Reestablishing Religion

Richard Schragger,† Micah Schwartzman†† & Nelson Tebbe‡

In the last few years, the Supreme Court has upended its doctrine of religious freedom under the First Amendment. The Court has explicitly rejected separationism, which limited government support of religion, and it has adopted interpretations of disestablishment and free exercise that provide special solicitude for religion. Now, the government must treat religion equally with respect to providing public benefits. But it must also grant special exemptions from regulations that burden religion. This pattern of equal treatment for benefits and special exemptions from burdens yields a doctrinal structure that gives preference to religion. We refer to this regime as structural preferentialism.

What explains this shift? This Article offers an external, political account of changes in Free Exercise and Establishment Clause jurisprudence, analyzing them as if they were the result of political conflicts between competing interest groups. Focusing on the role of religion in political polarization, rapid disaffiliation from denominations, and shifting strategies to fund religious schools, this political perspective has explanatory and predictive power that extends beyond conventional legal arguments about text, history, and precedent. Applying this approach, we predict that structural preferentialism will transform First Amendment doctrine and provide material grounds for its own entrenchment. But the political history of the Religion Clauses also shows that legal paradigms can become unstable and can be threatened by long-term changes in political demographics, suggesting both outer limits and possible sources of resistance to the Court's emerging model of religious freedom.

---

† Walter L. Brown Professor of Law, University of Virginia School of Law.

†† Hardy Cross Dillard Professor of Law, University of Virginia School of Law.

‡ Jane M.G. Foster Professor of Law, Cornell Law School. For comments and discussion, we thank Arvind Abraham, Alan Brownstein, Richard Garnett, Frederick Gedicks, Linda Greenhouse, Aziz Huq, John C. Jeffries, Jr., Michael Klarman, Andrew Koppelman, Martin Lederman, Leah Litman, Ira C. Lupu, James Nelson, James Oleske, Richard Primus, Frank Ravitch, Kate Redburn, Zalman Rothschild, James E. Ryan, Elizabeth Sepper, Anna Su, Mark Tushnet, and participants in the Nootbaar Workshop at Pepperdine Caruso Law; the Workshop in Law, Philosophy, and Political Theory at the Kadish Center for Morality, Law & Public Affairs at UC Berkeley School of Law; the "Text and (What Kind of) History?" conference hosted by the Stanford Constitutional Law Center at Stanford Law School; and the Cornell Summer Faculty Workshop. Generous support was provided by the Milton and Eleanor Gould Fund at Cornell Law School. For research assistance, we thank Io Jones, Mackenzie Kubik, Leah Schwartz, and Mary Triplett.

INTRODUCTION

In the last few years, a new pattern has emerged in the doctrine of religious freedom. Religion must be treated equally with respect to public funding and other forms of government support.[1] But with respect to burdensome government regulations, believers are entitled to special treatment in the form of exemptions or accommodations.[2] When these two lines of doctrine are brought together, they create a legal structure in which the state is required to give religious entities preferential treatment as compared to secular counterparts. So far, this emergent regime of *structural preferentialism* has favored mostly mainstream religious groups, which demand public funding while opposing a range of government regulations, including antidiscrimination and employment laws, education requirements, and public health rules.[3] Reduced to a slogan, this is a constitutional doctrine of equal funding without equal regulation.

The slow undoing of constitutional limits on government support for religion that began with the Rehnquist Court has intensified over the last several years into a systematic dismantling of the previous legal regime. The Court has mandated government funding of religious schools alongside secular schools,[4] where before the government had been forbidden from doing so under the Establishment Clause.[5] Similarly, recent decisions have authorized displays of religion in government settings, jettisoning the doctrinal framework that constrained such expressions in the

---

1 *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 276–77 (2020) (discussing the rise of a "neutrality" model in state funding of religion).

2 *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2462 (2021) [hereinafter Tebbe, *Equal Value*] (discerning a pattern of religious advantage in Supreme Court decisions); Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1182–84 (2023) (surveying recent decisions granting exemptions).

3 *See, e.g.*, Kate Shaw, *The Supreme Court's Disorienting Elevation of Religion*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/opinion/supreme-court-religion.html ("[S]ince Justice Barrett replaced Ruth Bader Ginsburg, the court has sided with religious plaintiffs in every major religion case except a few exceptions on the shadow docket, representing an essentially unbroken streak of wins for Christian plaintiffs.").

4 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022).

5 *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971); *see also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 385–414 (2008) [hereinafter GREENAWALT, RELIGION AND THE CONSTITUTION] (surveying twentieth-century constitutional limits on government funding of religious schools).

past.[6] At the same time, the Court now interprets the Free Exercise Clause to require religious exemptions in areas once thought obviously amenable to government regulation—notably, public health and safety during a pandemic.[7] A limited free exercise regime has been replaced with a newly robust one, inviting comparisons to the use of due process rights in the *Lochner* era.[8]

Our most basic claim is that structural preferentialism has replaced the strict separation that characterized the midcentury church-state consensus. That consensus is dead, as recent obituaries attest.[9] But we do not yet have a convincing *postmortem*—an account of what happened—at least not one that explains both the death of the earlier regime and the rise of its replacement. This Article provides such an account and attempts to identify the legal and political forces that destroyed separationism and that are working to consolidate, expand, and entrench a special solicitude toward religion.

We begin with a diagnosis of the doctrine. In Part I, we survey the Court's recent decisions under the Religion Clauses to show that structural preferentialism is descriptively apt. Many commentators agree that the Roberts Court has dramatically altered the doctrine with respect to public funding, government religious expression, and exemptions.[10] Some might object that

---

6 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2077, 2089 (2019) (concerning a government display of a thirty-foot tall Latin Cross on public land); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416, 2433 (2022) (regarding a public school football coach praying with students).

7 *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam); *see also* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2273 (2023) [hereinafter Koppelman, *"Most-Favored Nation" Theory*].

8 *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1498–1502 (2015) [hereinafter Sepper, *Free Exercise Lochnerism*]; Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 163–64 (2018); Tebbe, *Equal Value*, *supra* note 2, at 2476–82.

9 *See* Frederick Schauer, *Disestablishing the Establishment Clause*, 2022 SUP. CT. REV. 219, 222 (2023); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1809 (2023) [hereinafter Lupu & Tuttle, *Remains of the Establishment Clause*].

10 *See, e.g.*, Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 210 (2023) ("Two decades have succeeded in transforming yesteryear's Hail Marys into today's answered prayers."); Christopher Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 844 (2022) ("Free exercise is in the middle of a revolution."); Noah Feldman, *The Supreme Court Has Just Eroded the First Amendment*, BLOOMBERG L. (June 21, 2022),

recent decisions simply provide for religious freedom in the face of expanding government activity across multiple areas of regulation, funding, and expression.[11] According to this view, principles of disestablishment only require equal treatment of religious and nonreligious actors, while recent free exercise jurisprudence merely mandates that the government extend equal regard to religious activities.[12] Others believe that the Court is simply correcting mistakes of the past—an account that admits to the change but sees it as a welcome return.[13] To the contrary, we argue that Establishment and Free Exercise Clause doctrines now work together to privilege religious groups, especially those that are aligned with traditional or conservative social values.[14]

In Part II, we offer an external or political account of the dramatic legal changes that have affected First Amendment doctrine. Here, we are not starting from scratch. Instead, we build upon, revise, and extend what we take to be the most influential and important account of Establishment Clause jurisprudence available in the existing literature.[15] More than two decades ago, Professors John Jeffries and James Ryan found it difficult to explain dramatic changes in Establishment Clause decisions by appealing only to traditional legal sources of text, structure,

---

https://news.bloomberglaw.com/us-law-week/supreme-court-has-just-eroded-the-first-amendment-noah-feldman ("[*Carson*] represents the end of the centuries-old constitutional ban on direct state aid to the teaching of religion.").

11 *See, e.g.*, Stephanie Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2105–09 (2023) (arguing that the implications for the Court's recent rulings on religion do not represent a dramatic departure from preexisting jurisprudence).

12 Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 141 (2017) [hereinafter Laycock, *Churches, Playgrounds*]; Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54–55 (2007).

13 *See, e.g.*, Richard W. Garnett, *Refreshing Unity on Religious Liberty*, LAW & LIBERTY (July 4, 2023), https://perma.cc/QXM5-8AVP ("The Court has, in recent decades, substantially undone its earlier mistakes, and brought its Establishment Clause doctrine into alignment with the Constitution's text, historical practice, and common sense.").

14 Traditional groups like these may be perceived by the Court to be politically vulnerable and therefore in need of constitutional protection. *See* Leah Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 17 (2023); *see also* Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 293 (2019).

15 *See generally* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). Professors Jeffries and Ryan were, in turn, responding to a call for such an account from Professor Michael Klarman. *See id.* at 284 n.13; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 47 (1996) (noting that "[i]nexplicably, this sort of social and political history of the transformation of Establishment Clause doctrine remains largely unwritten").

history, and precedent.[16] Twentieth-century shifts were too stark. In response, they proposed understanding the discontinuities in legal doctrine as a function of their political economy, that is, "*as if they were* products of political contests among various interest groups, both religious and secular, with competing positions on the proper relation of church and state."[17]

This political approach to the history of the Establishment Clause yielded a powerful and parsimonious explanation of the rise and fall of separationism. Briefly stated, opposition to state funding of religion was driven originally by Protestant anti-Catholicism. As a dominant political majority in the nineteenth and early twentieth centuries, Protestants made public schools inhospitable for Catholics and rejected government aid to religious schools.[18] But the Protestant consensus that supported "no-aid" separationism fragmented over massive resistance to desegregation in the 1960s and 1970s, when white Southern evangelicals created private "Christian academies" and sought public funding for them.[19] This strategy brought evangelicals into political alignment with Catholics on the issue of government aid to religion.[20] The resulting coalition of conservative Christian groups eventually gained sufficient political power to influence the composition of the federal courts, leading to separationism's weakening.[21]

To a significant extent, this political history has become the standard or received view of how Establishment Clause jurisprudence was transformed in the twentieth century.[22] But today, its limitations have become increasingly apparent. Most importantly, it neglected free exercise, which was less

---

16 Jeffries & Ryan, *supra* note 15, at 291.

17 *Id.* at 280 (emphasis in original); *see also* LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION 18 (1975) ("Religious groups are what political scientists call interest groups."); *cf.* Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process*, 64 EMORY L.J. 1041, 1045 (2015) (exploring how religious interest groups participate in the political process).

18 Jeffries & Ryan, *supra* note 15, at 301.

19 *Id.* at 308, 344 n.371, 345–46.

20 *Id.* at 348–49.

21 *Id.* at 370.

22 The Supreme Court has embraced part of this account to support the claim that separationism was driven by anti-Catholicism. *See Espinoza*, 140 S. Ct. at 2259 (citing Jeffries & Ryan, *supra* note 15, at 301–05); *see also id.* at 2271–72 (Alito, J., concurring) (same). But the Court has ignored the thesis that racial backlash was critical to separationism's demise. This selectivity in applying an external or political perspective to the doctrine is perhaps unsurprising, even if methodologically dubious.

consequential at the time but has become central to contemporary doctrine.[23] This may be surprising, but there is still no political history of free exercise—let alone of both Religion Clauses—in the existing literature. A more complete account must also take into consideration social and political changes that Jeffries and Ryan could not have anticipated, especially the intensification of political polarization, denominational disaffiliation on the left, and the surge of right-wing populism.

Part II offers a more comprehensive political history of the Religion Clauses. Beginning in the mid-twentieth century, we describe four periods marked by major changes in both Free Exercise and Establishment Clause jurisprudence. The first period was marked by *pluralism*, which characterized the prevailing legal tendency when the Court first began to develop doctrine under the Religion Clauses.[24] During this period, Protestant dominance gave way to a trifaith America that included Catholics and Jews. Second, during the 1960s and 1970s, *separationism* reached its apex, putting strict limits on government support for religion in combination with stronger protections for individual conscience, at least in theory.[25] Third, during the 1990s and through the early 2000s, the Rehnquist Court adopted a posture of judicial *deference*, consistent with its broader emphasis on federalism.[26] The Court gave state and local governments greater leeway under doctrines of both free exercise and disestablishment. State lawmakers had latitude to pursue policies of separationism, accommodation, or both. But that deference has given way to a more assertive jurisprudence, with the Court sharply limiting the power of government to deny benefits to religious organizations and to impose regulatory burdens upon them. A new period of structural preferentialism has arrived.

What explains the rise of this approach to religious freedom? In Part III, we argue that the transformation in constitutional

---

[23] This was an understandable omission for Jeffries and Ryan. As Ryan had shown, the Court's twentieth-century free exercise jurisprudence was never as robust as many scholars believed. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1417 (1992). Because the doctrine did not shift as much as many assumed, it might have seemed as if the need for a political history of it was less pressing, or perhaps less interesting, at least as compared to caselaw under the Establishment Clause, where changes were comparatively dramatic. But the picture is now very different, and no political economy of religious freedom can be complete without examining decisions under both Religion Clauses.

[24] *See infra* Part II.A.

[25] *See infra* Part II.B.

[26] *See infra* Part II.C.

thought is explained by several factors.[27] First, political polarization has deepened and intensified, especially with respect to conflicts over reproductive rights and abortion, LGBTQ rights and marriage equality, and hostility toward Muslims expressed in terms of Christian nationalism.[28] Second, the United States has experienced rapid disaffiliation from organized religion.[29] Importantly, these two phenomena map onto one another, with disaffiliation occurring disproportionately among liberals and progressives, even as conservatives have maintained or intensified their affiliated religious identities. Yet this mapping is asymmetric, insofar as conservative groups, often led by legal elites, are highly mobilized around matters of religion, whereas the disaffiliated lack a comparable level of political organization. Third, the political economy of school funding has shifted advocates away from a primary focus on vouchers and toward strategies, such as mandatory direct funding of parochial schools, that can be achieved through countermajoritarian courts.[30] Together, these factors help explain the current paradigm shift in religious freedom, not only in the legal doctrine but also in the broader constitutional culture.

What are the prospects for structural preferentialism? Our periodization shows that church-state regimes in the United States have undergone significant evolutions roughly every thirty years. In Part IV, we consider the stability of the emerging regime. In the near term, we predict doctrinal consolidation, including the formal abandonment of barriers to direct government funding of religion, the spread of public funding to religious charter schools, the rejection of antidiscrimination rules as conditions on aid, and the privileging of the rights of religious employers and employees in the market.[31] Other developments are more difficult to foresee.[32]

Beyond consolidation, there are larger questions about whether the political interests that motivate structural preferentialism are sustainable. The forces we have identified may continue to support the paradigm. Moreover, by requiring large scale

---

27 *See infra* Part III.

28 *See infra* Part III.A.

29 *See infra* Part III.B.

30 *See infra* Part III.C.

31 *See infra* Part IV.A.

32 Here, we are thinking of the constitutionality of school prayer and the formal abandonment of *Employment Division v. Smith*, 494 U.S. 872 (1990).

public funding of religious institutions, structural preferentialism may create a feedback loop, drawing more religious groups into the political system as they seek to remain competitive with those who are already receiving government support. In this way, structural preferentialism is self-reinforcing.[33] Its long-term stability depends, however, on the prospects of the broader political alignment. With increasing disaffiliation, the partisan political divide—which is at the same time a religious divide—is now more salient than twentieth-century denominational conflicts. The Roberts Court supports a church-state settlement that favors one side in that divide. But its ability to expand and entrench this establishment will turn on whether conservative religious groups are effective in resisting political countermovements formed by those disadvantaged under structural preferentialism: mainline denominations, the religiously disaffiliated, progressive women, Black Americans, the LGBTQ community, and families with children in public schools. If these disparate groups form a sufficiently cohesive and durable coalition, then we might expect the usual thirty-year generational turnover, or an even shorter timeline. But a political alignment of this kind would be necessary to disestablish the preferentialism that now defines the Court's understanding of religious freedom.

The contributions of this Article are primarily descriptive and explanatory. Despite blockbuster religious freedom cases arriving annually over the past decade,[34] the literature contains no systematic account of the new Religion Clause doctrine and no comprehensive political history of it. This Article provides both, but its broader aim is to shift attention away from traditional legal

---

[33] *See infra* Part IV.B.

[34] *See generally* Groff v. DeJoy, 143 S. Ct. 2279 (2023) (Title VII); *Kennedy*, 142 S. Ct. 2407 (2022) (prayer in public schools); *Carson*, 142 S. Ct. 1987 (2022) (school funding); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (exemption from antidiscrimination rules); *Tandon*, 141 S. Ct. 1294 (2021) (exemption from public health regulations); *Cuomo*, 141 S. Ct. 63 (2020) (same); *Espinoza*, 140 S. Ct. 2246 (2020) (school funding); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (exemption from contraception mandate); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (ministerial exception); *Am. Legion*, 139 S. Ct. 2067 (2019) (government religious display); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (travel ban); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (antidiscrimination law); *Trinity Lutheran*, 137 S. Ct. 2012 (2017) (school funding); Zubik v. Burwell, 578 U.S. 1557 (2016) (contraception mandate); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (same); Holt v. Hobbs, 574 U.S. 352 (2014) (Religious Land Use and Institutionalized Persons Act); Town of Greece v. Galloway, 572 U.S. 565 (2014) (legislative prayer); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (ministerial exception).

discussions of constitutional text, original meaning, and normative argumentation about relations between religion and state. Our point is not to displace those arguments, which is impossible anyway, but to revive—and revise—an alternative view that, as Jeffries and Ryan wrote more than two decades ago, might be "useful and informative regardless of general jurisprudential commitments on the relative autonomy of law."[35]

I. THE STRUCTURE OF PREFERENCE

This Part describes the emerging church-state regime, what we call structural preferentialism. This model provides religious speakers, organizations, and institutions equal access to funding, speech opportunities, and other government benefits, but it couples that equal treatment with exemptions from government regulation not otherwise available to secular claimants. The combination of these two features is what distinguishes this regime from one of religious neutrality.[36] Access cases make claims of formal equality.[37] They are based on a theory of nondiscrimination—an assertion that religious and nonreligious claimants should be treated alike with respect to government benefits.[38] Exemption cases may also be grounded in claims of equality,[39] or they may rely on claims of liberty, where the argument is that religious believers should be treated specially and more favorably than other claimants.[40] Working together, these doctrines generate systematic preferences for religious individuals and institutions.

