/>.

85. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, pp. 292-293.

86. *Ibid.*

87. Uddin, Asma. “The Baffling Argument that Has Become Mainstream Under Trump: ‘Islam Is not a Religion.’” *Washington Post*, 19 Mar. 2019, [www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/](https://www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/).

88. Kanno-Youngs, Zolan. “Trump Administration Adds Six Countries to Travel Ban.” *New York Times*, 3 Feb. 2020, <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html>. Hamedy, Saba. “Everything You Need to Know About the Travel Ban: A Timeline.” *CNN*, 26 June 2018, <https://www.cnn.com/2018/06/26/politics/timeline-travel-ban/index.html>. And, “Timeline of the Muslim Ban.” *ACLU of Washington*, <https://www.aclu-wa.org/pages/timeline-muslim-ban>. Accessed 28 Dec. 2020.

89. “Trump v. Hawaii.” *Oyez*, <https://www.oyez.org/cases/2017/17-965>. Accessed 28 Dec. 2020. This was after the Court struck down the earlier version that had included the explicit preference for Christian refugees over Muslims.

danger.”<sup>90</sup> Civil rights organizations have documented other forms of discrimination in law enforcement and elsewhere, including “infiltration and surveillance of Mosques and Muslim communities; government discrimination against Muslims; and discrimination against Muslims in public schools.”<sup>91</sup>

There is a pernicious ideological claim behind these discriminatory practices: that Islam is in fact *not* a religion, but instead a political ideology masquerading as one. This is not merely a fringe belief. Prominent former Trump administration officials—including Michael Flynn, Sebastian Gorka, and Stephen Bannon—have espoused it,<sup>92</sup> and the notion has come into play in attempts to suppress Sharia.<sup>93</sup> This discriminatory assertion is particularly dangerous because it seeks to justify the suppression of free exercise for American Muslims without contravening the First Amendment, under the false claim that Islam is not protected by the First Amendment at all.<sup>94</sup>

### FREE EXERCISE V. ESTABLISHMENT

Under pressure from the religious right, the federal government has also increasingly undermined the Establishment Clause.

This has been noticeable in the resurfaced debate over prayer in public school. The Supreme Court has held that school-sponsored prayer violates the Establishment Clause, but students are permitted to pray privately on school grounds, as long as they do not pressure others to do so.<sup>95</sup> This is the delicate balance of

free exercise and non-establishment in action. In several recent public comments, however, including the 2020 State of the Union Address, President Trump has expressed support for public school-sponsored prayer.<sup>96</sup> In one case, he even threatened to withdraw federal funding from a school because it had restricted unconstitutional forms of prayer.<sup>97</sup>

The debate about government aid to religious institutions is also intensifying. In *Zelman v. Simmons-Harris* (2002), the Supreme Court carefully balanced the Establishment and Free Exercise Clauses in ruling when it is permissible for government assistance to benefit religious institutions. The Court held that the aid must be given indiscriminately to all citizens, and it is permissible for some citizens to then use the money for religious purposes.<sup>98</sup> In 2017, however, the Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that “[t]he exclusion of churches from an otherwise neutral and secular aid program violates the First Amendment’s guarantee of free exercise of religion.”<sup>99</sup>

The difference between the two rulings is subtle but significant. The 2002 case made it permissible for a neutral aid program to benefit religious institutions. *Trinity Lutheran*, on the other hand, said it was *impermissible* for a neutral aid program *not* to benefit religious institutions; they must be included. In her dissent, Justice Sonia Sotomayor described the ruling as “precisely the sort of direct connection between church and state that the Establishment Clause was intended to prevent.”<sup>100</sup>

90. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 296. And, Goldstein, Laurie. “Christian Leaders Denounce Trump’s Plan to Favor Christian Refugees.” *New York Times*, 29 Jan. 2017, <https://www.nytimes.com/2017/01/29/us/christian-leaders-denounce-trumps-plan-to-favor-christian-immigrants.html>. His comments as a candidate were explicit. In December 2015, he called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Johnson, Jenna, and Abigail Hauslohner. “I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims.” *Washington Post*, 20 May 2017, <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/>. In July 2016, “Trump explained that Muslim refugees were ‘trying to take over our children and convince them how wonderful ISIS is and how wonderful Islam is.’” Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 293.

91. “Protecting the Religious Freedom of Muslims.” *ACLU*, <https://www.aclu.org/issues/national-security/discriminatory-profiling/protecting-religious-freedom-muslims>. Accessed 1 Jan. 2021.

