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## No, It Is Not a Christian Nation, and It Never Has Been and Should Not Be One

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# No, It Is Not a Christian Nation, and It Never Has Been and Should Not Be One

Erwin Chemerinsky\*

## INTRODUCTION

This Symposium asks the question “Is the United States a Christian nation?” The answer must be a resounding no. The country is not now, never has been, and never should be a Christian nation *as a matter of law*.

In 1791, in the Treaty of Tripoli, the United States declared, “[t]he government of the United States is not in any sense founded on the Christian religion.”<sup>1</sup> Proposals have been made to amend the United States Constitution to make it a Christian nation, but never have these attracted sufficient support to be seriously considered. In 1864, the National Reform Association proposed amending the Constitution: “humbly acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the ruler among nations, and his revealed will as the supreme law of the land, in order to constitute a Christian government.”<sup>2</sup> In 1950, there was a proposed constitutional

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1. Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, art. 11, U.S.-Tripoli, Jan. 3, 1797, 8 Stat. 154.

2. *Amending the Constitution*, N.Y. TIMES (Feb. 2, 1864), <https://www.ny-times.com/1864/02/02/archives/amending-the-constitution.html> [perma.cc/XM92-JEM3].

amendment that would have said that the Constitution “devoutly recognizes the authority and law of Jesus Christ, saviour [sic] and ruler of nations, through whom we are bestowed the blessings of liberty.”<sup>3</sup> The absence of significant support for these proposed constitutional amendments is revealing that there are some, but a minority, who see it as desirable to make the United States legally a Christian nation.

The language of the United States being a Christian nation has its strongest support from a unanimous Supreme Court opinion, in 1892, where Justice David Brewer, writing for a unanimous Court, declared that “this is a Christian nation.”<sup>4</sup> Justice Brewer’s opinion relied on his view of history and on one provision of the Constitution: Article 1, Section 7, which eliminates Sundays from the ten-day period provided for the President to consider a bill before signing it or returning it to Congress with his veto.<sup>5</sup> This seeming recognition of a religious practice, Sunday worship, into the Constitution led Justice Brewer to conclude that America was a Christian nation.

Thankfully, this language from Justice Brewer’s opinion has faded into obscurity and has even been expressly rejected by subsequent justices.<sup>6</sup> To be sure, the theme of the United States being a Christian country continues to be expressed, especially by the religious right. James Dobson, head of Focus on the Family, declared: “The United States was established as a Christian nation by Christian people.”<sup>7</sup> But there is no indication that even the most

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3. *Proposing an Amendment to the Constitution of the United States Recognizing the Authority and Law of Jesus Christ: Hearing on S. J. Res. 87 Before Senate Comm. on the Judiciary*, 83d Cong. 63 (1954). The full proposed amendment read, “[t]his nation devoutly recognizes the authority and law of Jesus Christ, saviour [sic] and ruler of nations, through whom are bestowed the blessings of Almighty God.” *Id.*

4. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

5. *Id.* at 470 (citing U.S. CONST. art I, § 7).

6. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (calling *Church of the Holy Trinity* an “aberration[ ]” (citing *Church of the Holy Trinity*, 465 U.S. at 471)); *Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting) (calling Justice Brewer’s declaration “arrogant” (citing *Church of the Holy Trinity*, 465 U.S. at 471)).

7. James Dobson, *America is a Christian Nation*, DR. JAMES DOBSON (July 14, 2017), <https://www.drjamesdobson.org/broadcasts/america-christian-nation> [perma.cc/S6DZ-XCFS].

conservative, originalist justices on the Supreme Court accept this characterization as a matter of constitutional law.

My thesis is that the United States is not a Christian nation *as a matter of law* and should never be considered one. The laws of the country cannot embody Christianity or favor it over other religions. It is firmly established that the government violates the Establishment Clause if it discriminates among religious groups. Such discrimination will be allowed only if strict scrutiny is met.<sup>8</sup> All of the Justices on the current Court, regardless of their theory of the establishment clause, adhere to this principle. In *Larson v. Valente*, the Court declared that “the history and logic of the Establishment Clause [mean] that no State can ‘pass laws which aid one religion’ or that ‘prefer one religion over another.’”<sup>9</sup>

But as a matter of social reality, it cannot be ignored that this is a country where over 200 million people identify as Christians. As a Jew, I often have the sense—especially during the December holiday season—that I am living in a Christian nation. But as a matter of law, including constitutional law, the United States is a secular nation, not a Christian one. This is crucial in a country with enormous religious pluralism, and many who profess no religious beliefs at all.

In this Article, I make three points. First, historically, the United States was not meant to be a Christian nation. Second, as a matter of constitutional interpretation, the First Amendment should be interpreted to require a separation of church and state that would be incompatible with the United States being a Christian nation. And finally, I fear that we have a majority of justices on the Supreme Court who reject the idea of separating church and state. I do not believe that they will declare the United States officially to be a Christian nation, but I am afraid that is the lens through which they will decide cases.

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8. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause* 99–100 (Nw. U. Sch. of L., Faculty Working Paper No. 213, 2012).

9. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

I. HISTORY DOES NOT SUPPORT THE CLAIM OF THE UNITED STATES  
BEING A CHRISTIAN NATION

I am not an originalist.<sup>10</sup> I believe that the Constitution is a living document that must be interpreted in light of history and modern needs. But for those who are originalists, including Supreme Court justices, the evidence is overwhelming that the Constitution was not meant to create a Christian nation.