---

35 Jeffries & Ryan, *supra* note 15, at 284.

36 For the distinction between formal neutrality and substantive neutrality, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999, 1001 (1990) [hereinafter Laycock, *Neutrality Toward Religion*].

37 *See* Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998 (2022) ("The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260–62 (2020) (striking down a Montana no-aid provision that prohibited tuition assistance for religious schools); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017) (declaring that the "the most exacting scrutiny" should be applied to a policy that "expressly discriminates" against recipients on account of their religious nature).

38 *See* Laycock, *Churches, Playgrounds*, *supra* note 12, at 141. *But see* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1288–91 (2008) (rejecting a discrimination-based argument for equal access to government funding).

39 *See* Tebbe, *Equal Value*, *supra* note 2, at 2417–21 (surveying equality-based arguments in recent religious exemption cases).

40 *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012) ("[T]he text of the First Amendment itself . . . gives special solicitude to

Depending on its structure, a church-state regime might be consistent with a concept of substantive neutrality, which holds that, as far as possible, the government should seek not to influence the adoption or abandonment of religious practice or belief with its funding and regulatory decisions.[41] Benefits and burdens can be understood as flip sides of the same coin; both influence religious choice and thus should be neutral. But an account that exempts religious actors from burdens while providing equal benefits is asymmetric. It treats religion as special with respect to one but not the other. The result is a preference for religion over nonreligion, and for some religious views over others.

In this Part, we describe three main lines of doctrine that converge to create structural preferentialism: funding, exemptions, and government expression. Commentators and scholars often focus on one strand of doctrine at a time, analyzing these lines of cases as if they are independent from each other.[42] But while the doctrine might look unexceptional with respect to any one area, a more comprehensive approach shows the larger pattern of preference.

A. Mandatory Funding

Under the emerging rule, government aid to religion is permitted so long as it is neutral, as a formal matter, between religion and nonreligion and among religions.[43] We say this neutrality is formal because it is insensitive to effects. This standard can be satisfied even when nearly all government support flows to religious groups, or even to a particular denomination, so long

---

the rights of religious organizations."); *see also* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISSUES 313, 322 (1996).

41 *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 12, at 54–55.

42 *See, e.g.*, Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2123–26 (2023); Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. PA. L. REV. 147, 156–59 (2022). The point applies to some of our previous work as well. *See, e.g.*, Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 811 (2018) [hereinafter Schwartzman et al., *Costs of Conscience*].

43 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002):

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

as the program is theoretically available to everyone.[44] Allowing such aid has meant undermining policies of separationism—the idea that government cannot fund religious activity, even on a neutral basis.[45]

Even without those turnabouts, however, it is clear that something important has changed. Not only is neutral aid permitted, but it is also now sometimes required. Whenever government funds a category of nonreligious activity, it must support religious activity on equal terms. Anything less constitutes impermissible discrimination. The Court has rejected or distinguished precedents that allowed for "play in the joints"[46] between the Religion Clauses—i.e., decisions that previously permitted governments to limit funding in pursuit of Establishment Clause values without contravening the Free Exercise Clause. Under those decisions, the government could pursue separationist values beyond what was required under the First Amendment.[47] But this doctrinal flexibility has been significantly diminished, if not altogether extinguished.[48] It is no exaggeration to say that what was long required by the Establishment Clause, and then more recently permitted by it, now violates the Free Exercise Clause.[49]

This radical transformation of the relationship between the Religion Clauses has been accomplished through a trio of recent Supreme Court decisions: *Trinity Lutheran v. Comer*,[50] *Espinoza v. Montana Department of Revenue*,[51] and *Carson ex rel. O.C. v.*

---

44 For example, in the Court's leading school voucher case, "96.6% of all voucher recipients [went] to religious schools, only 3.4% to nonreligious ones." *Zelman*, 536 U.S. at 703 (Souter, J., dissenting). Another example of formal neutrality, albeit in the area of legislative prayer, is *Town of Greece v. Galloway*, 572 U.S. 565 (2014), where the Court affirmed the Town's prayer practice, describing it as "opened . . . to all creeds," *id.* at 573, even though "[a]bout two-thirds of the prayers given over this decade or so invoked 'Jesus,' 'Christ,' 'Your Son,' or 'the Holy Spirit'; in the 18 months before the record closed, 85% included those references," *id.* at 628 (Kagan, J., dissenting).

45 *See Carson*, 142 S. Ct. at 2012–13 (Sotomayor, J., dissenting) ("[I]n just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.").

46 Locke v. Davey, 540 U.S. 712, 718–19 (2004).

47 *See id.* at 718–19 (rejecting a free exercise challenge to a state scholarship program that restricted use of public funds to pursue a degree in devotional theology on the grounds that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause" and noting that "[t]his case involves that 'play in the joints'").

48 *See Carson*, 142 S. Ct. at 2002 (limiting *Locke* to its facts).

49 *Id.* at 2014 (Sotomayor, J., dissenting) ("Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.").

50 137 S. Ct. 2012 (2017).

51 140 S. Ct. 2246 (2020).

Makin.[52] *Trinity Lutheran* involved a Missouri program that disbursed state funds for playground resurfacing. When Trinity Lutheran, a house of worship that operated a preschool, applied for funding, it was denied pursuant to a Missouri constitutional amendment—similar to those adopted in thirty-seven other states—that prohibited the funding of religious organizations with public monies.[53] In an opinion by Chief Justice John Roberts, the Court held that Missouri's exclusion violated the Free Exercise Clause by discriminating based on the school's religious identity.[54] Applying strict scrutiny, it concluded that Missouri's interest in enforcing strict separation failed to qualify as compelling, though the Court was careful to indicate that its holding did not apply beyond playground resurfacing or other generally available programs that did not directly implicate an organization's religious mission.[55]

Just three years later, however, the Court held in *Espinoza* that the State of Montana violated the Free Exercise Clause when it read the "no aid" provision of its constitution to bar public funding of scholarships to private religious schools.[56] Montana's program involved a tax credit that could be applied to private school tuition. The Supreme Court had previously interpreted the Establishment Clause to permit such a program to include religious schools, so long as taxpayer funds were not paid directly from the state treasury to the schools.[57] The Court also previously held that states retained the discretion to exclude funding of religious education under their own no-aid provisions.[58] But *Espinoza* rejected this "play in the joints," holding that exclusion from the tax credit program based on the private school's religious status was impermissible discrimination under the Free Exercise Clause.[59]

Finally, in *Carson*, the Court rejected the exclusion of religious schools from a Maine tuition-assistance program that provided direct payments to private schools.[60] In Maine, families in public school districts without government-operated secondary

---

52 142 S. Ct. 1987 (2022).
53 *Trinity Lutheran*, 137 S. Ct. at 2037 (Sotomayor, J., dissenting).
54 *Id.* at 2021 (majority opinion).
55 *Id.* at 2024 n.3.
56 140 S. Ct. at 2262–63.
57 *Zelman*, 536 U.S. at 652.
58 *Locke*, 540 U.S. at 718–19.
59 140 S. Ct. at 2260–61.
60 142 S. Ct. at 2002.

schools could designate private schools for their children to attend.[61] The state would then transfer payment directly to those schools to defray tuition costs.[62] Maine argued that the purpose of its program was to provide secular education in rural districts that lacked public schools,[63] but the Court rejected this defense, holding that when a state decides to subsidize private education, "it cannot disqualify some private schools solely because they are religious."[64]

The dissenters in the *Carson* trilogy emphasized the Court's radical contravention of settled Establishment Clause principles. In all three cases, the majority relied on an antidiscrimination theory not only to *permit* but to *require* state funding of religious activities and institutions, allowing public monies to flow to churches and religious schools despite long-standing state constitutional prohibitions.[65]

Appealing to principles of neutrality, the Court has rejected separationism, even as an option for states. After *Carson*, it is doubtful whether states can have any "antiestablishment interests" that are stronger than that of the Federal Constitution.[66] The Court has abandoned federalism values, "play in the joints" in the context of funding religious education, and apparently any distinction between indirect and direct aid to religion.[67] In doing so, it has unsettled two centuries of state constitutional rules,[68] as well as decades of federal precedents upholding them.[69] The new constitutional baseline is this: whenever the state provides a public benefit, it has no choice but to offer that benefit to religious

---

61 *Id.* at 1993.

62 *Id.*

63 *Id.*

64 *Id.* at 2000 (quotation marks omitted) (quoting *Espinoza*, 140 S. Ct. at 2261).

65 *See Carson*, 142 S. Ct. at 2013 (Sotomayor, J., dissenting) ("[I]n just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.").

66 *Id.* at 2014.

67 *Id.* at 1998. For the collapse of the distinction between direct and indirect aid, see *infra* Part IV.A.

68 *See Trinity Lutheran*, 137 S. Ct. at 2037 (Sotomayor, J., dissenting) (noting that state provisions prohibiting direct funding of houses of worship, "as a general matter, date back to or before these States' original Constitutions").

69 *See* Lupu & Tuttle, *Remains of the Establishment Clause*, *supra* note 9, at 1783 ("After *Everson*, limits on direct funding of religious education became mandatory under the First Amendment. But the broader and more explicit limits under state constitutional law precede *Everson* by many decades.").

organizations on equal terms. If secular organizations receive state subsidies, so too must churches.

B. Religious Exemptions

While requiring equal funding with respect to government benefits, the Court has also mandated special exemptions from regulations that burden religion. Formally, the Court continues to adhere to an interpretation of the Free Exercise Clause that rejects exemptions from neutral and generally applicable laws.[70] In theory, then, religion and nonreligion are similarly situated under government regulations. Absent discrimination, neither is entitled to special relief from burdens. Preferentialism is not a danger under this kind of regime, because no one can demand accommodations, at least not as matter of constitutional doctrine.

In practice, however, the Court has expanded the availability and strength of exemptions, giving religious believers an important measure of freedom not enjoyed by others, even when those others are exercising fundamental rights of their own. Several doctrinal developments are important in this expansion of special protections for religion. Here we emphasize the erosion of the prevailing constitutional rule and the narrowing of constitutional limits on exemptions.

1. Abandonment of *Smith*.

The project of constitutionalizing religious exemptions has worked by exploiting exceptions and boundaries to the rule of *Employment Division v. Smith*,[71] which holds that the government is not required to grant exemptions from laws that are neutral and generally applicable.[72] For several decades, the concepts of "neutrality" and "general applicability" worked to foreclose exemptions, but recent decisions have made them easy triggers for heightened review.[73]

With respect to neutrality, in the thirty years after *Smith* was decided, the concept did almost no work under the Free Exercise Clause. The Court applied it only once to invalidate a set of local

---

[70] *See* Emp. Div. v. Smith, 494 U.S. 872, 890 (1990); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (declining to reverse *Smith*).

[71] 494 U.S. 872 (1990).

[72] *Id.* at 885–86, 886 n.3.

[73] *See* Kendrick & Schwartzman, *supra* note 8, at 135 (arguing that the Court has distorted the animus doctrine to reach exemptions under the concept of neutrality); Tebbe, *Equal Value*, *supra* note 2, at 2409–10 (focusing on general applicability).

ordinances whose object was to suppress ritual slaughtering practices used by members of the Santeria faith.[74] But more recently, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[75] the Court has revived the doctrine, holding that state officials violated their "obligation of religious neutrality" by expressing hostility toward a Christian baker who refused to serve a gay couple celebrating their wedding.[76] In reaching that conclusion, the Court applied a totality-of-the-circumstances approach to determine the presence of antireligious animus, even as it refused to apply the same standard to far more egregious expressions of religious hostility surrounding President Donald Trump's travel ban.[77]

Although the Court's invocation of neutrality in *Masterpiece Cakeshop* was significant, the more important shifts in free exercise doctrine have focused on the concept of general applicability. In *Fulton v. City of Philadelphia*,[78] which involved a religious foster care agency's refusal to comply with antidiscrimination rules, the Court held that city policies lacked general applicability because they incorporated a "system of individual exemptions" that allowed for discretion in evaluating claims.[79] Despite the fact that city officials had *never* exercised that discretion to permit secular or religious exceptions, the Court applied strict scrutiny to require a religious accommodation.[80] In effect, the Court held that the government had to grant a religious exemption because it *could* have granted one, even though it had never done so.

There is little question that *Fulton* signaled a departure from the Court's rule-based approach to exemptions in *Smith*. But that decision has been overshadowed by a more profound shift in free exercise doctrine, namely, the Court's adoption of what has been

---

74 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).

75 138 S. Ct. 1719 (2018).

76 *Id.* at 1729.

77 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see also* Kendrick & Schwartzman, *supra* note 8, at 168.

78 141 S. Ct. 1868 (2021).

79 *Id.* at 1877.

80 *Id.* Moreover, the Court had never relied solely on the individualized exemption rule to ground a holding until *Fulton*. Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 300–01, 300 n.180 (2021) [hereinafter Tebbe, *Liberty of Conscience*].

called the "most-favored nation"[81] theory of general applicability.[82] Under this approach, religious activities must be treated at least as favorably as comparable secular activities.[83] Comparability is determined by asking whether a regulated religious activity risks undermining the government's interests to the same, or a similar, extent as some unregulated secular activity.[84] This rule is meant to prevent a type of discrimination in which the government devalues religious practices by regulating them even while it exempts similar nonreligious forms of conduct.[85] When the government discriminates in this way, it must show that its regulatory scheme, including any secular exceptions, is necessary to advance a compelling interest.[86]

Although the "most-favored nation" approach to free exercise appeals to a principle of equality, it often results in special exemptions for religious practitioners. During the COVID-19 pandemic, courts were willing to carve out exemptions for religious actors even where no others received them and even when the regulated activities implicated other constitutional rights.[87] In *Tandon v. Newsom*,[88] the Court exempted religious gatherings from California's public health restrictions,[89] but nonreligious gatherings were still prohibited, including those that were expressive and presumably entitled to speech protections under the First Amendment. In another case, a federal district court exempted religious schools from an order issued by the Governor of Kentucky, temporarily closing K–12 schools to in-person learning

---

81 *See, e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting from the denial of application for injunctive relief) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50); *cf.* Koppelman, *"Most-Favored Nation" Theory*, *supra* note 7, at 2245–46 (discussing the origins of the "most-favored-nation" analogy in free exercise doctrine).

82 *See* Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://perma.cc/UKQ5-MYE8.

83 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 62, 66 (2020) (per curiam).

84 Douglas Laycock & Steven Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 11 (2016) ("We must look to the reasons the state offers for regulating religious conduct and then ask whether it permits secular conduct that causes the same or similar harms.").

85 *See* Tebbe, *Equal Value*, *supra* note 2, at 2409.

86 *Tandon*, 141 S. Ct. at 1296.

87 *See* Tebbe, *Equal Value*, *supra* note 2, at 2421–22.

88 141 S. Ct. 1291 (2021).

89 *Id.* at 1296.

during the height of the pandemic.[90] The court reasoned that the order was not generally applicable, even though it applied to all public and private schools, because it left open preschools and universities.[91] Similarly, the Sixth Circuit exempted religious schools from a similar closing order in Ohio, holding that the regulation was invalid because it did not apply to various retail businesses.[92] The upshot of both decisions was that private *religious* schools were permitted to open, but private *secular* schools, along with public schools, were not.

Courts reached similarly selective results in other public health cases. For the first time in U.S. history, during the COVID-19 pandemic, federal courts granted injunctions to require religious exemptions from vaccination mandates.[93] In one of the earliest cases,[94] a federal district court reasoned that New York's mandate for healthcare workers failed general applicability because it included a secular exception for those with contraindications to the vaccine.[95] The court came to that conclusion even though the number of workers seeking medical exceptions was likely to be much smaller than those with religious objections.[96] Although this ruling was reversed on appeal,[97] it found allies in Justices Clarence Thomas, Samuel Alito, and Neil

---

90 *See* Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 531 (E.D. Ky.), *stayed pending appeal sub nom.* Kentucky v. Beshear, 981 F.3d 505 (6th Cir. 2020), *stay denied sub nom.* Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020). The Sixth Circuit stayed the district court's decision on the ground that Governor Andy Beshear's order was generally applicable. *See Kentucky*, 981 F.3d at 510. The Supreme Court declined to interfere, noting that the Governor's order was about to expire, *see Danville Christian Academy*, 141 S. Ct. at 528, but Justices Samuel Alito and Neil Gorsuch dissented, arguing in part that the Governor had "discriminat[ed] against religion," *id.* at 529.

91 *Danville Christian Acad.*, 503 F. Supp. at 524–25.

92 Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't, 984 F.3d 477, 482 (6th Cir. 2020).

93 Prior to the COVID-19 pandemic, no state or federal court had granted a vaccine exemption based on constitutional free exercise protections. *See* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1108–09 (2022).

94 The first case was Dahl v. Board of Trustees of Western Michigan University, 558 F. Supp. 3d 561 (W.D. Mich. 2021), *aff'd*, 15 F.4th 728 (6th Cir. 2021) (granting a motion for a temporary restraining order).

95 Dr. A. v. Hochul, 567 F. Supp. 3d 362, 375 (N.D.N.Y. 2021), *rev'd in part*, *vacated in part sub nom.* We The Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021), *cert. denied sub nom.* Dr. A. v. Hochul, 142 S. Ct. 2569 (2022).

96 *Id.*

97 *We The Patriots*, 17 F.4th at 267.

Gorsuch.[98] And while the Supreme Court has not directly addressed the merits of free exercise challenges to vaccine mandates,[99] some lower courts have continued to grant religious exemptions from them.[100] Importantly, these exemptions do not apply to those who object to vaccinations on nonreligious grounds. The result is to favor religious motivations and thereby incentivize objectors to adopt or articulate them.[101]

In addition to broadening its doctrines of neutrality and general applicability, the Court has circumvented the stringency of its *Smith* rule by recognizing and then expanding the ministerial exception. This doctrine holds that religious organizations may hire and fire their clergy without having to comply with employment discrimination laws.[102] Grounded in both Religion Clauses,[103] the ministerial exception gives the Court the power to define who counts as a minister for such purposes. Most recently, the Court held that lay teachers at parochial schools could not bring employment discrimination claims, even though they were women and therefore ineligible for ordination in the Catholic Church, and even though they taught secular subjects as well as religion to elementary school students.[104] As a result of this decision, the ministerial exception strips an increasingly large number of employees of statutory protections, giving religious

---

98 *Hochul*, 142. S. Ct. at 2571 (Thomas, J., dissenting from the denial of certiorari) ("The New York mandate includes a medical exemption but no religious exemption, even though 'allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones.'" (quoting Dr. A. v. Hochul, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief))).