92. “I don’t see Islam as a religion. I see it as a political ideology... it will mask itself as a religion globally because, especially in the west, especially in the United States, because it can hide behind and protect itself behind what we call freedom of religion”. Uddin, Asma. “The Baffling Argument that Has Become Mainstream Under Trump: ‘Islam Is not a Religion.’” *Washington Post*, 19 Mar. 2019, <https://www.washingtonpost.com/religion/2019/03/19/baffling-argument-that-has-become-mainstream-under-trump-islam-is-not-religion/>.

93. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 279.

94. Similar claims were made in the past about previous minority faiths, including Mormons, Catholics, and Native Americans. *Ibid.*, p. 271.

95. Ordonez, Franco. “Trump Defends School Prayer. Critics Say He's Got it All Wrong.” *NPR*, 16 Jan. 2020, <https://www.npr.org/2020/01/16/796864399/exclusive-trump-to-reinforce-protections-for-prayer-in-schools>.

96. *Ibid.* And, Strauss, Valerie. “In State of the Union, Trump Makes Clear His Aversion to Public Schools.” *Washington Post*, 5 Feb. 2020, <https://www.washingtonpost.com/education/2020/02/05/state-union-trump-makes-clear-his-aversion-public-schools/>.

97. Ordonez, Franco. “Trump Defends School Prayer. Critics Say He's Got it All Wrong.” *NPR*, 16 Jan. 2020, <https://www.npr.org/2020/01/16/796864399/exclusive-trump-to-reinforce-protections-for-prayer-in-schools>.

98. “*Zelman v. Simmons-Harris*.” *Oyez*, <https://www.oyez.org/cases/2001/00-1751>. Accessed 1 Jan. 2021.

99. “*Trinity Lutheran Church of Columbia, Inc. v. Comer*.” *Oyez*, <https://www.oyez.org/cases/2016/15-577>. Accessed 1 Jan. 2021.

100. *Ibid.* Emphasis added. Justice Ruth Bader Ginsburg joined the dissent.



In June 2020, the Supreme Court’s ruling on a similar case, *Espinoza v. Montana Department of Revenue*, further strengthened the Free Exercise Clause at the expense of the constitutional responsibility of non-establishment.<sup>101</sup> This case was brought by the religious right and is supported by the Trump administration.<sup>102</sup> In 2015, Montana created a state program that provided tax credits for individuals and businesses who donated to private, nonprofit scholarship organizations. However, owing to a clause in the state constitution prohibiting state support for religious institutions, the Montana Department of Revenue added a rule (“Rule 1”) that the scholarships could not be used at religious schools.<sup>103</sup> Several parents challenged the rule, arguing it discriminated against religion and their right to free exercise, and that religious schools must be eligible for the program.<sup>104</sup> After the Montana Supreme Court decided against the parents—and went further by eliminating the program altogether—the case went to the Supreme Court.

The Court ruled in favor of the parents, receiving praise from the Trump administration.<sup>105</sup> In his 5-4 majority opinion, Chief Justice John Roberts Jr. argued that Rule 1 discriminated against religious free exercise and that Montana must allow parents to use the scholarship money at religious schools.<sup>106</sup> Employing the compelling interest test, the majority argued that Montana’s interest in “creating greater separation of church and State than the Federal Constitution requires” is not compelling enough to justify restrictions on free exercise.<sup>107</sup> This ruling, which explicitly built on the foundation laid by *Trinity Lutheran* in its reasoning,

further blurs the line between the separation of church and state. As with that previous case, *Espinoza* cements the notion that states are *required* to include religious entities in state aid programs.<sup>108</sup> As some observers warned before the ruling, this result is difficult to distinguish from state support for religion.<sup>109</sup>

Another recent development indicates the administration’s frame of mind: the decision to classify churches and other “faith-based organizations” as “businesses” in the COVID-19 economic relief package.<sup>110</sup> In fact, the Paycheck Protection Program, established under the CARES Act, allows taxpayer money to be used directly to pay the salaries of clergy.<sup>111</sup> As prominent legal scholars have observed, this sort of direct government funding of religious activity is unprecedented.<sup>112</sup> The Trump administration has stepped onto the slippery slope that Madison and the Founders had fought so hard to avoid.

### FREE EXERCISE V. EQUAL PROTECTION

In addition to its challenge to non-establishment, the Trump administration’s expansive view of religious freedom is also challenging the right to equal protection and non-discrimination. This has been increasingly demonstrated in court cases pertaining to LGT-BQ rights, employment rights, and women’s reproductive rights.