The framers of the Constitution were deeply aware of the religious strife in other countries, including England, over a long period of time. They very much wanted to avoid the conflict that inevitably comes with the government being aligned with a particular religion.<sup>11</sup> Also, they saw themselves as part of the enlightenment where reason had replaced religion as the basis for decisions.<sup>12</sup> They expressly rejected government-established religions and forced conformity.<sup>13</sup> They chose, and ultimately wrote into the Constitution, the secularization of government and a commitment to religious tolerance.<sup>14</sup> Those who framed the American Constitution insisted that the welfare of the people was best advanced, not by religious *establishments* and forced *conformity* to officially endorsed religions, but by the *secularization* of government authority and the *toleration* of diverse religious practitioners.<sup>15</sup>

Quite importantly, there were no references in the Constitution to a Supreme Being, no authority given to Congress to legislate on matters of religion, and a prohibition against religious tests for

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10. See ERWIN CHEMERINSKY, *WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY* 34–46 (2018); see also Erwin Chemerinsky, *The Philosophy That Makes Amy Coney Barrett So Dangerous*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/opinion/supreme-court-amy-coney-barrett.html> [perma.cc/3FYA-5C8V].

11. See JAMES T. HUTSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 59 (1998).

12. See Derek H. Davis, *Original Intent*, THE FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/823/original-intent> [perma.cc/VWG8-XTAW] (last visited Apr. 6, 2021).

13. See *id.*

14. See U.S. CONST. amend. I, cl. 1; *Id.* c. 2.

15. See Saul K. Padover, *The World of the Founding Fathers*, 25 SOC. RES. 191, 211–14 (1958).

office.<sup>16</sup> At the state level, at the time of the drafting and ratification of the Constitution, there still were vestiges of formal, government-authorized “established” religions, but state practices were quickly changing.<sup>17</sup> An establishment of religion (in terms of direct tax aid for a favored church) was the practice in nine of the thirteen British colonies on the eve of the American Revolution, but by 1800 only three American states (New Hampshire, Massachusetts, and Connecticut) had established churches.<sup>18</sup> These all faded relatively quickly in the early nineteenth century.<sup>19</sup> Some of the arguments associated with this transformation—especially during Virginia’s multi-year debate about assessments in support of particular churches—became among the most important and revered documents in all of American history.<sup>20</sup> They certainly are regarded as foundational in understanding what the framers intended with the religion clauses in the First Amendment.<sup>21</sup>

The role of Roger Williams, for whom this law school is named, must be recognized in creating religious freedom in the United States. He sided with the Puritans who insisted on a complete separation with the Anglican Church. But rather than replace the Anglican Church with a more purified church, Williams advocated for the complete separation of church and state.<sup>22</sup> Exiled from Massachusetts in 1635, he settled in what is now Providence, Rhode Island and founded the Rhode Island Colony, which declared in its charter:

No person within the said colony, at any time hereafter, shall be any ways molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the peace of our said colony; but that all and every person and persons may, from time to time, and at all times hereafter, freely and fully

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16. U.S. CONST. amend. I, cl. 1 (Establishment Clause); *Id.* art. VI, cl. 3 (No Religious Test Clause); *see generally id.*

17. *See HUTSON, supra* note 11, at 60.

18. John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 J. CHURCH & ST. 753, 754 (1990).

19. *See id.* at 759.

20. *See id.* at 757.

21. *See id.* at 758.

22. *See id.*

have and enjoy his and their own judgments and consciences, in matters of religious concernments.<sup>23</sup>

His goal, as he famously put it in 1643, was to construct “a wall of Separation between the Garden of the Church and the Wildernes [sic] of the world.”<sup>24</sup>

Williams’s work, *The Bloody Tenent*<sup>25</sup> of Persecution, for Cause of Conscience, Discussed in a Conference between Truth and Peace, was published in England in 1644—the same year John Milton published *Areopagitica* to make the case for more liberty of expression (especially for Protestant nonconformists)<sup>26</sup>—while he was trying to convince English authorities to grant Rhode Island a charter.<sup>27</sup> The book was so radical that Parliament ordered every copy burned.<sup>28</sup> But it had a substantial influence throughout the colonies.<sup>29</sup> In it he lamented “the blood of so many hundred thousand souls of *protestants* and *papists*, spilt in the *Wars* of *present* and *former* ages, for their respective *Consciences*”—noting that the spilling of this blood “is not *required* nor *accepted* by *Jesus Christ* the *Prince of Peace*”—and argued that the “[e]nforced *uniformity*” of religion in any “*civil state* . . . is the greatest occasion of *civil war*, *ravishing of conscience*, *persecution of Christ Jesus* in his servants, and of the *hypocrisy* and *destruction* of millions of

23. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 32, 32–33 (Neil H. Cogan et al. eds., 2d ed. 2015).

24. ROGER WILLIAMS, MR. COTTON’S LETTER LATELY PRINTED, EXAMINED, AND ANSWERED (1644), reprinted in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 313, 392 (Rueben Aldridge Guild & James Hammond Trumbull eds., 1963).

25. “Tenent” is an obsolete spelling of the word “tenet.” See *Tenet*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tenet> [perma.cc/33Y9-9AXS] (last visited Apr. 6, 2021).

26. See generally JOHN MILTON, AREOPAGITICA (Cambridge U. Press 1916) (1644).

27. Samuel L. Caldwell, *Preface* to ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION (1644), reprinted in 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS iii, iii (Samuel L. Caldwell ed., 1963).

28. See Rob Boston, *The Forgotten Founder*, CHURCH & ST. MAG. (Apr. 2003), <https://www.au.org/church-state/april-2003-church-state/featured/the-forgotten-founder> [perma.cc/U2PB-UV8Z].