99 *See generally Hochul*, 142 S. Ct. 2569 (denying certiorari); Does 1–3 v. Mills, 142 S. Ct. 1112 (2022) (denying certiorari).

100 *See, e.g.*, Doster v. Kendall, 54 F.4th 398, 405 (6th Cir. 2022) (military vaccine mandate), *vacated*, 144 S. Ct. 481 (2023); Bosarge v. Edney, 669 F. Supp. 3d 598, 606 (S.D. Miss. 2023) (school vaccine requirements).

101 *See* Pritzker v. Ill. Republican Party, 973 F.3d 760, 762 (7th Cir. 2020) (rejecting a free speech challenge to exemptions favoring religious speech over protected political speech); *see also* Micah Schwartzman & Nelson Tebbe, *Barrett Favors Religious Expression Over Other Speech. The Constitution Doesn't*, WASH. POST (Oct. 13, 2020), https://www.washingtonpost.com/outlook/2020/10/13/barrett-first-amendment-religion-expression/.

102 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("Under [the ministerial exception], courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").

103 *See Hosanna-Tabor*, 565 U.S. at 181.

104 *Our Lady of Guadalupe*, 140 S. Ct. at 2066.

institutions immunities from civil rights laws that are not available to secular employers.[105]

Lastly, the Court has also interpreted federal statutes to increase the scope and power of religious exemptions. Chief among these provisions is the Religious Freedom Restoration Act[106] (RFRA),[107] which is joined by the Religious Land Use and Institutionalized Persons Act (RLUIPA),[108] along with numerous subject-specific legislative and regulatory accommodations.[109] RFRA has been especially important as a vehicle for extending accommodations into for-profit markets.[110] The Court's landmark decision in *Burwell v. Hobby Lobby*[111] established, for the first time, that large business corporations are legal persons capable of exercising religious liberty within the meaning of RFRA[112]—a conclusion that quickly carried over into constitutional doctrine.[113] As a result of *Hobby Lobby*, religious employers have special protections that have enabled them to defeat economic regulations, public health measures, and civil rights laws that conflict with their convictions.[114] Relatedly, the Court has also recently expanded the rights of religious employees under its interpretation of Title VII. In *Groff v. DeJoy*,[115] the Court held that businesses must grant accommodations to religious employees unless those accommodations impose "substantial increased costs" on the employer.[116] Together, *Hobby Lobby* and *Groff*

---

105 By some estimates, the ministerial exception now covers as many as two million employees of religious organizations. *See* Robert Drust, *Reinterpreting the Ministerial Exception in* Our Lady of Guadalupe School v. Morrissey-Berru, 101 NEB. L. REV. 773, 774 (2022).

106 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

107 *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 428 (2016).

108 *See generally* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907 (2011).

109 States have also granted religious accommodations by interpreting their own constitutional free exercise provisions, enacting state RFRAs, and creating specific exemptions from a wide range of state laws. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 169 (2016).

110 *See* Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 131–37 (Micah Schwartzman et al. eds., 2016).

111 573 U.S. 682 (2014).

112 *See* Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 149, 150 (Micah Schwartzman et al. eds., 2016).

113 *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

114 *See* Sepper, *Free Exercise Lochnerism*, *supra* note 8, at 1513–18.

115 143 S. Ct. 2279 (2023).

116 *Id.* at 2295.

marshal federal statutes to confer protections on both religious employers and religious employees, affording them rights that are not available to nonreligious participants in the workplace.[117]

2. Elimination of limits.

As the Supreme Court has expanded its free exercise jurisprudence, it has also significantly diminished the role of constitutional limitations on exemptions. Until recently, the Court interpreted the Establishment Clause to prohibit statutory religious accommodations that imposed substantial burdens on other private citizens.[118] But the Roberts Court has virtually abandoned this third-party harm doctrine.

This conclusion follows, in part, from the Court's decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[119] which involved a challenge to regulations exempting religious nonprofits from contraceptive coverage requirements under the Affordable Care Act.[120] Certain business employers had been exempted from those requirements after *Hobby Lobby*.[121] But there was a significant difference between the for-profit exemption at issue in *Hobby Lobby* and the accommodation of nonprofits challenged in *Little Sisters*. Although the former provided alternative coverage for those affected, the latter left employees entirely without it.[122] By relieving religious nonprofits of this regulatory burden, the Trump Administration blocked insurance coverage for women's contraception that employees otherwise would have received.[123] Lower courts had found that even a temporary deprivation of coverage would cause irreparable harm in the form of unwanted pregnancies and other medical consequences.[124] Writing in dissent, Justice Ruth Bader Ginsburg noted that under the religious exemption, "between 70,500 and 126,400 women would immediately lose access to no-cost

---

[117] *See, e.g.*, *id.*; Sepper, *Free Exercise Locherism*, *supra* note 8, at 1513–18; James Nelson, Micah Schwartzman & Elizabeth Sepper, *The Supreme Court Just Dealt a Major Blow to Corporate Mandates*, SLATE (June 30, 2023), https://perma.cc/HR2D-JPZ6.

[118] *See* Schwartzman et al., *Costs of Conscience*, *supra* note 42, at 788–89.

[119] 140 S. Ct. 2367 (2020).

[120] *Little Sisters of the Poor*, 140 S. Ct. at 2372–73.

[121] *Id.* at 2376–77.

[122] *See id.* at 2399 (Kagan, J., concurring).

[123] *Id.* at 2408–09.

[124] *See* Pennsylvania v. President U.S., 930 F.3d 543, 574 (3d Cir. 2019), *rev'd and remanded sub nom. Little Sisters of the Poor*, 140 S. Ct. at 2373.

contraceptive services."[125] She argued that the Court's practice and precedent "d[o] not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs."[126] Yet the Supreme Court upheld the nonprofit exemption without even addressing third-party harms.[127]

Little Sisters does not stand alone. In *Fulton*, the Court exempted a religious child welfare agency from the city's antidiscrimination policy without determining whether the exemption would harm prospective foster care parents and children who might be placed with them.[128] Similarly, in *Masterpiece Cakeshop*, the Court invalidated application of Colorado's civil rights law without resolving the issue of how a religious exemption would affect the ability of same-sex couples to participate on equal terms in the marketplace.[129] Though the Roberts Court has not explicitly rejected precedents limiting third-party harms, its decisions signal that such harms are largely irrelevant to the majority's understanding of whether exemptions are constitutionally permissible.

By rejecting constitutional constraints on religious accommodations, the Court has given lawmakers wide latitude to favor religion and particular religious believers with little concern for countervailing interests. The idea of "play in the joints"[130] is now unidirectional. Governments can grant exemptions that are not required under the Free Exercise Clause without fear of running up against constitutional boundaries. But they are still forbidden from separating religion from government any more than is necessary under the Establishment Clause.[131] The Court's doctrines thus provide officials with powerful incentives to grant exemptions and vanishingly narrow grounds on which to oppose them.

---

125 *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

126 *Id.* at 2400.

127 *Id.* at 2381–82 (majority opinion).

128 *Cf.* Netta Barak-Corren, Yoav Kan-Tor & Nelson Tebbe, *Examining the Effects of Antidiscrimination Laws on Children in the Foster Care and Adoption Systems*, 19 J. EMPIRICAL LEGAL STUD. 1003, 1040–43 (2022) (finding that state enactment of antidiscrimination rules that protect same-sex couples from exclusion from child welfare systems does not affect most children, but that it does measurably benefit the most vulnerable children).

129 *See* Kendrick & Schwartzman, *supra* note 8, at 159.

130 *Locke*, 540 U.S. at 718–19.

131 *See supra* Part I.A.

C. Government Religious Speech

The Roberts Court has also favored religion in the context of government religious speech. Historically, the government was forbidden from endorsing religious messages, especially those that supported one denomination over another.[132] But recently, the Court has signaled its abandonment of those Establishment Clause limits. For decades, the Court had applied its test from *Lemon v. Kurtzman*[133] to prohibit government actions that had the principal effect of advancing religion.[134] An important gloss on *Lemon*, known as the endorsement test, barred official expression that endorsed religion over nonreligion, or one religion over another.[135] Today the Roberts Court has explicitly abandoned the *Lemon* framework along with the endorsement test.[136] No general rule now prohibits government speech that promotes religion,[137] and the Justices have not settled on any specific tests that might set some limits.[138]

What is clear, however, is that the government cannot pursue a policy of separationism in its own speech beyond what the Constitution requires. Here, too, principles of disestablishment and free exercise are blended. In *Kennedy v. Bremerton School District*,[139] the Court observed that the school district terminated a football coach partly because it feared that his practice of praying on the fifty-yard line after football games would be perceived

---

[132] There are exceptions to these generalizations. "Mild" or "ceremonial" endorsements were always permitted, such as the national motto "in God we trust." *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2095 (1996) (collecting examples).

[133] 403 U.S. 602 (1971).

[134] *Id.* at 612–13; *see also* GREENAWALT, RELIGION AND THE CONSTITUTION, *supra* note 5, at 158–93 (surveying Establishment Clause decisions applying *Lemon* to limit government religious expression).

[135] The endorsement test was developed initially by Justice Sandra Day O'Connor, *see Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), and later adopted and applied by the Court, *see County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307–10 (2000); and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005).

[136] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2447 (2022).

[137] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (rejecting an Establishment Clause challenge to the government's display of a forty-foot-tall Latin Cross).

[138] *See* Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 2018–19 AM. CONST. SOC'Y SUP. CT. REV. 21, 30 (2019) [hereinafter Schragger & Schwartzman, *Establishment Clause Inversion*] (noting that *American Legion*, which produced seven, or possibly eight, opinions, "reveal[ed] a Court sharply divided about the meaning of the Establishment Clause").

[139] 142 S. Ct. 2407 (2022).

as official speech[140]—a fear that was reasonable, considering that petitioner Joseph Kennedy was a public high school teacher who was on duty when he engaged in his prayer practice.[141] Yet Justice Gorsuch dismissed the school district's concern in his majority opinion, which declared that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[142] Because the district did not risk a formal Establishment Clause violation, its policy of separation—avoiding the coercion of students, among other things—was not strong enough to overcome Kennedy's right to free exercise.[143]

After *Bremerton*, what is the test for impermissible government religious speech? The Court suggested that "the Establishment Clause must be interpreted by reference to historical practices and understandings."[144] More than standard forms of originalism, this interpretive approach relies not only on "the understanding of the Founding Fathers" but also on "history," which appears to include past practices not tethered to original meaning.[145] Members of the conservative majority seem attracted to a method that identifies certain "hallmarks" of an official establishment and prohibits only those practices today.[146]

Evidently by design, the Court's turn toward history and tradition allows significant leeway for government religious expression.[147] Aside from pointing to the hallmarks of an official establishment, such as compulsory church attendance or government composition of prayer, the Court offered no guidance as to what limits on government endorsement of religion might exist. The only clear takeaway from *Bremerton* is that a public school employee may pray during the workday, in a deliberately public

---

140 *Id.* at 2426–27.

141 *See id.* at 2443 (Sotomayor, J., dissenting) ("Kennedy was on the job as a school official 'on government property' when he incorporated a public, demonstrative prayer into 'government-sponsored school-related events' as a regularly scheduled feature of those events.").

142 *Id.* at 2427 (majority opinion).

143 *Id.* at 2432.

144 *Kennedy*, 142 S. Ct. at 2428 (quotation marks omitted) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

145 *Id.* (quotation marks omitted) (referring separately to "original meaning" and "history") (quoting *Town of Greece*, 572 U.S. at 577).

146 *See id.* at 2429 n.5 (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WILLIAM & MARY L. REV. 2105, 2144–46 (2003)).

147 *See* Lupu & Tuttle, *Remains of the Establishment Clause*, *supra* note 9, at 1804 ("*Kennedy* . . . claims historical practices as a touchstone, most likely because the Justices believe that pre-*Engel* practices in public schools were religion-friendly.").

way, and in the presence of students who are subject to the employee's direct authority, and even if there is evidence that some of those students felt pressure to participate in the employee's religious practice.[148]

Apparently, direct coercion would risk offending the Establishment Clause,[149] but that marks a dramatic shift from the reasoning of the school-prayer cases, *Engel v. Vitale*[150] and *School District of Abington Township v. Schempp*,[151] which expressly disclaimed reliance on a coercion analysis.[152] In *Engel*, the Court held that "[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[153] To say now that only coercion risks constitutional offense is to rework the foundations of the Establishment Clause. And to prohibit lawmakers from promoting the separation of church and state, at least when not required under the desiccated remains of federal doctrine, shifts power to the federal judiciary to advance a program of religious preferentialism.

D. From Neutrality to Preference

So far, in this Part, we have argued that the Roberts Court has given legal preference to religion under both the Free Exercise and Establishment Clauses. In each of the areas we have surveyed—funding, exemptions, and government speech—the Court has adopted rules that either require equal treatment of religion or special protections for it. But these rules also interact with each other, working together to generate more favorable treatment for religious entities as compared to secular counterparts. The combination of formal neutrality toward religion with respect to public benefits and substantive neutrality for

---

148 *See id.* at 2452 (Sotomayor, J., dissenting) (noting "direct record evidence that students felt coerced to participate in Kennedy's prayers").

149 Lupu & Tuttle, *Remains of the Establishment Clause*, *supra* note 9, at 1804.

150 370 U.S. 421 (1962).

151 374 U.S. 203 (1963).

152 *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 223.

153 370 U.S. at 430. The *Engel* Court further declared that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion," *id.* at 431, and "[a]nother purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand," *id.* at 432.

exemptions leads to doctrinal structures that privilege religious interests.

To illustrate how doctrinal convergence reinforces religious preferentialism, consider the Paycheck Protection Program (PPP), which was part of the Coronavirus, Aid, Relief, and Economic Security (CARES) Act.[154] This legislation was a response to the economic crisis caused by government shutdowns during the COVID-19 pandemic. Under the PPP, the Small Business Administration (SBA) was authorized to distribute approximately $800 billion in forgivable loans to businesses and nonprofits with fewer than five hundred employees.[155] When this program was announced, there was an immediate question about whether religious organizations were eligible to receive funding. The SBA responded by saying that it would not follow a preexisting rule that excluded religious organizations.[156] It reasoned that this rule was inconsistent with the Supreme Court's decision in *Trinity Lutheran*, which prohibited discriminating against beneficiaries based on of their religious status.[157] SBA thus implemented a rule of formal neutrality with respect to religious organizations, which would be treated just like secular small business and nonprofits.

But there was another obstacle to some religious organizations receiving PPP funds. The program was designed by Congress to aid small businesses, and, under SBA's eligibility rules, large employers—defined as those with five hundred or more employees—were ineligible to apply for PPP loans.[158] SBA's rules further specified that small organizations that were affiliated with large employers were also ineligible.[159] This rule had

---

154 Pub. L. No. 116-136, § 1106(b), 134 Stat. 281, 298 (2020); *see also PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., https://perma.cc/B6TD-AB8F.

155 *See* David Autor, David Cho, Leland D. Crane, Mita Goldar, Byron Lutz, Joshua Montes, William B. Peterman, David Ratner, Daniel Villar & Ahu Yildirmaz, *The $800 Billion Paycheck Protection Program: Where Did the Money Go and Why Did It Go There?*, 36 J. ECON. PERSPS. 55, 58 (2022).

156 *See Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL)*, U.S. SMALL BUS. ADMIN. (Apr. 3, 2020), https://perma.cc/PKY8-EQEB.

157 *See* VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10445, ELIGIBILITY OF RELIGIOUS ORGANIZATIONS FOR THE CARES ACT'S PAYCHECK PROTECTION PROGRAM 3 (2020); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020) [hereinafter Tebbe et al., *Quiet Demise*], https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html.

158 *See Affiliation Rules for Paycheck Protection Program (PPP)*, U.S. SMALL BUS. ADMIN. 2 (Apr. 3, 2020), https://perma.cc/K8Q4-J2ZY.

159 *Id.*

the effect of excluding local chapters and affiliates of nationally organized businesses and nonprofits. But after a lobbying effort led by the Catholic Church,[160] SBA waived its affiliation rules for religious employers.[161] As a result, thousands of religious organizations that would have been denied PPP funding were made eligible for it. All told, those organizations received billions of dollars in federal aid.[162] SBA's decision to grant a religious exemption from its affiliation rules thus led to what was (and what remains), by far, the single largest government payout to religious institutions in U.S. history.[163]

SBA's decisions concerning eligibility for PPP funding, which were informed explicitly by Supreme Court precedent, are a paradigmatic instance of structural preferentialism. The agency justified its choice to ignore a previous rule excluding religious organizations as necessary to comply with the reasoning of *Trinity Lutheran*.[164] But inclusion on neutral terms was not sufficient. To receive funding, many religious organizations required an exemption from eligibility rules that applied to all other nonprofits. For example, when local Planned Parenthood centers applied for and received PPP funding, the SBA, along with more than two dozen Republican Senators, objected that those centers were violating its affiliation rules[165]—the same rules from which the SBA had recently exempted religious nonprofits.[166] The combination of equal funding and special exemption from otherwise

---

[160] *See* Reese Dunklin & Michael Rezendes, *Catholic Church Lobbied for Taxpayer Funds, Got $1.4B*, AP NEWS (July 10, 2020), https://perma.cc/2X6K-JZ3Z.

[161] *See Affiliation Rules*, *supra* note 159; *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20,817, 20,820 (Apr. 15, 2020) (codified at 13 C.F.R. § 121.103(b)(10) (2021)).

[162] *See* Elliot Hannon, *The Catholic Church, With Billions in Reserve, Took More Than $3 Billion in Taxpayer-Backed Pandemic Aid*, SLATE (Feb. 4, 2021), https://perma.cc/BC3D-2VHX.