Although the Supreme Court ruled in 2015 in *Obergefell v. Hodges* that equal protection covers same-sex marriage, anti-LGBTQ discrimination has come in other forms.<sup>113</sup> The most prominent

101. “*Espinoza v. Montana Department of Revenue*.” *SCOTUS Blog*, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/>. Accessed 1 Jan. 2021.

102. Greenhouse, Linda. “The Supreme Court’s Collapsing Center on Religion.” *New York Times*, 30 Jan. 2020, <https://www.nytimes.com/2020/01/30/opinion/supreme-court-religion.html>.

103. “*Espinoza v. Montana Department of Revenue*.” *Oyez*, <https://www.oyez.org/cases/2019/18-1195>. Accessed 1 Jan 2021.

104. “Reply Brief for Petitioners.” *Espinoza v. Montana Department of Revenue*. No. 18-1195. 6 Dec. 2019. *United States Supreme Court*, <https://www.supremecourt.gov/DocketPDF/18/18-1195/124711>.

105. Barnes, Robert. “Supreme Court Says States that Subsidize Private Education Must Include Religious Schools.” *New York Times*, 30 June 2020, [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f_story.html).

106. *Ibid.*

107. United States, Supreme Court. *Espinoza v. Montana Department of Revenue*. No. 18-1195. 30 June 2020, [https://www.supremecourt.gov/opinions/19pdf/18-1195\\_g314.pdf](https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf).

108. Barnes, Robert. “Supreme Court Says States that Subsidize Private Education Must Include Religious Schools.” *New York Times*, 30 June 2020, [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-says-montana-program-aiding-private-schools-must-be-open-to-religious-schools/2020/06/30/4d0af7e6-bad7-11ea-bdaf-a129f921026f_story.html)

109. Greenhouse, Linda. “The Supreme Court’s Collapsing Center on Religion.” *New York Times*, 30 Jan. 2020, <https://www.nytimes.com/2020/01/30/opinion/supreme-court-religion.html>.

110. Gjeltén, Tom. “Another Break from the Past: Government Will Help Churches Pay Pastor Salaries.” *All Things Considered* on NPR, 6 Apr. 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/06/828462517>.

111. Tebbe, Nelson, et al. “The Quiet Demise of the Separation of Church and State.” *New York Times*, 8 June 2020, <https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html?referringSource=articleShare>

112. *Ibid.*

113. “*Obergefell v. Hodges*.” *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/14-556>. Accessed 1 Jan. 2021. And, Tiven, Rachel B. “If Abortion Rights Fall, LGBT Rights Are Next.” *Washington Post*, 22 Feb. 2017, [https://www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61\\_story.html](https://www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61_story.html)

example in recent years is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. In this case, the Supreme Court held that a Colorado baker's refusal to bake a wedding cake for a gay couple because of his religious objection to same-sex marriage was an element of his free exercise, and the ruling of the Colorado Civil Rights Commission to compel him to serve the couple was unconstitutional.<sup>114</sup> In other words, the baker's right to free exercise justified denying the gay couple's right to equal protection and non-discrimination.<sup>115</sup> Following this precedent, more cases are sure to come. As one commentator observed, "innkeepers, restaurant owners, and photographers are all using the free-exercise clause of the First Amendment to justify their refusal to serve gay customers."<sup>116</sup> (See "LGBTQ Rights").

An additional area of conflict is employment and disability rights, particularly for employees of religious institutions. A 2012 case illustrates the growing pressure against claims of discrimination. After being diagnosed with narcolepsy, a teacher named Cheryl Perich was fired by her employer, an evangelical Lutheran school in Michigan. Ms. Perich argued that her firing violated her rights under the Americans with Disabilities Act. The Supreme Court, however, referring to a legal tradition of "ministerial exceptions," upheld the right of the religious school to make hiring and firing decisions as it wished, even if those decisions would otherwise have been considered discriminatory by a non-religious employer.<sup>117</sup> This decision was a harbinger of future cases where religious institutions were allowed to violate a right that would normally have been protected.<sup>118</sup> (See, "Disability Rights").

114. "Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission." Oyez, <https://www.oyez.org/cases/2017/16-111>. Accessed 1 Jan. 2021. Although they tried to provide some nuance: "Though the court ruled in favor of the business owner, the majority said it did so because the Colorado government showed clear anti-religious bias when handling the case. Justice Anthony Kennedy, who wrote the majority opinion, made clear that religious beliefs do not justify discrimination against LGBTQ individuals... 'Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.'" Campbell, Alexia Fernández. "Trump's Plan to Let Employers Discriminate Against LGBTQ Workers, Explained." *Vox*, 16 Aug. 2019, <https://www.vox.com/identities/2019/8/16/20806990/trump-religion-lgbtq-discrimination-rule>.