29. See *id.*

*souls.*”<sup>30</sup> In the middle of this bloody century, and at the dawn of the English Civil War, Williams’s advice was that a “firm and lasting *peace*” could only be procured by the “permission of other *consciencences* and *worships* than a state professes.”<sup>31</sup>

The Constitution, written in 1787, was in accord with this view. It makes no mention of religion, let alone a specific religion, as a basis for governing authority. The first words of the Preamble, “We the People,” make clear that the sovereign is the people; the authority of government is derived from it and not from God.<sup>32</sup> There is no authority given to Congress to legislate as to matters of religion.<sup>33</sup> In fact, the only explicit mention of religion in the text of the first seven Articles of the Constitution is a rejection of it as a basis for holding office.<sup>34</sup> Article VI, Section 3 provides:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.<sup>35</sup>

During this period, debates about state-established or state-supported religions were more controversial, although popular support for this practice was weakening. At the time of the Declaration of Independence, Virginia had established a range of practices in support of Anglicanism, but they were quickly being erased.<sup>36</sup> The legislature repealed laws making it a crime to subvert Anglicanism and failing to attend church.<sup>37</sup> In the 1780s James Madison and Thomas Jefferson—no fans of the “age of Constantine” that resulted in “millions of innocent men, women, and children . . . [being] burnt, tortured, fined, and imprisoned”

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30. WILLIAMS, *supra* note 27, at 1, 3–4 (spelling modernized).

31. *Id.* at 4 (spelling modernized).

32. U.S. CONST. pmbl. I explain the importance of “We the People” as the first words of the Preamble in CHEMERINSKY, *supra* note 10, at 60–64.

33. U.S. CONST. amend. I, cl. 1.

34. *See* U.S. CONST. art. I–VII.

35. *Id.* art. VI, § 3.

36. HOWARD GILLMAN & ERWIN CHEMERINSKY, *THE RELIGION CLAUSES* 31 (2020).

37. *Id.*



with no resulting consensus on matters of faith<sup>38</sup>—engaged in a lengthy campaign for religious freedom in Virginia.<sup>39</sup> Their campaign ended with the passage of the Virginia Act for Religious Freedom, the law that disestablished the Anglican Church.<sup>40</sup>

The controversy in Virginia began in 1784 when Patrick Henry proposed that a property tax be levied on all citizens to support ministers of recognized Christian sects, with each property owner to specify the denomination to which he wished his tax directed.<sup>41</sup> An amendment was initially passed to drop the word “Christian” so that the act would support all religious instruction, but Benjamin Harrison, the former governor, had the change reversed.<sup>42</sup> The purpose of the bill was to keep the Christian ministry, particularly the Episcopalian clergy, active and solvent.<sup>43</sup>

The next year Madison drafted the *Memorial and Remonstrance against Religious Assessments* arguing that the religion “of every man must be left to the conviction and conscience of every man” and therefore, “[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”<sup>44</sup> He went on:

Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man . . . .<sup>45</sup>

In critiquing the proposed law, Madison echoed Locke’s argument in *A Letter Concerning Toleration* advocating for a separation of

38. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 167–68 (Lilly & Wait 1832) (1787).

39. GILLMAN & CHEMERINSKY, *supra* note 36, at 31.

40. *Id.*

41. *Id.*

42. THOMAS BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 108 (1977).

43. *Id.* at 109.

44. James Madison, *Memorial and Remonstrance against Religious Assessments* (ca. June 20, 1785), NAT’L. ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [perma.cc/98YZ-3XR6] (last visited Apr. 6, 2021).

45. *Id.*

civil authority and religious authority:

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

....

... [The Bill] will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease.<sup>46</sup>

Importantly, Madison was not merely advocating a principle of “equality” or “no favoritism” among Protestant sects. Rather, he was urging a more general principle of “nongovernmental,” meaning that the civil authority can take no notice of such matters and should assert no jurisdiction over a person’s faith and conscience.<sup>47</sup> As such, his views presage arguments during debates about the First Amendment regarding laws that “respect an Establishment of religion.”<sup>48</sup>

Virginia politicians waited until the 1786 state election before finalizing a decision on these debates. The election brought a strong anti-assessment contingent into the legislature, and the resulting “Act for Establishing Religious Freedom,” drafted by Jefferson, disestablished the Anglican Church in Virginia.<sup>49</sup> In so doing the Act declared:

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46. *Id.*

47. *See id.*

48. *See* Vincent Phillip Munoz, *James Madison’s Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 21–24 (2003).

49. A Bill for Establishing Religious Freedom, H.D. 82, 1779 Gen. Assemb. (Va. 1786), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> [perma.cc/JD74-PX8K] (last visited Apr. 6, 2021).

[T]he impious presumption of legislators and rulers, . . . who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; . . . and finally, that truth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.<sup>50</sup>

The bill was one of the three accomplishments Jefferson insisted be mentioned on his tombstone, along with authoring the Declaration of Independence and founding the University of Virginia.<sup>51</sup>

Christianity obviously was, by far, the dominant religion in the United States when the Constitution was written, and ever since.<sup>52</sup> But the framers made no effort to institutionalize this in the Constitution. If there is an original meaning to be found concerning religion and the Constitution, it can be summarized in two principles. First, the new American republic rejected the centuries-old European practice of linking government authority to a formal religious tradition or sect. Second, although the government would have a secular identity, the Constitution also would recognize that

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50. *Id.*

51. *Jefferson's Gravestone*, MONTICELLO, <https://www.monticello.org/site/research-and-collections/jeffersons-gravestone> [perma.cc/W574-4JAG] (last visited Apr. 6, 2021).