[163] *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020) [hereinafter Schwartzman et al., *Separation of Church and State*], https://perma.cc/8JW4-7UUJ.

[164] *But see* Brenna James O'Connor, *Funding Faith: The Paycheck Protection Program's Establishment Clause Violation*, 95 ST. JOHN'S L. REV. 895, 916 (2021) (arguing that PPP funding of clergy salaries was not required under *Trinity Lutheran*).

[165] *See* Kate Smith, *Planned Parenthoods Received $80 Million in PPP Loans. Now, the SBA Wants It Back*, CBS NEWS (May 22, 2020), https://perma.cc/R4H7-TET8.

[166] *See* Schwartzman et al., *Separation of Church and State*, *supra* note 163.

applicable regulatory constraints gave religious organizations preferential treatment on a massive scale.[167]

The structure of doctrinal claims that serves as justification for PPP funding can be generalized to other programs. For example, anticipating the Court's decision in *Carson* to require equal funding of private religious schools, Maine's legislature amended its antidiscrimination law to prohibit state funding of private schools that discriminate based on sexual orientation and gender identity.[168] But antidiscrimination conditions on public funding, like the affiliation rules under PPP, are vulnerable to free exercise objections, which are now being tested in federal courts.[169] And after *Fulton*, which held that a government-funded religious child-welfare agency was entitled to an exemption from antidiscrimination policies,[170] it would not be surprising for courts to extend this pattern of exemption-based preferentialism to school funding.[171]

This is the logic of structural preferentialism: It mandates the massive transfer of taxpayer funds to religious organizations while insulating them from government regulation. It also permits legislatures to adopt discretionary exemptions and civic practices that favor religious believers and organizations with little concern for third-party harms or the problems of selective denominational endorsement. In accumulated and mutually reinforcing decisions concerning funding, exemptions, and

---

167 In some states, churches that received PPP funding also resisted public health orders during the pandemic and eventually received exemptions that were not available to secular nonprofits. We first flagged this possibility in Nelson Tebbe, Micah Schwartzman & Richard Schragger, *Churches Have Been Hypocritical During the Pandemic. They Want Exemptions from General Laws. They Also Want Federal Funding*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/outlook/2020/05/13/churches-have-been-astonishingly-hypocritical-during-pandemic/.

168 *See* ME. REV. STAT. ANN. tit. 5, § 4602(1), (5)(C) (2022); *see also* Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html.

169 There are currently lawsuits challenging antidiscrimination conditions on private school funding in Maine and Colorado. *See generally, e.g.*, Complaint, St. Dominic Acad. v. Makin, 2024 WL 3718386 (D. Me. June 13, 2023) (No. 2:23-CV-00246); Complaint, Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163 (D. Colo. 2023) (No. 1:23-CV-01557).

170 *See Fulton*, 141 S. Ct. at 1882.

171 Professor Aaron Tang has defended Maine's response, arguing that conditioning aid on compliance with antidiscrimination rules is a creative solution to mandatory funding after *Carson*. *See* Aaron Tang, *Who's Afraid of* Carson v. Makin*?*, YALE L.J.F. 504, 524–25 (2022) [hereinafter Tang, *Who's Afraid?*]. But as we argue below, the answer to Tang's titular question is: any supporter of church-state separation who respects the political economy of recent decisions under the Religion Clauses.

government religious speech, the separation of church and state has been demolished, often quietly and without significant legal resistance.[172]

What explains this constitutional revolution in doctrines of religious freedom? Why have conservative Justices moved from supporting *Smith* to undermining it in *Tandon* and *Fulton*? In the funding trilogy of *Trinity Lutheran*, *Espinoza*, and *Carson*, why have they abandoned judicial deference and restraint, which motivated the play-in-the-joints metaphor, and why have they instead embraced vigorous judicial review? And, after *Bremerton*, why have they put into question the long-standing settlement surrounding school prayer? To answer these questions, in Part II, we situate the rise of structural preferentialism within a broader political history of the Religion Clauses. This account lays the groundwork for a political economy of recent decisions involving exemptions, funding, and expression, which follows in Part III.

II. A POLITICAL HISTORY OF THE RELIGION CLAUSES

Structural preferentialism follows three prior church-state regimes, defined for our purposes by paired Establishment and Free Exercise Clause cases. Each of these regimes lasted for roughly a generation. The first period, which we call postwar pluralism, spanned from 1940 to 1963. This era began with the Court's decisions in *Cantwell v. Connecticut*,[173] which incorporated the Free Exercise Clause, and *Everson v. Board of Education*,[174] which incorporated the Establishment Clause, and ended with the school-prayer decisions.[175] The second period, from 1963 to 1990, was characterized by *Sherbert v. Verner*,[176] which adopted strict scrutiny under the Free Exercise Clause, and *Lemon v. Kurtzman*, which crystalized a three-part test for Establishment Clause violations. This was the heyday of separationism. The third period, from 1990 to 2020, was marked by *Employment Division v. Smith*, which rejected strict scrutiny for generally applicable laws and effectively ended religious exemptions under the Free Exercise Clause, and

---

[172] *See* Tebbe et al., *The Quiet Demise*, *supra* note 157 ("With respect to public funding of religion, the separation of church and state has all but disappeared, without a bang or even a whimper.").

[173] 310 U.S. 296 (1940).

[174] 330 U.S. 1 (1947).

[175] *See generally Engel*, 370 U.S. 421; *Schempp*, 374 U.S. 203.

[176] 374 U.S. 398 (1963).

Zelman v. Simmons-Harris,[177] which permitted (but did not require) indirect public funding of religious schools through vouchers. This was a period of constitutional deference, especially toward state legislative decision-making. Structural preferentialism began around 2020. The current era is distinguished most prominently by *Tandon* for religious exemptions,[178] and, on the Establishment Clause side, by *Carson* for funding[179] and *Bremerton* for government speech.[180]

Legal scholars sometimes write of institutional "settlements" or "détentes" in church-state doctrine, seemingly aware that Religion Clause decisions tend to reflect, perhaps with some delay, a kind of political or cultural compromise among different religious interest groups.[181] The implicit, and sometimes explicit, dynamic of interdenominational conflict and judicial response seems to fit the early period fairly well: Catholic–Protestant tensions are invoked regularly to explain the rise of modern Religion Clause jurisprudence.[182] Of course, there are obvious questions about how public pressure is manifested by both religious and nonreligious interest groups, the mechanism by which those interests are translated into legal decisions, and to what extent constitutional doctrine is influenced by changing religious affiliations—or in turn influences them.

Without resolving these difficulties, we offer an abbreviated account of the previous church-state regimes, emphasizing their discontinuities from the preferential system that is currently emerging. These periods are defined in terms of constitutional doctrine but explained when possible as a function of interest group politics.[183]

---

[177] 536 U.S. 639 (2002).

[178] *See generally* 141 S. Ct. 1294.

[179] *See* 142 S. Ct. 1987.

[180] *See* 142 S. Ct. 2407.

[181] *See, e.g.*, STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 9–10 (2014); Lupu & Tuttle, *Remains of the Establishment Clause, supra* note 9, at 1801; Driver, *supra* note 10, at 216. *See generally* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

[182] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion); *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring).

[183] For another recent periodization, see John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom*, 74 HASTINGS L.J. 1813, 1820 (2024). Our historical account differs from theirs, not only in aspects of our periodization, but more significantly in that ours reflects an explanatory approach grounded in the political economy of the doctrine. Professors John Witte, Jr., and Eric Wang ignored previous scholarship of

A. Postwar Pluralism: 1940–1963

The conventional narrative of the modern Religion Clauses begins with their incorporation against the states via the Fourteenth Amendment in the 1940s. We begin there, too, though it is important to acknowledge that interreligious conflict has long been a feature of U.S. history—that it strongly influenced the Founding generation and state disestablishments thereafter—and certainly generated controversy in state courts well before incorporation.[184] For purposes of our periodization, however, we start with *Cantwell v. Connecticut* and *Everson v. Board of Education*, decided in 1940 and 1947, respectively.

These cases were decided against the backdrop of World War II, the global mobilization against fascist dictatorships, and the transition into a postwar period, which began with interdenominational tension over the public schools and ended with a wary embrace of trifaith America—Protestant, Catholic, Jew.[185] Whereas religious conflict in the United States previously had entangled Protestants and Catholics, it now came to include a wider panoply of beliefs. Postwar pluralism was not quite a full embrace of religious diversity, but it did introduce a U.S. ecumenicism that included the secularization of public schools and that culminated with the election of the first Catholic President in 1960.[186]

Free exercise protections expanded alongside speech rights for dissenters during the middle of the twentieth century. *Cantwell* was one of a series of decisions in the 1940s that protected religious speakers and embraced a "preferred position" for the First Amendment.[187] The Court struck down the prosecution of a Jehovah's Witness for soliciting converts and for distributing

---

this kind, including that of Jeffries and Ryan, and offered no account of doctrinal change; nor did they perceive any "grand unified theory" in the emerging paradigm. *Id.* at 1819. Instead, they treated lines of doctrine as independently related to distinct values, a method that led them to miss how doctrines interact to structure preferences for religion and for specific denominations.

184 *See generally* STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY (2022); NOAH FELDMAN, DIVIDED BY GOD (2007); Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307 (2014).

185 *See* WILL HERBERG, PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 266 n.20 (1955).

186 *See* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN AMERICA 92 (2010) [hereinafter GORDON, THE SPIRIT OF THE LAW].

187 *See generally, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Jones v. Opelika, 319 U.S. 584 (1943); Murdock v. Pennsylvania, 319 U.S. 104 (1943).

literature that attacked organized religion.[188] Indeed, the Witnesses featured prominently in this period.[189] In *Marsh v. Alabama*,[190] decided in 1945, the Court reversed a trespass conviction of a Witness who distributed literature on the sidewalk of a company town in Chickasaw, Alabama.[191] The Witnesses also brought the dueling flag salute cases, *Minersville School District v. Gobitis*[192] and *West Virginia State Board of Education v. Barnette*.[193] Famously, *Gobitis* upheld a mandatory school flag pledge, while *Barnette* effectively reversed that decision only three years later, in 1943.[194]

The reversal in the flag salute cases and the politics of religious free speech more generally have been explained by both the Court's and the nation's self-conception as protectors of minority faiths, in contrast with the genocidal regimes waging war in Europe and elsewhere.[195] A mandatory flag salute no doubt conjured images of National Socialism, a connotation made explicit by Justice Robert Jackson in *Barnette*.[196] And the Witnesses were the paradigmatic discrete and insular minority.[197] Small in number and politically unpopular, they were utterly despised, violently attacked, and regularly prosecuted, for both their vocal opposition to organized religion and their refusal to serve in the military.[198] Over four thousand people went to jail as conscientious objectors.[199]

This expansive preferred position of the First Amendment was consistent with the country's antifascist mobilization. As part of this campaign, President Franklin Roosevelt announced his four freedoms, which prominently included free speech and the

---

188 *See Cantwell*, 310 U.S. at 307–08.

189 *See generally* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000).

190 326 U.S. 501 (1946).

191 *Id.* at 509–10.

192 310 U.S. 586 (1940).

193 319 U.S. 624 (1943).

194 *See* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia Board of Education v. Barnette*: The Pledge of Allegiance and Freedom of Thought*, *in* FIRST AMENDMENT STORIES 99, 118 (Richard W. Garnett & Andrew Koppelman eds., 2004).

195 *Cf.* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (rev. ed. 2011) (interpreting civil rights protections as a policy response to international relations during the Cold War).

196 *See Barnette*, 319 U.S. at 640–41.

197 *See Gobitis*, 310 U.S. at 606 (Stone, J., dissenting) (applying United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

198 *See* Blasi & Shiffrin, *supra* note 194, at 109–10.

199 GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 29.

right of "every person to worship God in his own way."[200] Recoil against the Holocaust only reinforced the trend toward ecumenicism.[201] Though a small minority, U.S. Jews overwhelmingly backed a secular state.[202] U.S. society—always diverse in Protestant sects—was hurtling toward a post-Protestant future.

Pointing to the interfaith grounding of the New Deal, Professor Sarah Barringer Gordon has argued that there was already "substantial precedent" for religious pluralism by the 1930s.[203] "The embrace of religious diversity as a positive value in constitutional jurisprudence, and in the broader society, blended a new and dynamic legal innovation with a religious movement toward ecumenicism."[204] Gordon observed that President Roosevelt's liberalism was inclusive, egalitarian, and interdenominational.[205] It led to an ecumenicism in the spirit of President Dwight Eisenhower, who famously said that "our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[206]

There were, of course, crosscurrents through the postwar period. The Cold War and anticommunism opened a new front in conflicts over religion and speech, though in some ways that muted Protestant–Catholic competition.[207] Anticommunism inspired vocal declarations of U.S. religiosity, though not particularly sectarian ones. The phrase "under God" was added to the Pledge of Allegiance in 1954, a little more than a decade after *Barnette*.[208] In a 1952 decision, *Zorach v. Clausen*,[209] upholding a release time program that allowed public school students to receive religious instruction during the school day, Justice William Douglas famously observed: "We are a religious people whose institutions presuppose a Supreme Being."[210] His defense of what

---

200 *Id.* at 43.

201 Jeffries & Ryan, *supra* note 15, at 308.

202 *See generally* GREGG IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE (1995); NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY (1992).

203 GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 34.

204 *Id.* at 17.

205 *Id.* at 40.

206 *Id.* at 50; *see generally* Patrick Henry, *"And I Don't Care What It Is": The Tradition-History of a Civil Religion Proof-Text*, 49 GORD AM. ACAD. OF RELIGION 35 (1981) (providing a truly absurd level of historical detail about Eisenhower's statement).

207 *See* Corinna Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 STAN. L. REV. 480, 497 (2015).

208 *Id.*

209 343 U.S. 306 (1952).

210 *Id.* at 313.

would be called the United States' "civil religion"—general endorsements of God, Thanksgiving Proclamations, and prayer breakfasts—would set the outer bounds of permissible state religious expression.[211]

Nevertheless, there was a decided shift away from Catholic–Protestant division to ecumenicism in this period, evident in constitutional issues beyond free exercise and free speech. *Everson*, decided in 1947, was a case about public funding of religious schools, which required the Court to articulate the extent to which states could support religious institutions.[212] This issue reached the Court in an environment characterized by increasing Catholic political power and corresponding pushback. Some of that resistance was laced with anti-Catholic bigotry. Protestants of certain stripes could still be whipped into a frenzy by the specter of Catholic domination—the Ku Klux Klan, for example. But postwar religious pluralism was gaining strength. By the mid-1940s, Catholics had become the largest denomination in the United States,[213] and they provided critical support for the New Deal.[214]

Indeed, *Everson* itself came to the Court as a result of Catholic electoral strength. The New Jersey law at issue in the case funded transportation for all students, including those attending parochial schools. This law was a project of Jersey City mayor Frank Hague, a Catholic Democrat who governed a city that was also overwhelmingly Catholic, as were many major cities in the Northeast and industrial Midwest.[215] The *Everson* Court upheld the funding program, but in doing so it also set limits on future state support of religious education.[216] It struck a kind of compromise—and so it was popular neither with concerned secularists like the American Civil Liberties Union (ACLU) nor with mainline Protestant denominations.[217]

---

211 *See* ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL 164–88 (1992); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1592 (2010).

212 330 U.S. 1 (1947).

213 *See* Jeffries & Ryan, *supra* note 15, at 306; Lain, *supra* note 207, at 490.

214 GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 39.

215 *Id.* at 60–61.

216 330 U.S. at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

217 *See* Sarah Barringer Gordon, *"Free" Religion and "Captive" Schools: Protestants, Catholics, and Education, 1945–1965*, 56 DEPAUL L. REV. 1177, 1188, 1190–93 (2007) [hereinafter Gordon, *"Free" Religion*].

In those early days, the Court did not directly address the issue of so-called "captive schools," though that was a lurking question.[218] In the 1940s and 1950s, there were over three hundred "Catholic public schools," mostly in neighborhoods where primary and secondary education was essentially contracted out to existing Catholic institutions.[219] The students were often taught by priests and nuns in church buildings.[220] Captive schools were deemed a threat by a new organization, Protestants and Other Americans United for the Separation of Church and State (POAU), which worried that *Everson* would lead to the support of such schools.[221] Other groups also opposed funding for religious schools in the 1940s and 1950s, including the ACLU and the American Jewish Congress (AJC).[222] But unlike those groups, which were motivated by a secular view of the state, the POAU promoted separation as part of its mission to protect "free" religion from what its leaders claimed was the pervasive threat of Catholic influence.[223]

Everson became the foundational text for the no-aid position, even as the lines between acceptable and unacceptable benefits were developing.[224] Separationism was supported by a range of interests, including not only the ACLU and the AJC, but also—and perhaps more importantly—the mainline Protestant denominations and their legal arms.[225] The dismantling of captive schools was consistent with their larger effort to disentangle public and parochial education—a goal shared not only by those with anti-Catholic leanings, but also by those seeking to advance a pluralist project in the public schools.

In fact, Catholic–Protestant battles over school aid had started to dissipate in the postwar period. Parochial school attendance was already in decline by the 1950s, in part because of the secularization of public schools, where Bible reading became less and less common.[226] Jews, too, came to feel more at home in

---

[218] *Id.* at 1201.

[219] GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 57.

[220] Gordon, *"Free" Religion*, *supra* note 217, at 1205–07.

[221] *Id.* at 1202–03.

[222] *See* Jeffries & Ryan, *supra* note 15, at 316 n.200.

[223] Gordon, *"Free" Religion*, *supra* note 217, at 1193, 1208–09.

[224] *Everson*'s status as a symbol of the no-aid position was strange because it upheld the aid program it reviewed. Nevertheless, it contained broad language that set limits on government support, which became influential in subsequent cases. *See* Laycock, *Churches, Playgrounds*, *supra* note 12, at 138.

[225] *See* Jeffries & Ryan, *supra* note 15, at 313.