115. There is legislation currently held up in Congress that would "add sexual orientation and gender identity as protected characteristics to existing civil rights law, including the Civil Rights Act." Graves-Fitzsimmons, Guthrie. "No Conflict Between True Religious Liberty and LGBTQ Rights." *The Hill*, 27 Feb. 2020, <https://thehill.com/opinion/civil-rights/484629-no-conflict-between-true-religious-liberty-and-lgbtq-rights>. It has passed the House and been received in the Senate. United States, Congress, House of Representatives. The Equality Act. *Congress.gov*, <https://www.congress.gov/bill/116th-congress/house-bill/5/text>. 116th Congress, 1<sup>st</sup> session, House Resolution 5, passed 20 May 2019.

116. Toobin, Jeffrey. "William Barr's Wild Misreading of the First Amendment." *New Yorker*, 17 Oct. 2019, <https://www.newyorker.com/news/daily-comment/william-barrs-wild-misreading-of-the-first-amendment>. For example, *Fulton v. City of Philadelphia*. See "*Fulton v. City of Philadelphia, Pennsylvania*." SCOTUS Blog, <https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/>. Accessed 1 Jan. 2021. And, Liptak, Adam. "Supreme Court to Hear Case on Gay Rights and Foster Care." *New York Times*, 24 Feb. 2020, <https://www.nytimes.com/2020/02/24/us/supreme-court-gay-rights-foster-care.html>.

117. "*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*." Oyez, <https://www.oyez.org/cases/2011/10-553>. Accessed 1 Jan. 2021.

118. *Ibid.*

119. "*Roe v. Wade*." Oyez, <https://www.oyez.org/cases/1971/70-18>. Accessed 1 Jan. 2021.

120. "*Burwell v. Hobby Lobby Stores*." Oyez, <https://www.oyez.org/cases/2013/13-354>. Accessed 1 Jan. 2021.

121. Another important point: the RFRA was designed, in the wake of Al Smith's peyote case, to protect religious minorities. Appealing to it to protect a Christian corporation would therefore seem a stretch. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 253.

122. United States, Supreme Court. *Burwell v. Hobby Lobby Stores, Inc.* No. 13-354. 2014. *United States Supreme Court*, [https://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](https://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf). The fact that the party to the case was a corporation, and not an individual, did not change the majority's reasoning. Essentially, they argued that because a corporation is composed of individuals with legitimate religious beliefs, the corporation itself can also be said to have protected religious beliefs. Justice Ginsburg, in her dissent, rejected this view.

In 2014, another employment-related case challenged women's reproductive rights. The right of a woman to choose when to bear a child is protected under *Roe v. Wade* and the Due Process Clause of the Fourteenth Amendment.<sup>119</sup> However, in *Burwell v. Hobby Lobby*, the Supreme Court held that a private company may deny contraceptive health coverage to their employees—coverage to which employees would "otherwise have been entitled" by the Affordable Care Act—based on the employer's religious beliefs.<sup>120</sup> In essence, the Court prioritized the free exercise of the employer over the employee's right to contraceptive health care. (See, "Women's Rights").

In reaching its decision in *Hobby Lobby*, the Supreme Court employed the compelling interest test.<sup>121</sup> As previously explained, that test requires the government to prove the policy in question meets two standards: that it is in support of a compelling public interest, and that there is no other less restrictive means to secure that interest. While conceding that a compelling interest—access to contraceptive care—was indeed at stake, the 5-4 majority opinion concluded that the second criterion was not met. There was another means to secure the interest: the US Department of Health and Human Security (HHS) had an alternative process to provide contraceptive care for employees of religious *nonprofit* corporations, and that process could also be used for the employees of non-religious, for-profit corporations like Hobby Lobby.<sup>122</sup>

The dissenting justices took issue with this reasoning. First, they warned that the majority opinion created a precedent under which commercial enterprises would now be able to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”<sup>123</sup> The ruling risked opening the door for innumerable requests for exemptions. This point echoed Justice Scalia’s concern in *Employment Division v. Smith* about the potential “anarchic” danger of a proliferation of religious exceptions from the law.