52. See *Religion in America: U.S. Religious Data, Demographics and Statistics*, PEW RES. CTR., <https://www.pewforum.org/religious-landscape-study/> [https://perma.cc/JRG7-TGMK] (last visited Apr. 6, 2021); Mark Hall, *Did America Have a Christian Founding?*, THE HERITAGE FOUND. (June 7, 2011), <https://www.heritage.org/political-process/report/did-america-have-christian-founding> [perma.cc/6X9M-JQJ9].

people would be free to exercise the religion of their choice. Both of these precepts are flatly inconsistent with the idea that the United States was meant to be, as a legal matter, a Christian nation. These two principles came to be embodied in the religion clauses of the First Amendment, which prohibit any law respecting the establishment of religion and protect the free exercise of religion.<sup>53</sup>

## II. THE CONSTITUTION SHOULD BE INTERPRETED TO SEPARATE CHURCH AND STATE

As a non-originalist, the question is how should the religion clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause—best be interpreted in light of the text of these provisions, the original understanding, the history of the United States, precedent, and modern social needs? I am firmly convinced that these clauses should be interpreted to ensure, to the greatest extent possible, the separation of church and state. Government should be secular and should not be identified with Christianity or any particular religion, or religion over secularism.

Beyond an originalist argument for this conclusion, why should the Constitution be interpreted in this way? First, this approach prevents the coercion that is inherent when the government becomes aligned with religion. World history, to say nothing of the history of this country, shows us that inherently, when the government becomes aligned with religion, people feel coerced to participate.<sup>54</sup> As the Court explained in *Engel v. Vitale*, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>55</sup>

This is especially the case in the context of public schools. Certainly, this is why the Supreme Court has repeatedly for almost a half century held that prayer, even voluntary prayer, does not belong in public schools.<sup>56</sup> Students who are from minority

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53. See U.S. CONST. amend. I.

54. See, e.g., HENRY KAMEN, *THE SPANISH INQUISITION: AN HISTORICAL REVISION* 10–11 (1997) (discussing the status of conversos—Jews or Muslims who had been forced to convert to Christianity—and the continuing pressure to conform in fourteenth-century Spain).

55. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

56. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that the Establishment Clause forbids prayer at public school graduations); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (striking down a statute authorizing “moments of silence” at public schools as violating the Establishment Clause); *Abington*

religions, or who have no religious upbringing, feel enormous social pressure to participate in the prayers of their classmates rather than risk being ostracized and ridiculed. This was exactly Justice Kennedy's point in *Lee v. Weisman*, when the Court held that clergy who deliver prayers at public school graduations violate the First Amendment.<sup>57</sup> Once the government becomes aligned with religion, coercion becomes so easy. We have seen this at public universities. Cadets at the Air Force Academy talk movingly about being forced to participate in Christian religious ceremonies, even if they are not Christians.<sup>58</sup> This is the danger if church and state are not separate. If the United States officially was deemed to be a Christian country, then those of different faiths inevitably would feel pressure to conform.

Second, separating church and state—and rejecting that the United States is a Christian country—is the best way of ensuring that we can all feel that it is “our” government, whatever our religion or lack of religion. If government becomes aligned with a particular religion or religions, or with some overarching religious traditions (e.g., Christian) over others (Jewish, Muslim, Hindu, or Santiera), those of other beliefs will be made to feel like outsiders, inherently alienated from the government that claims to represent us all. Justice O'Connor captured this better than anyone in her writings for the Court. She said that the Establishment Clause is there to make sure that none of us are led to feel that we are insiders or outsiders when it comes to our government.<sup>59</sup> She wrote: “[e]ndorsement [of religion by the government] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders . . . .”<sup>60</sup>

If our government becomes aligned with religion or a particular

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Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) (finding that the Establishment Clause barred reading Bible passages in public schools); *Engel*, 370 U.S. at 435 (holding that states may not compose official prayer to be read in public schools).

57. *Lee*, 505 U.S. at 599.

58. Josh White, *Intolerance Found at Air Force Academy*, WASH. POST (June 23, 2005), [https://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062200598\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062200598_pf.html) [perma.cc/3UQ6-895A].

59. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

60. *Id.* at 688.

religion, some of us are made to feel that we just do not belong in that place. If there were a large Latin cross atop a city hall, those who were not part of religions that accept the cross as a religious symbol would feel that it was not “their” city government. In the same way, how would one who does not accept God, or one who does not believe that there is one God, feel about walking into the Texas Supreme Court or the Texas State Capitol and seeing “I am the Lord, thy God,” and seeing underneath it, “Thou shalt have no other gods before me”?<sup>61</sup> If we want all citizens to feel that the government is open for everyone, we need our government to be strictly secular—respectful of all, without signaling an alliance, public or secret, with just some.

If the United States ever were to be deemed a Christian country, such as in a revival of Justice Brewer’s approach, all members of other religions or those who have no religious beliefs would feel like outsiders and lesser citizens. That is exactly what the Establishment Clause should be interpreted to prevent.