[226] Lain, *supra* note 207, at 494–95.

the public schools.[227] As Jeffries and Ryan observed, "[i]n most places, public education had already become largely secular, and Protestants generally were comfortable with this transformation."[228] Notably, the Supreme Court did not decide a religion case between 1952 and 1961.[229]

The school-prayer cases in the early 1960s marked the apex of postwar ecumenicism, and they introduced the separationist regime that followed. By the time *Engel* and *Schempp* were decided, many local school districts had already dispensed with Bible reading and other religious observances.[230] Of the twelve states that had adopted mandatory religious observance in the schools in the late 1950s, eleven were defending against efforts by local school boards to abandon them.[231] The prayers that were required had also been diluted significantly—the Regents Prayer at issue in *Engel* was an example.[232] As Jeffries and Ryan pointed out, "[w]hen they finally reached" the question of school prayer, the Court ruled "in a political environment increasingly tolerant of secularization."[233]

That is not to say that the school-prayer decisions were popular. They most certainly were not.[234] In fact, they effectively split the POAU, whose conservative Protestant supporters had never imagined that an organization dedicated to imposing limits on Catholic school funding would lead to the banning of school prayer.[235] Indeed, the conservative reaction to the school-prayer decisions was vitriolic, especially in the South.[236] But even as public opinion was generally opposed to the Court's decisions, elite opinion coalesced around them relatively quickly.[237] In 1964, congressional hearings on overturning the school-prayer cases

---

227 *See* Leo Pfeffer, *Church, State, and American Jewry*, *in* A READER IN JEWISH COMMUNITY RELATIONS 179, 184–85 (Ann G. Wolfe ed., 1975).

228 *See* Jeffries & Ryan, *supra* note 15, at 319.

229 Lain, *supra* note 207, at 498.

230 *Id.* at 494.

231 There was significant regional variation with respect to school prayer. A majority of schools in the South and Northeast practiced religious observances, but only a small percentage did so in Western and Midwestern schools. *See id.* at 494.

232 *See* KENT GREENAWALT, DOES GOD BELONG IN THE PUBLIC SCHOOLS? 42 (2009).

233 *See* Jeffries & Ryan, *supra* note 15, at 319.

234 *See* BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 151–52 (2007); Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS U. L.J. 409, 424–26 (2015).

235 GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 84–86.

236 Lain, *supra* note 207, at 510.

237 *Id.* at 525–30.

floundered after they were unable to answer pluralist questions: What would be the content of a school prayer? And who would decide it?[238] Despite the political benefits of criticizing the Supreme Court for holding that "God is unconstitutional,"[239] no measures to overturn the school-prayer decisions were passed. Indeed, the Republican Party Platform of 1964 essentially endorsed the holdings, advocating only a constitutional amendment to permit individuals and groups to pray freely in public schools, provided that those prayers were not prepared or prescribed by the state.[240]

Trifaith America was firmly in place by the mid-1960s.[241] John F. Kennedy had become the first Roman Catholic President in 1961. His reaction to *Engel* was more muted than the public's and could even be considered supportive.[242] Importantly, all the mainline denominations lined up behind the decisions, though the leadership's position reflected elite opinion more than popular views.[243] The Protestant–Catholic divide was still contested, but it had become much less fraught. Cold War America was more preoccupied with anticommunism than with anti-Catholicism,[244] and, by the late 1950s, even the wave of McCarthy-inspired religiosity was dissipating.[245]

B. Separationism: 1963–1990

The school-prayer cases, *Engel* and *Schempp*, can then be understood as the beginnings of what we call the separationist period: "no prayer" and "no aid" helpfully capture the separationist approach to public schools. But we prefer to anchor separationism in two other cases that capture its mature form: *Sherbert v. Verner*, decided in 1963, and *Lemon v. Kurtzman*, decided in 1971. Though eight years apart, *Sherbert* and *Lemon* together

---

238 *Id.* at 523–24.

239 *Id.* at 510 n.198 (quoting Senator Sam J. Ervin of North Carolina).

240 *Id.* at 525.

241 *See* HERBERG, *supra* note 185, at 250 n.21; *see also* KEVIN M. SHULTZ, TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE 199 (2011).

242 Lain, *supra* note 207, at 526.

243 Jeffries & Ryan, *supra* note 15, at 325–26.

244 *Cf.* James E. Zucker, *Better a Catholic than a Communist: Reexamining* McCollum v. Board of Education *and* Zorach v. Clauson, 93 VA. L. REV. 2069, 2113–17 (2007) (arguing that "the common enemy of communism gave Catholics and Protestants something to rally around").

245 Lain, *supra* note 207, at 496–99.

articulated a framework for Free Exercise and Establishment Clause doctrine, which had been replete with hoary generalizations but short on particulars. For the next several decades, the two cases provided tests for adjudicating matters of religious freedom within the broader turn toward civil rights ushered in by *United States v. Carolene Products Co.*[246] and *Brown v. Board of Education*.[247] Notably, Justice William Brennan—a New Jersey Catholic, Eisenhower appointee, and leader of the Warren Court's progressive wing—authored *Sherbert*, and Chief Justice Warren Burger—a Minnesota Presbyterian, Nixon appointee, and Warren-Court critic—wrote *Lemon*.

Sherbert was brought by a Seventh-Day Adventist.[248] As was the case in previous decades, minority faiths were instrumental in shaping free exercise doctrine during this period. And here, too, there were parallels with the Court's reversal in the flag salute cases, *Gobitis* and *Barnette*.[249] In this instance, *Sherbert* was preceded by two 1961 cases, *Braunfeld v. Brown*[250] and *McGowan v. Maryland*,[251] in which the Warren Court upheld Sunday closing laws against Free Exercise and Establishment Clause challenges.[252] These laws had been targeted by the AJC and the ACLU in the late 1950s and early 1960s.[253] Jewish merchants and employees were obviously disfavored by these accommodations of mainstream observance, as were others who did not worship on Sunday. *Sherbert* did not reverse the Sunday closing law cases directly,[254] but instead it held that a state law that conditioned unemployment benefits on an employee's willingness to work on all days except Sunday violated the religious free exercise rights of a Sabbatarian—Adele Sherbert.[255]

Importantly, *Sherbert* established for the first time that substantial government burdens on free exercise required the application of strict scrutiny. The government had to show that "no alternative forms of regulation"[256] were available to further a

---

[246] 304 U.S. 144 (1938).

[247] 347 U.S. 483 (1954).

[248] 374 U.S. at 399.

[249] *See supra* notes 192–99 and accompanying text.

[250] 366 U.S. 599 (1961).

[251] 366 U.S. 420 (1961).

[252] *See* GREEN, *supra* note 184, at 165.

[253] *See* De'Siree N. Reeves, *Missing Link: The Origin of* Sherbert *and the Irony of Religious Equality*, 15 STAN. J.C.R. & C.L. 201, 207, 238–39 (2019).

[254] *Id.* at 246.

[255] 374 U.S. at 402.

[256] *Id.* at 407.

"compelling state interest."[257] That test was designed to be minority protecting.[258] Informed by *Carolene Products* and consistent with *Barnette*, the decision was based, in large part, on an equality rationale, namely that withholding unemployment benefits from Sabbatarians was unconstitutional religious discrimination.[259] *Schempp* and *Sherbert* were handed down on the same day, which was not coincidental, as the Justices perceived the two cases—one focused on disestablishment and the other on free exercise—as constitutional companions.[260] The same could be said for the coalition that supported Sherbert's claim for employment benefits, which overlapped substantially with the groups that opposed Bible reading in *Schempp*: the ACLU, the AJC, and the Anti-Defamation League.[261]

For these groups, and for the Justices who were receptive to their arguments, support for free exercise exemptions and opposition to government funding and sponsorship of religion were aspects of a broader approach to church-state separation. *Lemon v. Kurtzman*, handed down in 1971, represented the most fully articulated statement of this position. Drawing together previous precedents, *Lemon* set forth a three-part test for applying the Establishment Clause: a law must (1) have a secular purpose, (2) have a primary effect of neither advancing nor inhibiting religion, and (3) avoid excessive entanglement between government and religion.[262] Though *Lemon* could be understood doctrinally as rationalizing the Court's school-aid decisions, in fact, there were few to that point. Between *Everson* (1947) and *Lemon* (1971), the Supreme Court had decided only one genuine funding case on its merits, *Board of Education v. Allen*,[263] which upheld textbook aid to religious schools, just as *Everson* had upheld transportation support.[264] Notably, it was not until *Lemon* that the Court invalidated a school-aid program.[265] *Lemon* itself involved Rhode Island

---

[257] *Id.* at 403.

[258] *See* Reeves, *supra* note 253, at 230, 249.

[259] *Id.* at 246–47.

[260] *Id.* at 243–44.

[261] *See id.* at 239; Michael Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Advocacy*, 56 SAN DIEGO L. REV. 306, 325 (2019).

[262] 403 U.S. at 612–13.

[263] 392 U.S. 236 (1968).

[264] *Id.* at 243.

[265] Other invalidations of state aid came later. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985) (sending public school teachers to teach secular subjects in religious schools); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 375 (1985) (same); Wolman v.

and Pennsylvania statutes that subsidized private-school teacher salaries or paid for the teaching of secular subjects in parochial schools.[266] In both states, public subsidies overwhelmingly benefited Catholic education.[267]

While *Lemon* focused on aid to parochial schools in Northern states,[268] the main political action in this period involved a shift in Southern Protestant attitudes toward state support for religious schools. Catholic schools had been declining in enrollment before *Lemon*, but white Christian academies designed to avoid desegregation rapidly expanded after *Brown v. Board of Education* and into the 1960s.[269] During this period, as Jeffries and Ryan noted, some strongly separationist Protestants changed their position.[270] The passage of the Civil Rights Act of 1964[271] coincided with the opening of the first segregationist Christian academies in Mississippi and South Carolina.[272] The arc of school aid in the South tracked massive resistance to *Brown*. Southern Protestants—in particular, evangelicals and fundamentalists—moved from opposing school aid, assuming it would go to Catholic schools, to backing school aid that would benefit white Christian academies. This shift was in direct response to the effort to desegregate the schools.[273]

In the North, the school-aid battle took a similar form, though its racial aspects were often less acknowledged. *Lemon* itself is a striking example. Today, the case is remembered for its interpretation of the Establishment Clause. But as presented to the Supreme Court, the case also included an equal protection challenge to racial discrimination.[274] The lead plaintiff, Alton Lemon,

---

Walter, 433 U.S. 229, 254 (1977) (invalidating transportation on field trips); Meek v. Pittenger, 421 U.S. 349, 366 (1975) (regarding instructional materials); Levitt v. Comm. for Pub. Educ., 413 U.S. 472, 481–82 (1973) (concerning costs for administering state-required tests); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 780, 794 (1973) (involving tuition rebates and tax deductions).

266 403 U.S. at 606–07.

267 *Id.* at 608, 610.

268 *Id.* at 606.

269 *See* Jeffries & Ryan, *supra* note 15, at 337.

270 *Id.* at 339–40.

271 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 2000a et seq.).

272 *See* Jeffries & Ryan, *supra* note 15, at 330.

273 *See* RANDALL BALMER, BAD FAITH: RACE AND THE RISE OF THE RELIGIOUS RIGHT 38–49 (2021); NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 295, 300–02 (1999); DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 1–11 (1976).

274 *See* Catherine Ward, *Northern Schools and* Lemon*'s Forgotten Segregation Claim*, 47 J. SUP. CT. HIST. 179, 182 (2022).

was a Black civil rights activist and social worker whose children attended Philadelphia public schools.[275] He sought to challenge the Pennsylvania statute in part on the ground that it fostered, encouraged, and subsidized a segregated school system.[276] More than 60% of the students in Philadelphia's public schools were Black.[277] In Philadelphia's Catholic schools, 71,000 children attended schools with only white students, approximately 6,300 students attended all-Black schools, and only about 3,000 students attended integrated schools.[278] Black enrollment in the surrounding county's parochial schools—also part of the Philadelphia Archdiocesan school system—was less than 1% of the student body.[279] As Mr. Lemon argued, state aid was subsidizing the mass withdrawal of white students from urban schools to private schools, and Catholic schools were by far the main destinations for these white students and the largest recipients of state aid.[280]

In other words, as commentators recognized at the time, Catholic school systems in the North were, whether purposefully or inadvertently, mechanisms for segregation.[281] New England's parochial schools were highly segregated, and students in that region had the worst "interracial exposure rate" of any Catholic schools nationwide.[282] In Philadelphia, former mayor and school board president Richard Dilworth argued in 1966 that big cities would find themselves "with public school systems almost entirely non-white, and parochial and private school systems at least 90 per cent white."[283] Arguing on behalf of the Rhode Island petitioners in *Lemon*, Leo Pfeffer, attorney for the AJC, observed that "many parents are withdrawing their children from public schools and sending them to parochial schools, not so that they may better pursue God but more effectively to avoid racial integration."[284]

---

275 *Id.* at 180.

276 *Id.* at 182.

277 *See* Jon S. Birger, *Race, Reaction, and Reform: The Three Rs of Philadelphia School Politics, 1965–1971*, 120 PA. MAG. HIST. & BIOGRAPHY 163, 200 (1996).

278 Ward, *supra* note 274, at 182.

279 *Id.*

280 *Id.* at 181–83, 189.

281 *See* Leo Pfeffer, *What Hath God Wrought to Caeser: The Church as a Self-Interest Interest Group*, 13 J. CHURCH & STATE 97, 109 (1971).

282 Ward, *supra* note 274, at 187.

283 *Id.*

284 *Id.* at 189.

Black migration, white flight, integration mandates, and student busing dominated the church-state politics of school funding through the decades following *Lemon*—in both the North and South. Between 1965 and 1983, Christian academies grew by over 700%, while enrollment in Catholic schools fell by half.[285] By 1997, Catholic schools accounted for less than half of private school enrollment; Christian academies accounted for at least 20%.[286] The Catholic demand for state funding did not wane, but the Protestant opposition split, foreshadowing the demise of the no-aid principle in the following decades.

This new funding politics helps explain the rise of the evangelical movement as a political force.[287] To be sure, the counterculture movements of the late 1960s and 1970s, including most prominently the mobilization for women's equality, generated pushback from religious conservatives.[288] Oral contraception (the Pill) was approved by the Food and Drug Administration in 1960 and became widely available soon thereafter.[289] Congress passed the Equal Rights Amendment with bipartisan support and sent it to the states in March of 1972.[290] And *Roe v. Wade*[291] was decided in 1973, two years after *Lemon*. To religious conservatives—many of whom were Southern evangelicals—"[l]esbianism, Marxism, and extreme social change" were clear and present dangers.[292] Godlessness and the problem of rising secularism were common themes, and 1950s anticommunism was repurposed to serve

---

285 *See* Jeffries & Ryan, *supra* note 15, at 337.

286 *Id.* at 338. By the turn of the twenty-first century, Jeffries and Ryan could report that "[t]oday, virtually all of these schools say that they practice nondiscrimination, and many—perhaps most—enroll African-American students. Nonetheless, private academies remain havens for whites seeking to avoid minority status in public school systems dominated by persons of color." *Id.* at 283.

287 FRANK LAMBERT, RELIGION IN AMERICAN POLITICS 197–98 (2008); WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT 168–73 (1996).

288 *See* Reva B. Siegel, *Memory Games:* Dobb*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1149 (2023); LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 76–79 (2012).

289 *See* DONNA J. DRUCKER, CONTRACEPTION: A CONCISE HISTORY 11 (2020); ELAINE TYLER MAY, AMERICA AND THE PILL: A HISTORY OF PROMISE, PERIL, AND LIBERATION 3 (2010).

290 Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1377–78 (2006).

291 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

292 *See* GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 133 (quoting *How to Lobby From Your Kitchen Table*, CONCERNED WOMEN FOR AM., https://perma.cc/ZUW5-NPZC).

traditional values and the emerging political organization of conservative evangelicals.[293]

There is an ongoing historical debate about whether opposition to abortion was a longstanding evangelical concern or whether it became a wedge issue in the late 1970s, used by movement leaders on the religious right to motivate evangelicals to support the Republican Party, which was more concerned with opposing racial integration than it was with opposing abortion.[294] Whatever the case, there is no doubt that the central political realignment of the era—the flight of Southern white evangelicals to the Republican Party—represented a backlash to Black civil rights.[295] Certainly abortion, school prayer, and the Equal Rights Amendment were part of a constellation of issues that motivated many evangelicals.[296] But school funding post-*Brown* was an obvious concern, and the segregationist "Southern Strategy" included appeals to religious conservatives.[297]

The fight over racial equality in religious schools was brought to a head by the Internal Revenue Service's (IRS) decision in 1975 to deny tax exemptions to private religious schools practicing

---

[293] *Id.* at 144.

[294] *Compare* Gillian Frank & Neil J. Young, *What Everyone Gets Wrong About Evangelicals and Abortion*, WASH. POST (May 16, 2022), https://www.washingtonpost.com/outlook/2022/05/16/what-everyone-gets-wrong-about-evangelicals-abortion/ (arguing that evangelical opposition to abortion predated *Roe*), *with* BALMER, *supra* note 273, at 31–37 (arguing that evangelical opposition to abortion did not arise until after *Roe*), *and* SARAH POSNER, UNHOLY: WHY WHITE EVANGELICALS WORSHIP AT THE ALTAR OF DONALD TRUMP 109 (2020) [hereinafter POSNER, UNHOLY] (arguing that evangelicals were motivated by racial backlash, not by *Roe*).

[295] *See generally* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); KEVIN KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2013).

[296] *See* Jeffries & Ryan, *supra* note 15, at 341; FRANCES FITZGERALD, THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA 291, 294–96 (2017). Note that the Southern Baptist Convention (SBC), previously a strong supporter of separationism, maintained a qualified defense of abortion rights until 1980. *See* Andrew R. Lewis, *Abortion Politics and the Decline of the Separation of Church and State: The Southern Baptist Case*, 7 POL. & RELIGION 521, 528 (2014). Professor Andrew Lewis argued that the SBC's shift on abortion diluted its separationism as pro-life Baptists defended abortion regulations from charges that they violated the Establishment and Free Exercise Clauses. *See id.* at 528–29.