The dissent also contended that the majority misused their application of the “least restrictive method” criteria. It was incorrect to say the HHS system was a valid alternative for contraceptive care because forcing employees to figure out the HHS system shifts too much of a burden onto them: “No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.”<sup>124</sup> In other words, although Hobby Lobby’s owners are entitled to their beliefs, it is unconstitutional for the expression of those beliefs to impose a burden on the lives, health, or rights of others. Indeed, as a group of law professors argued after *Hobby Lobby*, the Supreme Court has historically held that the government may not “accommodate religious belief by lifting burdens on religious actors if that means shifting meaningful burdens to third parties.”<sup>125</sup>

As things now stand, the majority’s expansive reading of the RFRA is now precedent and women’s reproductive rights are weakened relative to the right of religious free exercise.

## THE BALANCING ACT

Whether religious free exercise is inherently more important than other constitutional rights is the core of this debate.

In general, the Supreme Court has indicated that it is not. It has done so by favoring—on a case-by-case basis—other compelling interests: public health (*Employment Division v. Smith*); national defense (*Gillette v. United States*); social security (*United States v. Lee*); maintaining a “sound tax system” (*Hernandez v. Commissioner*); and, crucially for this chapter, avoiding Establishment Clause

violations (*Estate of Thornton v. Calder*).<sup>126</sup> These interests were considered to be sufficiently compelling to justify burdening free exercise.

The more ambiguous question is what happens when two rights collide. Whether it is a compelling government interest to secure rights—such as the right to equal treatment and non-discrimination, or women’s reproductive and privacy rights—cannot be resolved by appealing to legal precedent.

The majority’s rationale in *Hobby Lobby* created a seed of precedent for future argumentation that the protection of other constitutional rights is a compelling interest. The opinion agreed there was a compelling interest at stake in the assertion of a right of access to contraception. The majority referred to the interest as “guaranteeing cost-free access to the four challenged contraceptive methods.”<sup>127</sup> If access to contraceptive care is a constitutional right, that would imply that constitutional rights are compelling interests.

Arguments about balance and burden-shifting may be convincing here as well. For example, in the 1985 case *Estate of Thornton v. Calder*—although the compelling interest in question was the Establishment Clause—the Court’s reasoning seems applicable to cases where other rights are compelling interests: “The First Amendment [free exercise right]...gives no one the right to insist that, in pursuit of their own interests, others must conform their conduct to his own religious necessities.”<sup>128</sup> Following this line of reasoning, “conduct” could include actions like seeking contraceptive care or marrying the person whom one loves. Similarly, Justice Ginsburg’s observation in her *Hobby Lobby* dissent that “no tradition...allows a religion-based exemption when the accommodation would be harmful to others” could be convincing: what is more “harmful” than an impingement on a core human right?<sup>129</sup>

In a further complication of the issue, in states where there is no state version of the RFRA, state and local laws and policies are not subject to the compelling interest test. In states that are inclined to protect other rights even if that means burdening religious free exercise, there is greater room to do so.

123. Ibid. Emphasis added.

124. Ibid. Emphasis added. In other words, it is simply unfair to force Hobby Lobby’s female employees to jump through the bureaucratic hoops of joining the HHS program—particularly as at least some would inevitably not manage to do so, and their health would suffer as a result.

125. Franke, Katherine, et al. Letter to Representative Ed DeLaney, Indiana House of Representatives, Regarding the Religious Freedom Restoration Act. *Columbia University Law*, 27 Feb. 2015, [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law\\_professors\\_letter\\_on\\_indiana\\_rfra.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf).

126. Kelly, Kathleen P. “Abandoning the Compelling Interest Test in Free Exercise Cases.” *Catholic University Law Review*, Vol. 40, Issue 4, Summer 1991, pp. 947-949, <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1763&context=lawreview>.

127. United States, Supreme Court. *Burwell v. Hobby Lobby Stores, Inc.* No. 13-354. 2014. *United States Supreme Court*, [https://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](https://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf).

128. United States, Supreme Court. *Estate of Thornton v. Calder, Inc.* 472 U.S. 703. 1985. *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/472/703>.

129. United States, Supreme Court. *Burwell v. Hobby Lobby Stores, Inc.* No. 13-354. 2014. *United States Supreme Court*, [https://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](https://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf).

The debate on this issue will likely never be completely resolved. But in order to move forward, it is necessary to appraise in which direction the “balancing act” of religious freedom is currently leaning and, at the moment, it is tilting toward an expansive interpretation of religious free exercise. But this will burden the exercise of other constitutional rights, and therefore requires a rebalancing.