A third important reason to favor separation is that it is wrong to tax people to support the religion of others. James Madison captured this best in Virginia, where he talked about why he believed that it was, in his words, “immoral” to tax people to support religions in which they did not believe.<sup>62</sup> Each of us has our own religion, or maybe we decided that we do not have any religion, but should our tax dollars go to advance a religion in which we do not believe? What if it is a religion that teaches things that we find abhorrent? Certainly, we have the right to give our money to support any religion or any cause that we want, but it is wrong to be coerced to give our tax dollars to religions we do not believe in. That is why separation is best: it allows people to choose how to spend their money, rather than permitting the government to use it against their own wishes. This does not deny that there are line-drawing issues with regard to funding, some of which is discussed below.<sup>63</sup> Not providing police and fire protection to houses of worship would present serious free exercise clause issues. But nor does that mean that the government paying for everything else—

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61. See *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (upholding a Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court).

62. See Madison, *supra* note 44 (urging the Commonwealth of Virginia not to enact a bill providing support to religious groups through the levy of a tax).

63. See *infra* Part III.

even salaries for clergy—should be permissible.

Finally, keeping the government separate best protects religion. America is the most religious and religiously diverse nation in the developed western world, and to a large extent this is due to the view that people have that the government will play no favorites, thus allowing all people of faith to worship without fear or oppression. Roger Williams talked about this prior to the drafting of the Establishment Clause.<sup>64</sup> He wanted to separate church and state not to safeguard the state from religion, but to protect religion from the state.<sup>65</sup> The reality is that the more the government becomes involved in religion, the more the government will regulate religion and, consequently, the greater the danger is to religion. There is also the danger of trivializing religion. To say that a cross is just there for secular purposes—as in *American Legion v. American Humanist Association*—ignores how important the cross is as a religious symbol.<sup>66</sup>

Separation is not hostile to religion. Of course, any enforcement of the Establishment Clause will be seen by those who want a religious presence as hostility to religion. But that view begs the question and assumes that a religious presence in government is permissible. If the Constitution is seen as requiring separation of church and state, excluding religion is enforcing the view that the place for religion should be in the private realm. Our government should be secular—for the sake of a less turbulent political system and for the sake of a diverse set of religious practitioners seeking a political context where their personal religious convictions will be respected.

### III. “THE TIMES ARE A CHANGIN’”: THE SUPREME COURT AND THE RELIGION CLAUSES

There are now likely six justices on the Supreme Court—John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—who reject the idea of a

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64. See JAMES P. BYRD, JR., *THE CHALLENGES OF ROGER WILLIAMS* 121–27 (2002) (“In the process of corrupting the church, Williams believed that Christendom had corrupted biblical exegesis by devising an interpretative method that supported the state’s claim to authority over religious matters.”).

65. *Id.*

66. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019) (upholding the constitutionality of a thirty-two-foot cross on public property).

separation of church and state. They seek to provide much more protection for religion, including for religious beliefs to be a basis for violating laws of general applicability.<sup>67</sup> I do not foresee their adopting Justice Brewer's language that it is a Christian nation, but I expect that their rulings will consistently achieve the same results as if they held that explicitly. They will give great latitude towards Christianity being part of government activities and the government giving financial support for Christianity. At the same time, they will allow those who profess a religious objection to gay, lesbian, and transgender individuals to discriminate; these will likely be fundamentalist Christians.

First, for these justices, very little will ever violate the Establishment Clause of the First Amendment. To begin with, Justices Thomas and Gorsuch take the position that the Establishment Clause does not apply to state and local governments at all.<sup>68</sup> For them, a state could declare Christianity, or a denomination within it, to be its official religion.<sup>69</sup> Justice Thomas often has expressed the view that the Court was wrong in finding that the Establishment Clause applies to state and local governments.<sup>70</sup> His view is that the Establishment Clause was meant to prevent the federal government from establishing churches that would have competed with existing state churches.<sup>71</sup>

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67. Michelle Boorstein, *Religious conservatives hopeful new Supreme Court majority will redefine religious liberty precedents*, WASH. POST. (Nov. 3, 2020), <https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrett/> [perma.cc/RM3S-EK7L].

68. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring) (Justice Gorsuch joining); see James R. Rogers, *Incorporating the Establishment Clause, Wrongly*, LAW LIBERTY (Nov. 29, 2019), <https://lawliberty.org/incorporating-the-establishment-clause-wrongly/> [perma.cc/A2G6-VRWV].

69. *Id.*

70. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 604–08 (2014) (Thomas, J., concurring in part and concurring in the judgment); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring); see also Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. 39, 44–45 (2007).

71. See *Galloway*, 572 U.S. at 604–06; see also *Newdow*, 542 U.S. at 50–51; *Simmons-Harris*, 536 U.S. at 678–79.



This view, of course, would mean a dramatic change in the law as state and local governments would be completely unconstrained by the Establishment Clause of the First Amendment.

In his most recent expression of this, in 2020, in *Espinoza v. Montana Department of Revenue*, Justice Thomas was joined by Justice Gorsuch in declaring: “This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment. As I have explained in previous cases, at the founding, the Clause served only to ‘protec[t] States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government.’”<sup>72</sup> But then Justice Thomas went even further in expressing the view that the government may embrace a particular religion: “Thus, the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not prohibit States from favoring religion.”<sup>73</sup> Under this view, nothing a state or local government could do—including deeming itself to be a Christian city or state—would offend the Establishment Clause.

In 1947, in *Everson v. Board of Education*, the Court unanimously held that the Establishment Clause applies to state and local governments.<sup>74</sup> Not one justice questioned this until Clarence Thomas. Now Neil Gorsuch has joined this view, and it is possible that Justice Amy Coney Barrett—both a self-avowed originalist and very conservative—could be a third vote.<sup>75</sup>

But even for the conservative justices who do not go this far, they find little violates the Establishment Clause. They believe that the Establishment Clause—the provision of the First Amendment prohibiting any law respecting the establishment of religion—should be interpreted to accommodate religious

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72. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2263 (Thomas, J., concurring) (quoting *Simmons-Harris*, 536 U.S. at 678) (emphasis *Espinoza*).