[297] *See* ANGIE MAXWELL & TODD SHIELDS, THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS 261–62 (2019); ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 88–110 (2016); KEVIN PHILIPS, THE EMERGING REPUBLICAN MAJORITY (updated ed., 2014).

racial discrimination.[298] During his campaign for President in 1980, Ronald Reagan spoke at Bob Jones University, which had denied entry to Black students. By the time of his speech, Bob Jones had changed its policies, first to permit married Black students to attend, and then to allow unmarried Black students, while still prohibiting interracial dating.[299] Reagan's speech was well received, responding as it did to issues that animated conservative Southern evangelicals, including interference in private religious institutions and racial integration or, as Reagan put it, "racial quotas."[300] The Reagan revolution was underway, with the increasing support of an emerging "religious right" or "moral majority."[301]

Bob Jones University v. United States[302] was decided in 1983, along with a companion case, *Goldsboro Christian Schools, Inc. v. United States*.[303] Since its incorporation in 1963 in North Carolina, Goldsboro had maintained an all-white admissions policy based on its reading of scripture.[304] The two cases were easy for the Court. The lone dissenter, Justice William Rehnquist, affirmed the power of the IRS to deny a tax exemption to a religious school that discriminated based on race and objected only that Congress had not actually empowered the IRS to do so.[305] The other eight Justices, led by Chief Justice Burger, applied strict scrutiny and held that the government had met its burden: eradicating racial discrimination in education served a compelling government interest and there were no less restrictive means.[306]

Bob Jones represented the collision of free exercise and integration, and the latter won—though more in principle than in practice. The IRS has tended to underenforce its nondiscrimination policies, requiring little more than assertions of compliance.[307] The more significant effect of *Bob Jones* was to consolidate

---

[298] *See* DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 164 (2012) [hereinafter WILLIAMS, GOD'S OWN PARTY]; Olati Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 128, 135 (William Eskridge, Philip P. Frickey & Elizabeth Garrett eds., 2010); Jeffries & Ryan, *supra* note 15, at 340–41.

[299] GORDON, THE SPIRIT OF THE LAW, *supra* note 186, at 155.

[300] *Id.* at 156; FITZGERALD, *supra* note 296, at 303–04, 312.

[301] *See* LAMBERT, *supra* note 287, at 184–209; BALMER, *supra* note 273, at 61–65.

[302] 461 U.S. 574 (1983).

[303] 454 U.S. 892 (1981).

[304] *Bob Jones Univ.*, 461 U.S. at 583.

[305] *Id.* at 612–13 (Rehnquist, J., dissenting).

[306] *Id.* at 604 (majority opinion).

[307] *See* POSNER, UNHOLY, *supra* note 294, at 115; Johnson, *supra* note 298, at 157–58.

the ongoing political realignment with Southern evangelicals, who had been supporters of separationism but were now seeking to protect or expand aid to private schools. The religious right emerged from the 1980s with several agenda items: an end to abortion, the restoration of school prayer, and funding for religious schools.[308] The threat to the dominant Protestant culture was no longer Catholics, but rather secularists of all kinds.[309] The religious right's agenda then could be shared across conservative denominations, whether Protestant, Catholic, or Jewish.[310] And this realignment shaped the platform of the Republican Party,[311] whose political fortunes were buoyed by a potent culture-war mix of religion and race, and whose evangelical constituency was a key to its political success.[312]

C. Deferentialism: 1990–2020

The rise of the religious right and the decline of mainline Protestant churches initiated the unraveling of the separationist settlement that had developed in the early 1960s. Conservatives began to dominate the Supreme Court. Between 1980 and 2020, Republicans controlled the White House for twenty-four of the forty years—just over half.[313] During that same period, however, Republican Presidents appointed eleven Justices and Democratic Presidents appointed only four, even though the presidency alternated between parties, with Presidents Bill Clinton and Barack Obama both serving two terms during that period.[314] Not all the Justices voted the interests of their President's party all the time, but that only delayed the trend.[315]

---

308 *See* BALMER, *supra* note 273, at 51–57; Jeffries & Ryan, *supra* note 15, at 340–41.

309 *See* Siegel, *Memory Games*, *supra* note 288, at 1149–51.

310 *See* JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW, AND POLITICS IN AMERICA 85–95 (1992).

311 *See* Jeffries & Ryan, *supra* note 15, at 350 & n.407.

312 There is a large literature tracing the mutual influences and relationships between U.S. evangelical groups and the modern Republican Party. *See, e.g.*, FITZGERALD, *supra* note 296, at 411–32; WILLIAMS, GOD'S OWN PARTY, *supra* note 298, at 175–88; CLYDE WILCOX, ONWARD CHRISTIAN SOLDIERS? THE RELIGIOUS RIGHT IN AMERICAN POLITICS 59–92 (1996).

313 *See* CHARLES M. CAMERON & JONATHAN P. KASTELLEC, MAKING THE SUPREME COURT: THE POLITICS OF APPOINTMENTS, 1930–2020, at tbl.8.2 (2023).

314 *See Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://perma.cc/44CC-QLUJ.

315 *See* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 10–12 (2005).

The unraveling of separationism came quickly with respect to free exercise. In 1990, the Court decided *Employment Division v. Smith*, which held that neutral and generally applicable laws were not subject to heightened review when they incidentally imposed burdens on religion.[316] *Smith* rejected the separationist doctrinal presumption in favor of religious exemptions, purporting to distinguish *Sherbert* but effectively overruling it.[317]

Change came more gradually in school-funding cases under the Establishment Clause. *Zelman v. Simmons-Harris*, which upheld an Ohio school voucher program that permitted indirect public funding of private religious schools, was a major turning point in 2001.[318] Though decided eleven years after *Smith*, *Zelman* had been anticipated by a series of cases that loosened constraints on government aid to religious schools.[319]

This period, marked by *Smith* and *Zelman*, can be characterized as one of constitutional deference. The Court reduced the scope of both the Free Exercise and Establishment Clauses, in contrast to preceding periods, which had witnessed their expansion.[320] A posture of judicial deference on the part of the Rehnquist Court gave governments more latitude, or "play in the joints,"[321] to grant religious exemptions, which were no longer constitutionally mandated, and to fund religious institutions, at least indirectly, which was no longer prohibited. These decisions were often

---

316 494 U.S. at 886 n.3.

317 *Id.* at 884–85.

318 536 U.S. at 662–63.

319 *See generally* Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

320 In *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), Justice Rehnquist had laid out the blueprint for this approach, which the Court went some ways toward implementing during his tenure as Chief Justice. *See id.* at 727 (Rehnquist, J., dissenting):

> If the Court were to construe the Free Exercise Clause as it did in *Braunfeld* and the Establishment Clause as Justice [Stewart] did in *Schempp*, the circumstances in which there would be a conflict between the two Clauses would be few and far between . . . . I regret that the Court cannot see its way clear to restore what was surely intended to have been a greater degree of flexibility to the Federal and State Governments in legislating consistently with the Free Exercise Clause.

321 *See supra* notes 46–47, 130–31, and accompanying text.

cast as part of the Court's broader federalism jurisprudence.[322]

That said, the strength of judicial review in the previous period should not be overstated. For all their talk of strict scrutiny, the Warren and Burger Courts granted exemptions in only four cases: three concerning unemployment benefits (including *Sherbert* itself), and one case granting an exemption from truancy laws to the Old Order Amish.[323] They denied relief in every other case, either skirting the compelling interest test or finding it satisfied.[324] In the lower courts, similarly, the *Sherbert* test was inconsistently and rarely deployed to protect minority religions.[325] With respect to the Establishment Clause, the *Lemon* test seemed often manipulated to favor state support of religion. In 1983, the Court rejected challenges to a public display of a creche and to legislative prayer, even while purporting to apply *Lemon*'s framework.[326] Chief Justice Burger recalled Justice Douglas's affirmation of U.S. religiosity in *Zorach*, insisting once again that "[w]e are a religious people whose institutions presuppose a Supreme Being."[327]

Nevertheless, the abandonment of *Sherbert* in 1990 was striking. Like most of the Court's earlier accommodation cases, *Smith* arose out of a dispute over unemployment benefits. Two Native American employees of a drug rehabilitation clinic had been fired for ingesting peyote as part of a sacred ritual.[328] Because they were discharged for "work-related misconduct,"[329] and because peyote was proscribed by Oregon's controlled

---

322 *See, e.g.*, Richard W. Garnett, *Chief Justice Rehnquist, Religious Freedom, and the Constitution*, *in* THE CONSTITUTIONAL LEGACY OF WILLIAM H. REHNQUIST 12–14 (Bradford P. Wilson ed., 2015); Richard Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1816 (2004).

323 *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1414 (1992) [hereinafter Ryan, Smith *and the Religious Freedom Restoration Act*].

324 *See id.*; Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 52 (2015).

325 Ryan, Smith *and the Religious Freedom Restoration Act*, *supra* note 323, at 1416–17.

326 Lynch v. Donnelly, 465 U.S. 668 (1984) (rejecting an Establishment Clause challenge to a state-sponsored holiday display); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the constitutionality of legislative prayer).

327 *Lynch*, 465 U.S. at 675 (quoting *Zorach*, 343 U.S. at 313).

328 *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 106 (2001); Garrett Epps, *The Story of Al Smith: The First Amendment Meets Grandfather Peyote*, *in* CONSTITUTIONAL LAW STORIES 477, 478 (Michael C. Dorf, ed., 2004).

329 *Smith*, 494 U.S. at 876.

substance law, they were deemed ineligible for receipt of unemployment benefits. The Court upheld the denial.[330]

Today it may seem surprising that *Smith* was authored by Justice Antonin Scalia and joined in the main by the conservative wing of the Court. The Justices could have applied *Sherbert*'s higher level of scrutiny and nevertheless held that drug prohibitions were justified by compelling state interests and narrowly tailored.[331] But the rule of *Smith*—that free exercise exemptions are not available from neutral and generally applicable laws—was clearly intended to weaken the Free Exercise Clause.[332] Justice Scalia relied explicitly on *Gobitis*, the short-lived flag salute case, in asserting that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[333] Judicial restraint was a conservative theme in the wake of the Warren and Burger Courts, partly to weaken fundamental rights and partly to strengthen federalism and the separation of powers.[334]

Smith could also be understood as part of a conservative reaction to an emerging religious landscape that was fragmented, individualistic, idiosyncratic, and less tethered to older religious traditions. By 1990, the sociology and demographics of U.S. religious belief had shifted substantially. Mainstream faiths had declined in importance, and, in the 1970s and 1980s, Americans increasingly defined their religious practices in self-actualizing terms. The sociologist Robert Bellah and his coauthors famously observed that the reality "of over 220 million American religions, one for each of us," was "a perfectly natural expression of current American religious life."[335] For many conservatives, applying an exemption regime to such a wide diversity of religious views was a frightening proposition. In Justice Scalia's view, it was an invitation to anarchy, which would "permit every citizen to become a

---

330 *Id.* at 890.

331 *See id.* at 907 (O'Connor, J., concurring).

332 *See id.* at 886 n.3 (majority opinion).

333 *Id.* at 879.

334 *See* Stephen M. Feldman, *Conservative Eras in Supreme Court Decision-Making:* Employment Division v. Smith*, Judicial Restraint, and Neoconservatism*, 32 CARDOZO L. REV. 1791, 1797–99 (2011).

335 *See* ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 221 (1985).

law unto himself."[336] A robust Free Exercise Clause would risk challenges to a wide range of legislation—not only drug laws, but also many others opposed by countercultural forces in the previous decades.[337] Deconstitutionalizing free exercise exemptions had the institutional benefit of getting the Court out of the business of deciding which beliefs and practices deserved respect and protection.[338]

The Court's ruling in *Smith* was, however, extraordinarily unpopular. In 1993, a unanimous House of Representatives and a virtually unanimous Senate passed RFRA, which President Bill Clinton immediately signed into law.[339] RFRA was meant to overturn *Smith*'s central holding and reinstate the *Sherbert* test.[340] Practically every major religious denomination supported RFRA,[341] and they were joined by the ACLU and other civil rights organizations. Liberal groups saw RFRA as a vindication of equality guarantees for vulnerable minorities. And conservative groups understood the benefits of exemptions for securing religious liberty.[342]

So while *Smith* made some doctrinal waves, its practical import was more muted, partly because the decision itself carved out important exceptions from its rule, and partly because of RFRA and equivalent statutes enacted in the states.[343] Nevertheless, the Court's move to limit sharply the scope of free exercise was consistent with a general deconstitutionalization of the Religion Clauses.

---

336 *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

337 *See id.* at 888–89.

338 *Id.* at 889 n.5.

339 *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2527 n.46 (2015) [hereinafter NeJaime & Siegel, *Conscience Wars*].

340 *See* Lederman, *supra* note 107, at 428 ("[Congress] enacted RFRA to 'restore,' as a statutory mandate, that 'compelling interest test.'"); Micah Schwartzman, *What Did RFRA Restore?*, RELIGIOUS FREEDOM INST. (June 16, 2016), https://perma.cc/LH6D-UTWT.

341 Notably, the United States Conference of Catholic Bishops (USCCB) initially refused to support the law because of concerns that RFRA would authorize exemptions from laws prohibiting abortion. After the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 (2022), and President Clinton's election, the USCCB dropped its opposition to RFRA. *See* Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 65–67 (2022).

342 Laycock & Thomas, *supra* note 339, at 210–11.

343 *See* Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2057–59 (2011).

At the same time, the Supreme Court also began to revisit separationist orthodoxy, with conservative Justices raising questions about the anti-Catholic origins of the no-aid doctrine under *Everson*,[344] heaping criticism on *Lemon*,[345] and rejecting the principle of religious neutrality.[346] The conservative jurisprudence of this period was skeptical of the minority-protecting impulses of the previous cases.[347] Just as incidental burdens on religion should not be constitutionally cognizable, so too funding of religious schools should be majoritarian, subject only to limited judicial review.

Writing during this period, Jeffries and Ryan explained the collapse of the separationist consensus by reference to a new alliance between white evangelicals, Roman Catholics, and Orthodox Jews, many of whom came to support aid for religious schools.[348] On this basis, Jeffries and Ryan predicted the outcome in *Zelman*, which was preceded by a number of cases that had already opened the door to school funding via the concept of "parental choice."[349] Deference to legislatures meant that, under *Zelman*, states could fund religious schools through vouchers. But they were not required to do so; state restrictions on aid to religious schools would remain in place. "Play in the joints" was the principle, along with federalism's permissive posture toward state arrangements.[350]

The voices opposing funding were becoming more muted, holding on to a principle—no aid—that seemed to be losing its relevance in a diverse society that distributed benefits across a wide and even bewildering array of religious denominations.[351]

---

344 *See Mitchell*, 530 U.S. at 828–29.

345 *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, . . . *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.").

346 *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (rejecting religious neutrality as "the demonstrably false principle that the government cannot favor religion over irreligion").

347 *See* Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 152 n.38, 161 (2004).

348 *See* Jeffries & Ryan, *supra* note 15, at 328.

349 *See id.* at 367 ("Based primarily on these factors, we predict that the use of vouchers at private, religious schools will, sooner or later, be upheld.").

350 *See* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (allowing "play in the joints" for state funding of ministerial education).

351 *Cf.* Vince Blasi, *School Vouchers and Religious Liberty: Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 786 (2002) ("In terms of either first principles of political theory or the implications of the modern case law, the voucher issue is complicated and daunting.").

Meanwhile, some progressives were championing vouchers as a mechanism for addressing a steadily collapsing and unequal educational system, especially for Black children.[352]

But *Zelman* also represented a failure of the long civil rights struggle. "School choice" at the turn of the twenty-first century found echoes of similar demands for choice during the period of massive resistance in the South.[353] Resegregation happened in the North more quickly than in the South, where judicial orders prevented some backsliding.[354] By 2001, the prospects for school integration looked bleak—and still do today. The Philadelphia public schools at issue in *Lemon* are currently 50% Black, compared to 14% white, and have been for some time.[355] The country has generally given up on integration,[356] while an emboldened Roberts Court has invoked colorblindness to undercut voluntary school desegregation efforts[357] and, more recently, affirmative action in higher education.[358] During this period, undoing limits on religious school funding was consistent with this longer historical narrative of retrenchment and the abandonment of racial integration as a constitutional ideal.[359]

D. Preferentialism: 2020–

The end of approximately thirty years of church-state *deferentialism* can be marked with two recent Supreme Court decisions, ushering in the current regime of *structural*

---

[352] *See, e.g.*, STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 82–93 (2012); Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171, 176.

[353] *See* STEVE SUITTS, OVERTURNING *BROWN*: THE SEGREGATIONIST LEGACY OF THE MODERN SCHOOL CHOICE MOVEMENT 3–8 (2020).

[354] *See* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 42 (2010) [hereinafter RYAN, FIVE MILES AWAY]; THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION 163 (Erika Frankenburg & Gary Orfield eds., 2012).

[355] *See Fast Facts*, SCH. DIST. OF PHILA., https://perma.cc/9GL7-HYHA; *see also* Dale Mezzacappa, *Philadelphia Area Schools Among the Most Segregated in the Country*, CHALKBEAT PHILA. (May 23, 2022), https://perma.cc/K3GZ-WSKU.

[356] *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007) ("The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years.").

[357] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 747–48 (2007).

[358] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023).

[359] *See* Ryan, *Voluntary Integration, supra* note 356, at 154 ("[T]he Court is not simply telling school officials and citizens interested in racial integration that their pursuit might be difficult . . . . Instead, the Court is telling them that their pursuit is wrong or, at best, distasteful.").

preferentialism. With respect to free exercise, *Tandon v. Newsom*, a pandemic-related public health case decided in 2021, has eviscerated *Employment Division v. Smith*, even without formally overruling it.[360] As we have described, the Court's emergent free exercise doctrine requires broad religious exemptions—the exact opposite of *Smith*, which sharply restricted them.[361] In terms of Establishment Clause jurisprudence, *Carson v. Makin*, a funding case decided in 2022, not only permits but *requires* that private religious schools receive state funding on an equal basis with private secular schools.[362]

Preferentialism is characterized by an expansive Free Exercise Clause with little or no Establishment Clause constraints on state funding, government expression, or religious exemptions. The Court has now rejected a federalism-friendly doctrine of "play in the joints" with respect to funding and exemption rules—except when the government favors religious institutions. In many circumstances, both funding and exemptions are now constitutionally mandatory.[363]

Jeffries and Ryan did not anticipate the Court moving so quickly from discretionary aid in *Zelman* to compulsory funding in *Carson*.[364] They certainly did not contemplate the possibility that the Court would extend free exercise exemptions to corporations and to core civil rights statutes and healthcare regulations. They did offer a prediction, however, arguing that the United States' increasing religious pluralism would prevent a return to school prayer and the embrace of a more aggressive public Christianity.[365] That prediction was based on a narrative of increasing religious and cultural diversity: a story of how the Protestant–Catholic tensions of a prior era had given way to a panoply of religious groups seeking and receiving government aid.[366] With ever-expanding pluralism, government funding of religious organizations might seem no more threatening than funding of their secular counterparts. At the same time, pluralism works against school prayer or other forms of government religious expression. According to this account, the multiplicity of

---

360 141 S. Ct. 1294.