## Conclusions

### SETTING THE HISTORICAL RECORD STRAIGHT

The debate over religious freedom is littered on both sides with appeals to history and the intentions of the Founders.<sup>130</sup> While there is room for argument on many interpretations, advocates for a greater balance in rights and responsibilities should seek to definitively put to bed at least three historical myths.

Firstly, it is incorrect, as some modern religious conservatives claim, that “the concept of separation of church and state was actually invented in 1947 by an activist US Supreme Court.”<sup>131</sup> James Madison and Thomas Jefferson spent decades making the case for separation—and even the devout Puritan Roger Williams thought separation was necessary. Second, it is not true that just because “Judeo-Christian values” were influential in the nation’s founding, Jewish Americans and their Christian counterparts have always been aligned, as some like to imply when attempting to justify Islamophobic discrimination. Jews were widely persecuted before, during, and after the formation of the republic.<sup>132</sup> And third, going even further back, it is a falsehood that the original settlers were champions of religious liberty: the Puritans sought this right for themselves but denied it to others.

A fourth myth, that religious liberty was intended to predominate over other rights, touches on more complicated issues, but is also not true. A central element of the Founders’ political philosophy

was their belief that religious diversity protects religious freedom. In the case of religious diversity, Madison argued that a “multiplicity of sects, which pervades America...is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.”<sup>133</sup> In Federalist No. 10, Madison extended this view to politics, arguing that a diversity of political factions would prevent any of them from establishing tyrannical, majority rule.<sup>134</sup> These views were then incorporated in the founding documents and are essential to pluralist democracy.

If the Founders were to apply this philosophy to the question of rights, what would they think? Almost certainly they would conclude that, as with religious sects and political factions, a diversity of rights should prevent any one right from gaining dominance over others. Seen through this lens, it is difficult to imagine that the architects of religious freedom would feel comfortable assigning free exercise preeminence over other rights. Further evidence of this claim can be found in Madison’s arguments during the debate over the Virginia Declaration of Rights. Even at that early stage, Madison was conscious that the right to religious free exercise could not be preeminent in all circumstances: “all men are equally entitled to the free exercise of religion, according to the dictates of conscience, unpunished, and unrestrained by the magistrate, *unless* the preservation of equal liberty and the existence of the State are manifestly endangered.”<sup>135</sup> Note the first exception: religious free exercise was not more important than “the preservation of equal liberty.”

Today, the compelling interest test theoretically represents a tool to protect Madison’s design. Indeed, the “preservation of equal liberty” has the ring of a compelling state interest that *could* be used to justify some burdening of religious freedom. Equal liberty, for example, in being able to access needed health care, or in purchasing baked goods from fellow citizens without fear of discrimination.

130. Of course, the Founders disagreed constantly among themselves, and to say there was a unified view amongst them is false. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 39. Furthermore, the final language of the First Amendment was a compromise and—because of the dominance of concerns about state’s rights during the debate—it passed “even though there was no consensus about the philosophical matter of how separate church should be from state.” Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, pp. 157-158. Finally, even individual Founding Fathers occasionally contradicted themselves on this topic, or found their viewpoint changing over time. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. x.

131. Waldman, Steven. *Sacred Liberty: America’s Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 46. Madison wrote: “Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters is of importance... And I have no doubt that every new example, will succeed, as every past one has done, in shewing that *religion & Govt. will both exist in greater purity, the less they are mixed together.*” *Ibid.*, pp. 201-202. Emphasis added.

132. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 17.

133. “Over the decades, a virtuous cycle developed. Religious liberty allowed for more sects, and those minority faiths demanded more freedom. Thanks to that forward motion, government’s role changed from promoting religion to promoting religious freedom”. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 138.

134. Madison, James. “Federalist Papers No. 10 (1787).” *Bill of Rights Institute*, 1787, <https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/>. Accessed 2 Jan. 2021.

135. Brant, Irving. *James Madison: The Virginia Revolutionist*. Bobbs-Merrill, 1941, p. 246. Emphasis added. And, Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 114.