73. *Id.* at 2264.

74. *Everson v. Bd. of Educ.*, 330 U.S. 1, 6–7 (1947) (the Court split five–four on whether the buses to take children to and from school violated the Establishment Clause in favor of constitutionality).

75. Tom McCarthy, *Amy Coney Barrett is a constitutional ‘originalist’ – but what does it mean?*, THE GUARDIAN (Oct. 26, 2020), <https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean> [perma.cc/XN97-8ACR].

participation in government and government support for religious institutions.<sup>76</sup> Under their view, the government violates the Establishment Clause only if it coerces religious participation or discriminates among religions in the provision of benefits.<sup>77</sup> Under this approach, the Establishment Clause is not violated by religious symbols on government property,<sup>78</sup> or by religious observances at government functions,<sup>79</sup> or by the government providing financial support to religious institutions even when it is used for religious indoctrination.<sup>80</sup>

The ability of the government to favor Christianity over all other religions under their view is reflected in two recent Supreme Court decisions. In *Town of Greece v. Galloway*, the Court held that it does not violate the Establishment Clause for a town board to begin virtually every meeting over a ten-year period with a prayer by a Christian minister.<sup>81</sup> The Town of Greece is a suburb of Rochester, New York of about 100,000 people.<sup>82</sup> Its town board opened meetings with a moment of silence until 1999 when the town supervisors initiated a policy change.<sup>83</sup> The town began inviting ministers to begin meetings each month with a prayer.<sup>84</sup> From 1999 to 2007, the town invited exclusively Christian ministers, most of whom gave explicitly Christian prayers.<sup>85</sup>

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76. U.S. CONST. amend. I. The First Amendment, of course, says that “Congress” may not do this. In *Everson v. Board of Education*, the Court held that the Establishment Clause applies to state and local governments through its incorporation into the Due Process Clause of the Fourteenth Amendment. 330 U.S. 1 (1947). It always has been assumed that the First Amendment applies to the President and to the federal courts, even though its text provides only a prohibition against “Congress.”

77. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 585–86 (2014).

78. See *Am. Legion v. Am. Humanist Ass’n.*, 139 S. Ct 2067, 2090 (2019) (upholding thirty-two-foot cross on government property).

79. See *Town of Greece*, 572 U.S. at 585–86 (upholding Christian prayers before Town Board meetings over a long period of time).

80. See *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (opinion by Justice Thomas holding that the government may provide aid to parochial schools even if it is used for religious instruction).

81. *Town of Greece*, 572 U.S. at 585–86.

82. *Id.* at 570.

83. *Id.*

84. *Id.*

85. *Id.* at 571.

In 2007, complaints were made to the Town Board about this and for four months clergy from other religions were invited.<sup>86</sup> But then for the next eighteen months, the Town Board reverted to inviting only Christian clergy and their prayers were almost always Christian in their content.<sup>87</sup>

The Court, in a five–four decision, held that the Town of Greece did not violate the Establishment Clause.<sup>88</sup> The Court stressed the long history of prayers before legislative sessions, including explicitly Christian prayers, and said that its precedent “teaches . . . that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”<sup>89</sup> The Court said that for it to require nonsectarian prayers would put the government and the courts unduly in the position of monitoring the content of the prayers delivered by others:

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.<sup>90</sup>

The Court expressed great deference to the government in having prayers before legislative sessions and held: “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”<sup>91</sup>

Justice Thomas wrote an opinion concurring in part and concurring in the judgment, which was joined in part by Justice Scalia.<sup>92</sup> Writing for just himself, Justice Thomas reiterated his

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86. *Id.* at 572.

87. *Id.* at 611–12 (Breyer, J., dissenting).

88. *Id.* at 565, 568 (majority opinion).

89. *Id.* at 576 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

90. *Id.* at 566.

91. *Id.* at 585.

92. *Id.* at 568.

view, described above, that the Establishment Clause does not apply to state and local governments.<sup>93</sup> In a part of the opinion joined by Justice Scalia, Justice Thomas argued that the Establishment Clause is violated only if there is “actual legal coercion” to participate in religious activities.<sup>94</sup>

Justice Kagan wrote a dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor.<sup>95</sup> The dissent found that the Town Board violated the Establishment Clause by inviting virtually only Christian clergy over a long period of time and their usually delivering explicitly Christian prayers.<sup>96</sup> Justice Kagan wrote: “the Town of Greece’s prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian.”<sup>97</sup> Justice Kagan explicitly distinguished *Marsh v. Chambers*, which had allowed clergy-delivered prayers before congressional sessions:

The practice at issue here differs from the one sustained in *Marsh* because Greece’s town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a

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93. *Id.* at 608 (Thomas, J., concurring in part and concurring in the judgment). Justice Alito also wrote a concurring opinion. *Id.* at 592.

94. *Id.* at 608 (Thomas, J., concurring in part and concurring in the judgment).

95. *Id.* at 615 (Kagan, J., dissenting). Justice Breyer also wrote a dissenting opinion and stated:

[T]he town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece’s prayer practice violated the Establishment Clause.

*Id.* at 615 (Breyer, J., dissenting).

96. *Id.* at 631 (Kagan, J., dissenting).