361 *See supra* Part I.B.1.

362 142 S. Ct. at 2002.

363 *See supra* notes 128–31 and accompanying text.

364 *See* Jeffries & Ryan, *supra* note 15, at 367–68 (predicting permissive but not mandatory funding).

365 *Id.*

366 *Id.* at 368.

religious views in society would make religious preferentialism particularly unlikely.[367]

In the more than twenty years since Jeffries and Ryan made that claim, however, the politics of the Religion Clauses have shifted yet again. Today, the Free Exercise Clause—and not the Establishment Clause—must be central to any account of the political economy of decisions involving religious institutions.[368] The Roberts Court has now sharply limited the scope of judicial deference under *Smith*,[369] while abandoning the *Lemon* test and rendering Establishment Clause limits on funding and public religious expressions almost nonexistent.[370]

We will say more about the factors that account for this dramatic doctrinal shift in Part III below. The basic political background, however, can be sketched here—and, perhaps most obviously, it involves personnel changes on the Supreme Court. President Trump made three appointments to the Court during his single term: Justices Neil Gorsuch (2017), Brett Kavanaugh (2018), and Amy Coney Barrett (2020). These appointments have shifted power from a five-to-four conservative majority, which included one unreliable swing vote, to a more reliable six-to-three supermajority. Far more than earlier Courts controlled by Republican-appointed majorities, the new Roberts Court has reached decisions consistent with the long-standing political and cultural agenda of the Republican Party.[371] The most visible proof is *Dobbs v. Jackson Women's Health Organization*,[372] which overruled *Roe v. Wade* and finally brought the Court into alignment with the Republican Party's religiously conservative base.[373]

---

[367] *Id.* at 283–84 ("[T]he growing religious diversity of public school students makes it more and more difficult to envision any religious exercise that would not favor some faiths and offend others. We therefore predict that the constitutional prohibition against religious exercises in the public schools will remain intact.").

[368] *Cf.* Elizabeth Sepper & James Nelson, *Religion Law and Political Economy*, 108 IOWA L. REV. 2341 (2023) (arguing that the law and political economy field "urgently needs to grapple with religion"); Kate Redburn, *The Law and Political Economy of Religious Freedom*, LPE PROJECT (Sept. 8, 2022), https://perma.cc/3CTY-X3AM (urging scholars of law and political economy to pay more attention to the "shifting balance" between the Free Exercise Clause and the Establishment Clause).

[369] *See infra* Part I.B.

[370] *See infra* Part I.A.

[371] *See* Noah Feldman, *The Court's Conservative Constitutional Revolution*, N.Y. REV. (Oct. 5, 2023), https://www.nybooks.com/articles/2023/10/05/the-courts-conservative-constitutional-revolution-noah-feldman/.

[372] 142 S. Ct. 2228 (2022).

[373] *See* Siegel, *Memory Games*, *supra* note 288, at 1173.

Dobbs can be compared with *Obergefell v. Hodges*,[374] which constitutionalized the right to same-sex marriage in 2015,[375] a signal blow to the traditionalist agenda.[376] The decades-long backlash to the sexual revolution, women's liberation, and LGBTQ civil rights always included opposition to abortion and contraception.[377] Since the mid-1990s, it has also been driven by opposition to marriage equality,[378] and now more recently to transgender rights.[379]

From one angle then, the emergent church-state regime is continuous with the conservative religious-political movement that emerged in the 1980s. That movement sought repeatedly to capture the Court and finally did so in the Trump presidency, though too late to prevent *Obergefell*. The success of religious conservatives in appointing judges who share their constitutional vision has certainly been critical to the rise of the new paradigm.

The politics of preferentialism are, however, discontinuous in some ways from those of previous church-state settlements. Unlike the deferential regime characterized by *Smith* and *Zelman*, structural preferentialism is not deferential to political majorities. Justice Scalia, who wrote for the Court in *Smith*,[380] and Chief Justice Rehnquist, who supported "play in the joints,"[381] understood the dominant culture as mostly congenial to a conservative morality, even if increasingly under threat. A narrow Free Exercise Clause and limited Establishment Clause were part of a wider program of judicial deference, meant to constrain progressive-leaning courts, who would otherwise enforce exemptions for minority religions, bar government from funding religious schools or holding religious ceremonies, and recognize new

---

374 576 U.S. 644 (2015).

375 *Id.* at 681.

376 Or at least it was received this way by religious conservatives, including those in the legal academy. *See* Stephen J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 5–9 (2015) (surveying reactions to *Obergefell* from religious conservatives).

377 *See* ZIAD MUNSON, ABORTION POLITICS 31–34 (2018); B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U. J.L. & POL'Y 103, 105–10 (2016); Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L. REV. 373, 409–24 (2007).

378 *See* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. CIV. RTS. & CIV. LIB. L. REV. 129, 160–69 (2015); NeJaime & Siegel, *Conscience Wars*, *supra* note 339, at 2558–65.

379 *See* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1134–56 (2024).

380 494 U.S. 872 (1990).

381 *Locke*, 540 U.S. at 718.

rights of privacy and sexual autonomy.[382] Old-school deference to political majorities could be counted on in the main to protect traditional morality. For this reason, the Rehnquist Court, along with the conservative judicial establishment, was at least rhetorically committed to judicial deference and hostile to activism. *Roe* was wrongly decided, but so was *Sherbert*—for similar reasons.

The new preferentialism, however, has been described, pursued, and articulated in different terms. Borrowing from equal protection and asserting a civil liberties pedigree, the cases are explicitly cast as minority protective.[383] The doctrine presumes, even if only implicitly, a shift in the majoritarian political culture away from traditional morality.[384] Exemptions are deemed necessary to protect religious believers from secular imposition, especially when regulations involve the recognition of sexual diversity, equality, and autonomy. Similarly, equal funding is required to maintain the distinct (minority) cultures of religious institutions, which are being disfavored and repressed by mainstream (again, secular) society.[385]

Conservative judicial activism is alive and well.[386] In the church-state context, the Court's judicial rhetoric sounds in the register of *Barnette*, the forced flag salute case,[387] and involves what to the conservative Justices appear to be majoritarian restrictions on basic individual rights and freedoms: *Tandon* (2021) struck down a COVID-related gathering restriction that limited at-home religious activities;[388] *Hobby Lobby* (2014) rejected the

---

[382] *See infra* Part II.C.

[383] *See* Murray, *supra* note 14, at 282; Litman, *supra* note 14, at 14; Laura Portuondo, *Effective Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1564 (2023).

[384] Although sometimes the point is made quite explicitly. *See, e.g.*, *U.S. Supreme Court Justice Samuel Alito Delivers Keynote Address at 2022 Notre Dame Religious Liberty Summit in Rome*, NOTRE DAME L. SCH. (July 28, 2022), https://perma.cc/828B-8UTJ; *Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame*, OFF. OF PUB. AFFS. (Oct. 11, 2019), https://perma.cc/E8M4-MMFA.

[385] *See, e.g.*, Richard W. Garnett, *Religious Schools and Freedom of the Church*, L. & LIBERTY (July 10, 2020), https://perma.cc/XF6L-3F3Q.

[386] *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycle of Constitutional Time*, 98 TEX. L. REV. 215, 255–61 (2019) (surveying conservative calls to reject judicial restraint).

[387] *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318, 2321 (2023) (relying on *Barnette* to require exemption from an antidiscrimination policy applied to a wedding vendor); Dr. A. v. Hochul, 142 S. Ct. 552, 557–58 (2021) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief) (comparing healthcare workers who objected to vaccine mandates during the COVID-19 pandemic to Jehovah's Witnesses who objected to compulsory flag salutes for schoolchildren).

[388] 141 S. Ct. at 1297–98.

Affordable Care Act's contraception mandate applied to a religious corporation;[389] and *Masterpiece Cakeshop* (2018),[390] *Fulton* (2021),[391] and *303 Creative v. Elenis* (2023)[392] all required exemptions or carveouts from legislatively enacted antidiscrimination laws.[393] *Carson* (2022),[394] *Trinity Lutheran* (2017),[395] and *Espinoza* (2020),[396] were school-funding cases challenging state refusals to expend tax dollars on religious schools—all situations that have now been reinterpreted as constituting impermissible government discrimination against religious institutions.[397]

The Roberts Court has come into alignment with a significant and highly salient political coalition within the Republican Party, which has achieved its central aim of overturning *Roe v. Wade*, but which also has among its goals the return of school prayer, the public funding of religious schools, the limitation—if not outright reversal—of LGBTQ rights, the weakening of access to contraception, and the rollback of public health regulations. While these positions do not generally enjoy mainstream support, they are responsive to specific religious interest groups and have been and are effective at mobilizing the greater conservative electorate, which as currently constituted has a particular religious cast. Those opposed to structural preferentialism are less uniform in their opposition, unaware in many instances of the Court's doctrinal revolution, and—at least currently—less mobilized.

III. EXPLAINING PREFERENTIALISM

What accounts for this political asymmetry? In this Part, we explain how judicial conservatives have moved so quickly from permissive to mandatory funding, from few exemptions to many, and from constraints on government religious speech to the constitutional deregulation of religious endorsements. We highlight several interrelated developments that have destabilized church-state relations in the United States since the last paradigm shift at the turn of the twenty-first century. These developments include political polarization; rising religious disaffiliation; the

[389] 573 U.S. at 736.
[390] 138 S. Ct. at 1732.
[391] 141 S. Ct. at 1882.
[392] 143 S. Ct. 2298 (2023).
[393] *Id.* at 2321–22.
[394] 142 S. Ct. at 1995.
[395] 137 S. Ct. at 2018.
[396] 140 S. Ct. at 2252.
[397] *See infra* Part I.A.

development of fused religious-political identities, especially on the evangelical right; and a political economy of school choice that provides a material explanation for the Court's rush to adopt compulsory funding.

A. Polarization

We start with polarization, though that term alone does not tell us very much. To be sure, U.S. public opinion has radically bifurcated. Each end of the political spectrum is not only more isolated from the other, but more uniform and more extreme in its views.[398] Causes are multiple and debated, including media segmentation, partisan gerrymandering of federal and state electoral districts, reaction to neoliberal economic policies and rising wealth inequality, racial stratification, and so forth.[399] Whatever the drivers, the collapse of the political center has had wide-ranging effects.[400]

For our purposes, we want to understand how polarization maps onto a religious interest-group theory of church-state doctrine.[401] Our brief answer is that it has magnified existing religiously informed conflicts, undercutting potential compromise positions. In particular, the politics of abortion, LGBTQ rights, and Christian national identity have all intensified. These issues have always been polarizing, but extreme partisan sorting along ethno-religious lines, coupled with ideological consistency across cultural and political views, has exacerbated longstanding tensions.

1. Abortion.

The trajectory of abortion politics is well-known. Even as polls have consistently indicated general support for abortion

---

[398] *See* LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 44 (2018); ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP 2–5 (2018).

[399] *See* NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 69–100 (2019) (surveying causes of polarization).

[400] *See* JAMES E. CAMPBELL, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 227–41 (2016) (discussing consequences of polarization for political conflict and democratic governance); MASON, *supra* note 398, at 128–29 (same).

[401] Our focus on how polarization helps explain legal doctrine differs from projects that seek to ameliorate it. *See, e.g.*, THOMAS BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE 119–50 (2023); JAMAL GREENE, HOW RIGHTS WENT WRONG 167–69 (2022). *But see* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1330 (2022) (cautioning that some attempts to reduce social conflict may exacerbate it).

rights,[402] the Republican Party has found that its opposition energizes its supporters, who have also been inclined to support a traditionalist party along other dimensions.[403] While the Republican Party's membership was largely pro-choice in the 1970s, its leadership declared a pro-life position in its 1976 platform—a shift that prefigured the transformation of the party from mainline Protestant to Catholic and evangelical.[404] The translation of the antiabortion program into Republican Party politics and then into judicial action is a lengthy and familiar story,[405] culminating most recently with the Court's reversal of *Roe* in *Dobbs*. We do not have much to add to it.

What is important for purposes of understanding previous church-state settlements is that abortion politics after 1973 settled into a constitutional equilibrium, which has now collapsed. For decades, abortion was constitutionally protected, but the government could refuse to support, fund, or promote it.[406] Federal and state legislatures also protected private actors who refused to participate in providing for abortion.[407] Statutory conscience clauses for doctors, hospitals, pharmacists, and other healthcare providers forestalled religious complaints.[408] Similarly, the Hyde Amendment,[409] which barred federal funding of abortion, limited complicity claims on the part of antiabortion taxpayers.[410] The pro-life movement continued to press for more comprehensive

---

402 *See, e.g.*, *Abortion*, GALLUP, https://perma.cc/Q29N-XR2L (showing stable majority support since 1975 for the proposition that abortion should be "legal only under certain circumstances"); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 94 (2010) ("[T]he majority of Americans continue to prefer a middle ground on abortion, one in which abortion would continue to be legal at least in some circumstances.").

403 *See* MUNSON, *supra* note 377, at 93–94.

404 *See* Daniel K. Williams, *The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. POL. HIST. 513, 514 (2011).

405 *See generally* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA (2020); ANDREW R. LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS (2017).

406 *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980) (upholding the Hyde Amendment's restriction on federal abortion funding); Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding limits on Medicaid funding for abortion).

407 *See, e.g.*, Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)–(c), 87 Stat. 91, 95. This provision is also known as the Church Amendment.

408 *See* Elizabeth Sepper, *Conscientious Refusals of Care*, *in* THE OXFORD HANDBOOK OF U.S. HEALTH LAW 354, 356–57 (I. Glenn Cohen et al. eds., 2017).

409 Consolidated Appropriations Act 2022, Pub. L. No. 117-103, div. H, §§ 506–507, 136 Stat. 49, 496.

410 *See* Mary Ziegler, *The New Negative Rights: Abortion Funding and Constitutional Law After* Whole Woman's Health, 96 NEB. L. REV. 577, 585–86 (2018).

prohibitions, of course, and much of abortion politics after *Roe* involved the adoption and judicial testing of increasingly restrictive abortion-access laws.[411] The conscience protections for providers, however, went mostly unremarked.[412] Legislators on the right and left were basically unified in protecting conscience, particularly in the core case of medical providers, but also increasingly in more peripheral contexts such as institutional support and insurance funding.[413] More contentious was the expansion of exemptions to contraceptive coverage requirements under the Affordable Care Act,[414] especially as applied to large, for-profit corporations.[415] But still this debate occurred within the constitutional framework of the existing settlement on reproductive rights.

That framework was shattered by the Court's decision to overrule *Roe* in *Dobbs*, with several implications for doctrines of religious freedom. First, some states enacted trigger laws prohibiting abortion that barely concealed their religious motivations.[416] But after *Bremerton*, which abandoned *Lemon* and presumably its secular-purpose requirement, there may be no obstacle to religiously motivated laws.[417] Second, in multiple states, abortion restrictions have been challenged as violating the religious liberty of those who object on conscientious grounds to complying with those prohibitions.[418] Under current free exercise doctrine, especially after *Tandon*, states that grant secular exceptions to abortion restrictions, such as for medical emergencies, rape and incest, or for fetal anomalies, must justify their refusal to grant

---

411 *See generally* ZIEGLER, *supra* note 405; MUNSON, *supra* note 377.

412 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 339, at 2536 (noting that the Church Amendment passed with almost unanimous support).

413 *See id.* at 2533–34 ("While early healthcare refusal laws focused on the conscience claims of professionals opposed to performing certain procedures, over time refusal laws expanded through concepts of complicity to cover an increasing number of persons and institutions in healthcare services.").

414 *See Hobby Lobby*, 573 U.S. at 735–36 (granting RFRA exemptions to for-profit corporations); *Little Sisters of the Poor*, 140 S. Ct. at 2386 (upholding regulatory exemptions).

415 *See* Sepper, *Free Exercise Lochnerism*, *supra* note 8, at 1518. *See generally* James Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565.

416 *See* Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2315 (2023).

417 *But see id.* at 2304 (arguing that Establishment Clause objections to abortion bans are stronger than many believe, even if conservative courts are unlikely to accept them).

418 *See, e.g.*, Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, 455, 459 (Ind. Ct. App. 2024) (holding that Indiana's abortion ban violates the state's RFRA and granting a preliminary injunction for a religious exemption); *see also* Schwartzman & Schragger, *Religious Freedom and Abortion*, *supra* note 416, at 2301 n.5 (collecting cases).

religious exemptions, which may not be possible under some readings of the doctrine (including our own).[419] Third, with pending litigation over these issues, the current state of abortion politics generates pressure for conservative legal elites, including Justices and judges, to embrace structural preferentialism, which facilitates antiabortion politics by allowing religious groups to legislate their views when they have majority control and by authorizing conscientious refusals when antiabortion views are in the political minority.

2. LGBTQ rights and gay marriage.

The post-*Roe* settlement came under stress partly because of the speed and success of the movement for marriage equality, along with the broader campaign for LGBTQ rights. In 1993, the same year RFRA was enacted, the Hawaii Supreme Court became the first in the nation to require the application of strict scrutiny to a prohibition on gay marriage, anticipating its invalidation.[420] While the decision was overturned when the Hawaii Constitution was amended by referendum,[421] it nevertheless put the issue of marriage equality on the national agenda.