## SOLIDARITY

Responsible citizens can find ways to do their part against discrimination. There is precedent in American history, for example, for inter-faith solidarity in the face of external pressures. During the Revolutionary War, the Founders compromised on the religious language used in the Declaration of Independence. Why? Because they recognized that, “to defeat Great Britain, they would need to put aside certain theological disagreements and seek language that would unite rather than divide.”<sup>136</sup> More recently, in the wake of 9/11, President George W. Bush chose to defend Islam rather than scapegoat it.<sup>137</sup>

Today, inter-faith partnerships to fight bigotry and discrimination—such as the Muslim-Jewish Advisory Council—capture a similar spirit. For example, Jewish groups such as the Anti-Defamation League have helped fight back against the anti-Sharia laws that have been implemented countrywide, recognizing that “such a flagrant attack on religious freedom would inevitably hurt them too,” by weakening religious rights more generally.<sup>138</sup> In another case, the head of the Anti-Defamation League responded to President Trump’s proposal to create a national Muslim registry by saying that he would register as a Muslim himself.<sup>139</sup> Finally, Republican Senator Orrin Hatch, a Mormon, defended the proposed construction of the Cordoba House mosque in New York City, understanding from his knowledge of Mormonism in American history when discrimination was at play.<sup>140</sup>

## EXECUTIVE ACTIONS

While the challenge of balancing religious freedom with other rights and responsibilities will likely fall mostly to the legislature and courts, there are actions an incoming administration could consider.

A new administration should make it a priority to reverse the trend of anti-Muslim discrimination by

- undoing the travel ban from majority-Muslim countries, which, despite the Supreme Court’s ruling, seems to clearly have been founded on discriminatory intent;
- initiating a review of how discrimination has manifested within the federal government, and particularly with regard to law enforcement practices; and

- pressuring local and state lawmakers—to the extent that it is possible—to cease drafting legislation, such as the “anti-Sharia” bills, that unconstitutionally discriminates against religious practice.

With respect to the more conceptually complicated challenges—the increasing conflict between religious freedom and other constitutional rights and responsibilities—it will most likely be left to the courts and legislatures to find the proper balance. A new administration could contribute in a few ways, however.

One must pay close attention to the line of separation between church and state: the payments being made to churches in the context of the Coronavirus economic recovery—especially those that go to direct religious use such as clergy’s salaries—must cease; they are a violation of the Establishment Clause.

An incoming administration should also re-examine regulations that support religious institutions by shifting burdens—whether financial, bureaucratic, or burdens of principle—onto private citizens. As with anti-Islam discrimination, it might pay to initiate a review of changes made during the Trump administration that blur that line. Such a review should be accompanied by clear, simple rhetoric that the US government is prohibited from supporting religion, whatever the beliefs of the men and women in power.

For example, a new administration could reexamine Trump administration executive orders, especially Executive Order 13831, which focuses on federal assistance to community organizations, including faith-based ones.<sup>141</sup> Section 2 of the Order makes amendments to the Obama Administration’s Executive Order 13559, which itself was an amendment of George W. Bush’s Executive Order 13279. It strikes subsection 2h, which President Obama had added. That subsection had provided additional protections for beneficiaries of social service programs that had received federal funding: if a beneficiary, or potential beneficiary, had objected to the fact that the organization providing a service to them was religious in nature, the religious organization was required to refer that beneficiary to an alternate provider of the service.<sup>142</sup> Trump’s removal of subsection 2h means that requirement no longer exists. Now, if a beneficiary wishes to decline some service from a federally-funded religious

136. Waldman, Steven. *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty*. Penguin Random House, 2009, p. 91.

137. “‘Islam is Peace’ Says President.” *White House Archives*, 17 Sept. 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>.

138. Waldman, Steven. *Sacred Liberty: America's Long, Bloody, and Ongoing Struggle for Religious Freedom*. HarperCollins, 2019, p. 280.

139. *Ibid.*, p. 297.

140. Gustini, Ray. “Utah Republican Stands Up for NYC ‘Mosque.’” *The Atlantic*, 31 Aug. 2010, <https://www.theatlantic.com/politics/archive/2010/08/utah-republican-stands-up-for-nyc-mosque/340192/>.

141. United States, Executive Office of the President [Donald J. Trump]. Executive Order 13831: Establishment of a White House Faith and Opportunity Initiative.” 3 May 2018, *Govinfo*, United States Government Publishing Office, <https://www.govinfo.gov/app/details/DCPD-201800296>.

142. United States, Executive Office of the President [Barack Obama]. “Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations.” *Federal Register*, Vol. 75, No. 224, pp. 71319-71323, 22 Nov. 2010, <https://www.govinfo.gov/content/pkg/FR-2010-11-22/pdf/2010-29579.pdf>.



organization, the burden is on them—not the organization—to seek out and discover an alternative. It shifts the burden from religious organizations onto individual citizens and therefore bears reconsideration.

Finally, with respect to the conflicts of rights against rights, it would be difficult for the executive branch to play a leading role here, but an incoming administration could consider adopting the language of balance that has been discussed throughout this chapter. There is a case to be made that no right is inherently more important than another, and if such a message were to be delivered clearly from the Oval Office, it may have some impact.