97. *Id.* at 615–16 (Breyer, J., dissenting).

decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.<sup>98</sup>

The practical effect of *Town of Greece v. Galloway* is that there will be Christian prayers before legislative sessions in many parts of the country. A subsequent case makes clear that the Court will allow Christian religious symbols on government property. In *American Legion v. American Humanist Association*, the Court considered the constitutionality of a thirty-two-foot cross that sits on public property in Prince George's County, Maryland.<sup>99</sup> The cross was erected in 1920 as a memorial to those who died in military service in World War I.<sup>100</sup>

The Court in a seven–two decision rejected the constitutional challenge.<sup>101</sup> Justice Alito wrote, in part for the majority and in part for a plurality, and stressed that although a cross is a religious symbol, it also has other non-religious significance, including as a memorial for war dead.<sup>102</sup> He explained:

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.<sup>103</sup>

Justice Alito stressed that the monument long had been present and to remove it would be hostility to religion.<sup>104</sup> Justice Alito declared: “[t]he passage of time gives rise to a strong presumption of constitutionality.”<sup>105</sup>

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98. *Id.* at 616.

99. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2068 (2019).

100. *Id.*

101. *Id.* at 2067.

102. *Id.* at 2069–70.

103. *Id.* at 2074 (footnote omitted).

104. *Id.* at 2084–85.

105. *Id.* at 2085.

Justice Gorsuch concurred in the judgment and argued that no one has standing to challenge a religious symbol on government property on the basis of “‘offended observer’ theory”.<sup>106</sup> He said that no one is sufficiently injured to permit a suit in federal court.<sup>107</sup> He concluded that “suits like this one should be dismissed for lack of standing.”<sup>108</sup> This, of course, would mean that the government can put any religious symbol it wants on any piece of government property and no federal court could stop it because, under Justice Gorsuch’s view, no one ever would have standing to challenge this.

Justice Kavanaugh concurred and wrote separately to say that he believed that the Court had largely overruled the test from *Lemon v. Kurtzman*, a position long taken by those who advocate the accommodationist approach to the Establishment Clause.<sup>109</sup> He made clear that religious symbols on government property do not offend the Constitution: “[t]he practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition.”<sup>110</sup>

Only Justices Ginsburg and Sotomayor dissented.<sup>111</sup> Justice Ginsburg expressed the view that a cross is the quintessential Christian religious symbol and the display of a thirty-two-foot cross on public property violates the Establishment Clause.<sup>112</sup> She wrote:

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an “admirable and unquestionably secular” objective. But the Commission does not serve that objective by displaying a symbol that bears “a starkly sectarian message.”<sup>113</sup>

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106. *Id.* at 2098 (Gorsuch, J., concurring).

107. *Id.*

108. *Id.*

109. *Id.* at 2093 (Kavanaugh, J., concurring).

110. *Id.*

111. *Id.* at 2103 (Ginsburg, J., dissenting).

112. *Id.* at 2104.

113. *Id.* (first quoting *Van Orden v. Perry*, 545 U.S. 677, 715 (2005) (Stevens, J., dissenting); and then quoting *Salazar v. Buono*, 559 U.S. 700, 736 (2010) (Stevens, J., dissenting)) (citations omitted).

From this case, and other recent decisions such as *Town of Greece v. Galloway*, it seems that there are now five justices—Roberts, Thomas (who does not believe that the Establishment Clause applies to the states at all), Alito, Gorsuch, and Kavanaugh—to take the approach that the government violates the Establishment Clause only when it coerces religious participation or discriminates among religions in the distribution of benefits.<sup>114</sup> Rarely will the government be deemed to infringe this part of the First Amendment. I have no doubt Justice Barrett will join them. In other words, there is a majority to allow the government to be aligned with Christianity, even without a declaration that the United States is officially a Christian nation.

Second, there is a majority on the Court to grant broad exemptions to general laws—such as those requiring employers to provide contraceptives or forbidding discrimination based on sexual orientation—based on religious beliefs. Also, this is a majority that is *requiring* the government to provide aid to religion when it provides it to secular institutions. Two cases from June 2020 are revealing.

*Espinoza v. Montana Department of Revenue* involved a Montana law that allowed parents sending their children to private school to receive a \$150 tax credit.<sup>115</sup> In Montana, most private schools are religious.<sup>116</sup> The Montana Supreme Court had invalidated the tax credit law as violating the Montana State Constitution, which forbids direct or indirect government aid to religion.<sup>117</sup>

That should have ended the matter. The Montana tax credit program no longer existed; it could not be said that Montana was discriminating against religious institutions. This was Justice Ginsburg's key point in dissent: the Montana Supreme Court's decision invalidated the entire tax credit program, so that no one receives any money for private schools, whether secular or

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114. *Town of Greece v. Galloway*, 572 U.S. 565, 591 (2014).

115. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2251 (2020).

116. Nina Totenberg & Brian Naylor, *Supreme Court: Montana Can't Exclude Religious Schools From Scholarship Program*, NPR (June 30, 2020), <https://www.npr.org/2020/06/30/883074890/supreme-court-montana-cant-exclude-religious-schools-from-scholarship-program> [perma.cc/QLU8-XM9Y].