A few other actions beyond rhetoric could be considered as well:

- For example, a new administration could make it a priority, when appointing federal judges, to ensure that those judges' philosophies and record are aligned with the principle of balance and do not consistently favor one right over another.
- As with the Establishment Clause, a review of the pertinent executive orders may also be desirable. The rules on hiring federal contractors is an example. Beginning with President Lyndon B. Johnson's Executive Order 11246, the federal government has imposed rules on businesses that receive federal contracts; 11246 prohibited businesses who discriminated based on race from becoming contractors. This prohibition expanded over time to include discrimination on the basis of religion, gender, sex, national origin, and disability. In 2014, President Barack Obama expanded it again to include sexual orientation and gender identity.<sup>143</sup> There was a religious exemption, but it was narrow: religious nonprofit contractors were allowed to make hiring and firing decisions based on the religion of employees (for example, a Catholic nonprofit could exclusively hire Catholics). An August 2019 proposal by the Trump administration goes further. Under the proposed rules, contractors could make personnel decisions based on the religious beliefs of the employers, similar to the ruling in *Hobby Lobby*: "religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government."<sup>144</sup> In other words, they could fire LGBTQ employees, or those who seek contraceptive care, based on their religious objections to certain "lifestyles." The proposed rules would also expand the exemption from nonprofit contractors to for-profit contractors with a religious affiliation.<sup>145</sup> The proposed rule is pending final approval and promulgation.<sup>146</sup> If it is ultimately approved, an incoming administration should eliminate it and restore the Obama-era standard.

In all, the executive branch is likely limited in its ability to resolve the challenge at the heart of this chapter, which is fundamentally a philosophical and legal question. Where there are executive levers to pull, however, the central goal should be ensuring that the US government lives up to its First Amendment responsibilities: first, to maintain the separation of church and state and second, to protect free exercise—particularly for vulnerable minority religions—without harming or burdening Americans and their rights in the process.

## HOW TO REIMAGINE RIGHTS AND RESPONSIBILITIES

- **Guarantee Equality of Rights.** Confirm through federal legislation or executive order that all constitutional rights must be equally protected and no single constitutional right is privileged over other rights. The legislation or executive order should establish that there is a compelling interest in creating practical methods of providing for equal application of rights and not denying or unfairly burdening the exercise of a right when it comes into conflict with another right, e.g. religious freedom versus freedom from invidious discrimination.
- **Reestablish Balance of Claims of Religious Freedom with Other Constitutional Rights.** Rescind provisions of Executive Order 13831 that unreasonably shift the burden of exercising constitutional rights to patients of faith-based health care providers; reinstate Executive Order 13831 requiring faith-based health care providers to refer patients to reasonably accessible comparable-cost alternative providers for reproductive or contraceptive services; and restore Executive Order 11246 protection of LGBTQ employees of faith-based government contractors against employment discrimination resulting from employers' claims of religious freedom.
- **Protect Free Exercise of Religion Equally for All Religions.** Rescind Executive Order 13769 banning travel from Muslim-majority countries and issue an executive order barring religious discrimination against Muslims and the free exercise of their faith in the United States.
- **Encourage Interfaith Partnerships.** Encourage interfaith partnerships against religious discrimination, hate crimes, and discrimination by religious institutions against the exercise of other constitutional rights.

143. Campbell, Alexia Fernández. "Trump's Plan to Let Employers Discriminate Against LGBTQ Workers, Explained." *Vox*, 16 Aug. 2019, <https://www.vox.com/identities/2019/8/16/20806990/trump-religion-lgbtq-discrimination-rule>.

144. United States, Department of Labor, Office of Federal Contract Compliance Programs. "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption." *Federal Register*, 15 Aug. 2019, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-17472.pdf>.

145. Bailey, Sarah Pulliam, and Julie Zauzmer. "Trump Administration Proposes Protecting Federal Contractors Who Fire or Hire Workers Based on Religious Beliefs." *Washington Post*, 14 Aug. 2019, <https://www.washingtonpost.com/religion/2019/08/14/trump-administration-proposes-protecting-federal-contractors-who-fire-or-hire-workers-based-religious-beliefs/>.

146. "OFCCP Federal Register Documents." *United States Department of Labor*, [https://federalregister.dol.gov/index.php/index/document\\_list/162?agency=OFCCP&page=1](https://federalregister.dol.gov/index.php/index/document_list/162?agency=OFCCP&page=1).

## **Reimagining Rights & Responsibilities in the United States**

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