117. *Espinoza*, 140 S. Ct. at 2253.

religious.<sup>118</sup> Therefore, Justice Ginsburg contended, no one is being treated differently based on religion, and there is no constitutional problem.<sup>119</sup>

But the Supreme Court, five–four, concluded that the Montana Supreme Court violated free exercise of religion by invalidating the tuition program.<sup>120</sup> Chief Justice Roberts wrote the opinion for the Court and said that the Montana Constitution prevented parents from receiving aid if they sent their children to religious as opposed to secular private schools.<sup>121</sup> This, the Court concluded, violated free exercise of religion.<sup>122</sup> The Court said that the government must have a compelling reason and no other alternative any time it denies benefits to religious institutions that it allows to secular ones.<sup>123</sup>

Three years earlier, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that the State of Missouri violated the Free Exercise Clause when it gave secular private schools aid for playgrounds but denied the assistance to religious schools.<sup>124</sup> The Court said it was “odious” to deny religious institutions benefits that go to secular ones and that strict scrutiny had to be met,<sup>125</sup> but in a footnote the Court apparently cabined its holding to the facts before it (specifically, aid for “playground resurfacing”).<sup>126</sup> Now the Court has made it clear that whenever the government gives benefits to secular private schools it must provide them to religious schools unless it can be shown that doing so would violate the Establishment Clause of the First Amendment. And as explained above, very little will violate the Establishment Clause for the conservative justices on the Court.

Prior to 2017, the Court had looked askance at challengers seeking to compel state governments to provide aid to religion

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118. *Id.* at 2280–81 (Ginsburg, J., dissenting).

119. *Id.*

120. *Id.* at 2262–63 (majority opinion).

121. *Id.* at 2254.

122. *Id.* at 2262–63.

123. *See id.* at 2260–61.

124. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

125. *Id.* at 2025.

126. *Id.* at 2023 n.3.



under the guise of the Free Exercise Clause.<sup>127</sup> Now a majority on the Court has found that the government is compelled to do so whenever it gives assistance to secular private institutions.<sup>128</sup> When President George W. Bush took office, he created an office of faith-based programs to facilitate churches, synagogues, and mosques receiving federal social service money.<sup>129</sup> There was a debate among scholars and litigation in the courts as to whether the government may give this aid to religion or whether it violated the Establishment Clause of the First Amendment.<sup>130</sup> But now the Supreme Court has held that Constitution *requires* the government to provide aid to religious institutions when it provides benefits to secular ones.<sup>131</sup> In a country where Christians are the largest religious group, there is no doubt that Christian denominations and their schools will be the primary beneficiaries.

In addition to using the Free Exercise Clause as an unprecedented cudgel against state “no aid” (disestablishment) provisions, the conservatives have also deviated from long-standing precedent to use religious liberty to allow individuals to use their religion to impose great harm on others. In 1990, in *Employment Division v. Smith*, the Court held that the Free Exercise Clause cannot be used to challenge neutral laws of general applicability, no matter how much they burden religion, unless it can be shown that the government’s action is based on animus to religion.<sup>132</sup> But the current Court has backed away from this approach and supports a much more robust protection of free exercise of religion.

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127. See, e.g., *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that state scholarship program for postsecondary education denying use of funds for theological training did not run afoul of the Free Exercise Clause).

128. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

129. Frank Bruni & Laurie Goodstein, *New Bush Office Seeks Closer Ties To Church*, N.Y. TIMES (Jan. 29, 2001), <https://www.nytimes.com/2001/01/29/us/new-bush-office-seeks-closer-ties-to-church-groups.html> [perma.cc/83AB-546R].

130. See generally *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); Martha A. Boden, *Compassion Inaction: Why President Bush’s Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991 (2006); Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL’Y REV. 183 (2002).

131. See *Espinoza*, 140 S. Ct. at 2261.

132. *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990).

For instance, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court ruled that elementary school teachers at a Catholic school could not sue for employment discrimination.<sup>133</sup> The two cases before the Court involved a teacher who sued for disability discrimination after losing her job following a diagnosis for breast cancer and a teacher who sued for age discrimination after being replaced by a younger instructor.<sup>134</sup>

Previously, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court had only acknowledged a narrow exception that protected religions from being held liable for choices made with respect to “ministers,” because decisions regarding such officers necessarily implicate ecclesiastical questions that the government should not second guess.<sup>135</sup> But now the Court has expanded it to all teachers, meaning that religious schools can discriminate with impunity based on race, sex, religion, sexual orientation, age, and disability.<sup>136</sup> Again, overwhelmingly it is likely to be Christian schools, especially Catholic and evangelical Christian schools, that take advantage of this exemption from employment discrimination laws.

The Free Exercise Clause is being used to undermine rights to nondiscriminatory treatment that people are entitled to in all other settings. Ironically, the same conservative justices who, in *Espinoza*, stressed that religious schools should be treated the same as secular ones, in *Our Lady of Guadalupe* said that they should be treated differently with a broad exemption from anti-discrimination laws.<sup>137</sup>

In this way, the Court will act as if it were a Christian nation, even without so holding. And in the 2020 October Term, the Court

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133. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).

134. *Id.* at 2056–60.

135. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

136. *See Our Lady of Guadalupe*, 140 S. Ct. at 2069.

137. *Compare id.* at 2069 (“When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and teacher threatens the school’s independence in a way that the First Amendment does not allow.”), *with Espinoza*, 140 S. Ct. at 2261 (“A state need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious.”).

has a case before it where it likely will expand religious exemptions from general laws, and perhaps even overrule *Smith*.<sup>138</sup>

#### CONCLUSION

Governments in the United States, to the greatest extent possible, should be secular. Legally, the government should not be allowed to align with Christianity or any other religion. Yet, I worry that the Supreme Court is moving very much in the opposite direction, effectively allowing the United States to be a Christian nation. As I watch this process unfold, I am reminded of the words of Justice Sandra Day O'Connor, who said:

By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?<sup>139</sup>

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138. *Fulton v. Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123).

139. *McCreary County v. ACLU*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) (internal citations omitted).