In turn, religious exemptions acquired a different political valence. Civil rights groups came to realize that exemptions could undermine civil rights laws—a possibility that was demonstrated when the Ninth Circuit exempted a religious landlord from a housing discrimination law.[422] As that realization took hold, the coalition that had supported RFRA fell apart.[423] An attempt to pass RFRA again as against the states—after the Supreme Court

---

[419] Our view is that current free exercise doctrine, such as it is, requires religious exemptions from abortion prohibitions, but we also predict that conservative courts will adopt various "strategies of preference" to avoid this conclusion. *See id.* at 2323–29; Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 181–82 (2023); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WISC. L. REV. 475, 493–94; Elizabeth Platt, *The Abortion Exception: A Response to 'Abortion and Religious Liberty'*, 124 COLUM. L. REV. F. 83, 98–99 (2024); Ari Berman, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*, 76 STAN. L. REV. 1129, 1171–73 (2024).

[420] Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), *abrogated by Obergefell*, 576 U.S. 644.

[421] *See* Philip L. Bartlett II, *Same-Sex Marriage*, 36 HARV. J. ON LEGIS. 581, 582–83 (1999).

[422] *See* Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 718 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd*, 220 F.3d 1134 (9th Cir. 2000).

[423] *See* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DETROIT MERCY L. REV. 407, 412–13 (2011) (noting that the *Thomas* decision galvanized civil rights opposition to legislation promoting religious exemptions).

found the first version to be outside Congress's enforcement power[424]—failed in the face of division among RFRA's original proponents.[425] Unanimous support for religious freedom had begun to fracture.

The campaign for marriage equality culminated in *Obergefell v. Hodges*, decided in 2015. Since then, some religious conservatives have resisted recognition of same-sex marriage and LGBTQ rights. Litigation has focused primarily on conflicts between religious liberty and antidiscrimination law. These include refusals by wedding vendors, social service providers, and religious schools to comply with state public accommodation laws.[426] Recent cases have involved religious employers who object to hiring LGBTQ employees[427] and student groups that seek to deny membership on grounds of sexual and gender identity.[428] Courts have also been confronted with religious objections to transgender rights, including claims by public school teachers for exemptions from policies designed to protect the safety and equality of transgender students and employees.[429]

Since *Obergefell*, the Supreme Court has played an active role in shaping the cultural politics around conscience protections in a series of LGBTQ-related cases, most recently in *Masterpiece Cakeshop*, *Fulton*, and *303 Creative*. These decisions purport to affirm marriage equality while granting rights of conscience to those who refuse to support, service, fund, or promote it. This "settlement," however, has not muted culture war battles over same-sex marriage or, more recently, over transgender rights,[430]

---

424 *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

425 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 339, at 2527–28 (tracing the breakdown of the RFRA coalition).

426 *See generally* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT (2020).

427 *See, e.g.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 919, 940 (5th Cir. 2023) (granting RFRA exemption from the Title VII prohibition on sex discrimination to a for-profit employer that objected to hiring employees who engage in "gender non-conforming behavior" and same-sex marriage).

428 *See, e.g.*, Fellowship of Christian Athletes v. San Jose Unified Sch. Dist., 82 F.4th 664, 695 (9th Cir. 2023) (en banc) (holding that an antidiscrimination policy violated free exercise rights of a student-run organization).

429 *See, e.g.*, Vlaming v. West Point Sch. Bd., 895 S.E.2d 704 (Va. 2023) (holding that a pronoun policy violated free exercise rights); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (same); Willey v. Sweetwater Cnty. Sch. Dist. No. 1, 680 F. Supp. 3d 1250 (D. Wyo. 2023) (same).

430 *See generally* Eyer, *supra* note 379 (surveying recent free exercise objections to policies affirming transgender rights).

all of which continue to reflect a sharply divided electorate, with conservatives pursuing strategies in line with and facilitated by the free exercise doctrines of structural preferentialism.

3. Christian nationalism and religious pluralism.

Polarization is further evidenced by the rise of Christian nationalism,[431] which has harnessed and exacerbated negative sentiments toward religious minorities, especially Muslims, in the aftermath of the attacks on September 11, 2001, and subsequent conflicts in the Middle East.[432] Hostility toward Muslims has increasingly tracked partisan political affiliation over the last two decades. After 2001, Republicans were only moderately more likely than Democrats to say that Islam encourages violence, for instance. But by 2021, a significant gap had grown between members of the two parties.[433] During his campaign in 2016, President Trump promised to ban Muslim immigration, and he then did so through a series of Executive Orders targeting Muslim-majority countries.[434] Despite President Trump's obvious statements of religious animus,[435] the Supreme Court upheld the administration's immigration restrictions against a First Amendment challenge in *Trump v. Hawaii*.[436] That decision remains a striking exception to

---

[431] On the surge of Christian nationalism in contemporary American politics, see generally PAUL A. DJUPE, ANDREW R. LEWIS & ANAND E. SOKHEY, THE FULL ARMOR OF GOD: THE MOBILIZATION OF CHRISTIAN NATIONALISM IN AMERICAN POLITICS (2023); PHILIP S. GORKSI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY (2022); ERIC L. MCDANIEL, IRFAN NOORUDDIN & ALLYSON F. SHORTLE, THE EVERYDAY CRUSADE: CHRISTIAN NATIONALISM IN AMERICAN POLITICS (2022); and PAUL D. MILLER, THE RELIGION OF AMERICAN GREATNESS: WHAT'S WRONG WITH CHRISTIAN NATIONALISM (2022) (recognizing and criticizing the influence of Christian nationalism from within the conservative evangelical community).

[432] *See* Samuel L. Perry, Andrew L. Whitehead & Joshua B. Grubbs, *Race over Religion: Christian Nationalism and Perceived Threats to National Unity*, 10 SOCIO. RACE & ETHNICITY 192, 195 (2023) (noting studies showing that "Christian nationalism is associated with Islamophobia"); Allyson F. Shortle & Ronald Keith Gaddie, *Religious Nationalism and Perceptions of Muslims and Islam*, 8 POL. & RELIGION 435, 451 (2015) ("Based on the prejudice findings overall, we can conclude that prejudice against Muslims is largely the result of Christian nationalism.").

[433] *See* Besheer Mohamed, *Muslims Are a Growing Presence in U.S., but Still Face Negative Views from the Public*, PEW RSCH. CTR. (Sept. 1, 2021), https://perma.cc/8GKZ-WB2D ("Over the last 20 years, the American public has been divided on whether Islam is more likely than other religions to encourage violence, and a notable partisan divide on this question has emerged.").

[434] Trump v. Hawaii, 138 S. Ct. 2392, 2403, 2417 (2018).

[435] *Id.* at 2435 (Sotomayor, J., dissenting).

[436] 138 S. Ct. 2392 (2018); *id.* at 2423 (majority opinion).

the Roberts Court's otherwise highly solicitous free exercise jurisprudence.

The growth of Christian nationalism suggests one way in which Jeffries and Ryan's pluralism thesis might be mistaken. On their account, the increased diversity of religions and religious practice in the United States makes public agreement over the state's religious practices (such as school prayer) impossible. They thus predicted that the Court would not likely seek to reassert those practices.[437] But the rise of Christian nationalism suggests that an increase in religious pluralism might lead to more, rather than less, public religiosity.[438] For example, the perceived Muslim threat generates calls to ban religious sites, outlaw Islamic law, enforce restrictions on religious dress, or require outward assertions of fealty to Christian symbols.[439] Instead of weakening official displays of Christianity, pluralism in this form has produced a popular backlash, a more full-throated defense of Christian (or "Judeo-Christian") values and a reassertion of those values in public, up to and including coercing compliance with them. President Trump's "Muslim ban" expressed a form of Christian nationalism.[440] Controlling entry is a way of short-circuiting ethnic and religious pluralism and is part of a broader political project—now seemingly embraced by the Republican Party—of preserving an imagined U.S. identity in the face of perceived ethno-religious incursion.

---

[437] *See* Jeffries & Ryan, *supra* note 15, at 368.

[438] *See, e.g.*, Steven Lubet, *Louisiana Wants the Ten Commandments in Schools but Which Version?*, THE HILL (May 27, 2024), https://thehill.com/opinion/civil-rights/4684714-louisiana-wants-the-ten-commandments-in-schools-but-which-version/ (quoting Republican Louisiana State Representative Dodie Horton on why she sponsored a bill requiring every public school in the state—kindergarten through college—to display the Ten Commandments: "I'm not concerned with a Muslim"); Sarah Mervosh & Elizabeth Dias, *Oklahoma's State Superintendent Requires Public Schools to Teach the Bible*, N.Y. TIMES (June 27, 2024), https://www.nytimes.com/2024/06/27/us/oklahoma-public-schools-bible.html ("The efforts to bring religious texts into the classroom reflect a growing national movement among conservatives—particularly Catholics and evangelicals who oppose abortion, transgender rights and what they view as liberal school curriculums—to openly embrace the idea that America's democracy needs to be grounded in their Christian values.").

[439] For these and more examples, see NAZITA LAJEVARDI, OUTSIDERS AT HOME: THE POLITICS OF AMERICAN ISLAMOPHOBIA 5 (2020); ASMA UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM 191, 224 (2019); and Schragger & Schwartzman, *Establishment Clause Inversion*, *supra* note 138, at 54.

[440] Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 857 (2020).

B. Religious Disaffiliation and Political Identity

Political polarization in the United States has coincided with a dramatic decline in religious affiliation. One of the most important shifts ever in U.S. religious demography has been the rapid increase in the number of people who are unaffiliated with any religion.[441] When the General Social Survey asks the question—"What is your religious preference?"—the share of respondents who answer that they have no religion has exploded from 5% of the population in 1972 to 29% in 2020.[442] At least according to survey research, the religiously disaffiliated are now the same size as each of the two largest religious groups in the United States—Roman Catholics and evangelical Protestants.[443]

A plausible theory is that these "nones" were previously only loosely aligned with their denominations. With the politicization of many churches, some of which have become increasingly affiliated with the political right, these tepid members have fled their old religious communities.[444] Another theory holds that the nones are actually less religious in a meaningful sense—that they are nonbelievers. Current data suggests that the nones appear to be less religious in all senses of the word, though their beliefs and spiritual practices may be declining less rapidly than their disaffiliation from organized congregations.[445]

A key phenomenon is that religious disaffiliation tracks the political polarization discussed in the last Section. "The religious sort" or "the religiosity gap" are terms for the alignment that has developed, where disaffiliation is strongly associated with Democratic politics, while frequency of church attendance is correlated with Republican identity.[446] This has been called "one of the most important and enduring social cleavages in American

---

441 *See* JIM DAVIS & MICHAEL GRAHAM, THE GREAT DECHURCHING 3 (2023) ("In the United States, we are currently experiencing the largest and fastest religious shift in the history of our country . . . .").

442 *See* Mark Movsesian, *The New Thoreaus*, 54 LOY. U. CHI. L.J. 539, 554–55 (2022).

443 RYAN P. BURGE, THE NONES 32 (2d ed. 2023) [hereinafter BURGE, THE NONES].

444 For variations on this theme, see *id.* at 49–55; DAVID E. CAMPBELL, GEOFFREY C. LAYMAN & JOHN C. GREEN, SECULAR SURGE: A NEW FAULT LINE IN AMERICAN POLITICS 11, 98 (2020); and MICHELE F. MARGOLIS, FROM POLITICS TO THE PEWS: HOW PARTISANSHIP AND THE POLITICAL ENVIRONMENT SHAPE RELIGIOUS IDENTITY 38, 129 (2018).

445 *See* BURGE, THE NONES, *supra* note 443, at 136–40.

446 *See* MARGOLIS, *supra* note 444, at 2, 22–27; MASON, *supra* note 398, at 33.

politics."[447] In short, the big sort means that today "many Americans' religious and political identities are now aligned."[448]

The identification of political party with one's comprehensive views (religious or secular) undoubtedly increases the stakes of political contests.[449] The fusion of religious and political identity is arguably what disestablishment originally sought to avoid. Taking religion off the table and affirming citizens' equal status regardless of denomination were understood as necessary means to lower the political temperature—to separate politics from ultimate questions of salvation and thus avoid wars of religion.[450]

A conventional assumption is that there is a causal relationship between religion and politics, and that the former influences the latter. On this view, traditional beliefs drive voters toward the Republican Party, whereas nonbelief or freethinking on matters of religion push people toward the political left.[451] Yet there is also evidence for the reverse, namely, that political forces shape people's conception of their own religiosity. According to this account, identifying as secular or religious is part of what it means to belong to the liberal or conservative camp, respectively. Neither identification might reflect deeply held beliefs or practices, but instead each serves as a signifier of social and political membership.[452]

In fact, increasing evidence suggests that for certain demographics in the United States, religious and political identities have become fused. More specifically, social scientists describe a "porous, bidirectional relationship between evangelical identity

---

447 Michele F. Margolis, *The Religious Sort: The Causes and Consequences of the Religiosity Gap in America*, *in* DEMOCRATIC RESILIENCE: CAN THE U.S. WITHSTAND RISING POLARIZATION? 226, 226 (Robert C. Lieberman et al. eds., 2021) (internal quotation marks omitted).

448 *Id.* As recently as the 1960s, religious affiliation was far less aligned with political identity. Today, by contrast, the correlation is strong. *See* Michael Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 125–26, 128 (2020).

449 CAMPBELL, LAYMAN & GREEN, *supra* note 444, at 85–86.

450 *Cf.* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 646–47 (2011) (noting that disestablishment was originally justified, in part, because "it was politically sensible for competing sects to lay down their (political) arms; under circumstances of relative equality, all could agree not to attempt to take over the state").

451 *See* Michele F. Margolis, *Reversing the Causal Arrow: Politics' Influence on Religious Choices*, 43 ADVANCES POL. PSYCH. 261, 261 (2022) ("The standard narrative . . . is that religion shapes how citizens engage in politics.").

452 *See* BURGE, THE NONES, *supra* note 443, at 49–55, 70; MARGOLIS, *supra* note 444, at 37–38.

and Republican identity in the U.S.," in which the standard assumption about the direction of influence (i.e., from religious conviction to political action) is reversed.[453] Instead, the political aims of the Republican Party influence and alter the religious convictions of many white evangelicals. As political scientist Ryan Burge argued, "a stunning reality is coming into sharper focus: political concerns are driving religious behavior more than theological beliefs are guiding political principles."[454]

We need not decide here whether political polarization is the result of the heightening of stakes that follows from the fusion of political and religious identity or whether polarization is a by-product of the more effective sorting of citizens into the two parties—one religiously identified and one not. It could be that the nonreligious become more liberal and the religious become more conservative, or that Democrats are becoming less religious and Republicans are becoming more so. Likely it is a combination of the two. The directionality matters less than the fact that a range of cultural and policy commitments are increasingly and furiously aligned.

The result seems to be twofold: first, those who remain in the churches are more devout, and second, the influence of mainline or moderate denominations has waned significantly.[455] As Burge put it, "American religion has become smaller but much more potent."[456] Those looking for a church home are "left with a landscape that is either theologically conservative and incredibly devout on one side or completely irreligious on the other."[457] A predictable outcome of this cultural shift is that leaders who are speaking for faith communities in legislatures and courts are more likely to be politically and theologically conservative, while those on the other side of the religious and political divide are likely to be less organized—and certainly not through a religious denomination.

Our thesis is that the Supreme Court's shifting settlements on religious freedom tend to reflect, in the main, the interests of the dominant religious groups operating in the United States over a period of a generation or so. If that is so, then the gradual

---

[453] Mark Satta, *Political Partisanship and Sincere Religious Conviction*, 47 BYU L. REV. 1221, 1242 (2022).

[454] BURGE, THE NONES, *supra* note 443, at 53.

[455] RYAN P. BURGE, 20 MYTHS ABOUT RELIGION AND POLITICS IN AMERICA 183 (2022).

[456] *Id.*

[457] *Id.*

consolidation of religious conservatives and concomitant rise of nonaffiliated liberals has some important implications. The most obvious is that religious affiliation now closely tracks politics, as already noted. In the past, debates over the relationship between religion and government would also be theological disputes between, say, liberal Protestants and evangelicals, or Reform Jews and conservative Catholics. But mainline Protestant liberals have all but disappeared,[458] and disaffiliation means that the audience for religious, theological, or denomination-based arguments for separationism has become vanishingly small.

We therefore see an important asymmetry, with conservative religious forces highly organized, while disaffiliated liberals are unorganized around the issue of the relationship between religion and government. This is one reason that the rise of the nones might not contribute to church-state separationism. Another is that Americans are still a religious people, albeit in decline.[459] Forty-five percent of adults pray daily, down from 58% in 2007 but still significant, while 41% consider religion to be "very important" in their lives, down from 56%.[460] The secularization thesis has long held that modern industrial societies will inevitably lose their religion.[461] U.S. society has been an exception in this regard and continues to remain an outlier, even as declining religiosity accelerates, and some theorists suggest that the United States is finally catching up.[462]

Whatever the direction of the country's secularization trend, what seems to be occurring in the United States is the collapse of intra-denominational political diversity. Those who are religious are much more uniform in their political positions across denominations. The pluralism of religious sects that gave rise to the disestablishment détente of the founding period is no more. As a political matter, the nonaffiliated and the secularists are not the same as organized religious dissenters.

---

458 *See* DAVID A. HOLLINGER, CHRISTIANITY'S AMERICAN FATE: HOW RELIGION BECAME MORE CONSERVATIVE AND SOCIETY MORE SECULAR 90–108 (2022).

459 CAMPBELL, LAYMAN & GREEN, *supra* note 444, at 209.

460 Gregory Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://perma.cc/ERB8-XKES.

461 *See, e.g.*, CAMPBELL, LAYMAN & GREEN, *supra* note 444, at 10–11 ("Going back to the seminal social theorists, such as Marx, Weber, and Durkheim, many scholars have argued that secularization is inevitable."); RONALD F. INGLEHART, RELIGION'S SUDDEN DECLINE: WHAT'S CAUSING IT, AND WHAT COMES NEXT? 37 (2021) (reviewing debate over the secularization thesis).

462 CAMPBELL, LAYMAN & GREEN, *supra* note 444, at 11–12.

Moreover, as the nones increase, religious citizens feel increasingly embattled and isolated, even as their denominational political influence seems to be at its height. Religious conservatives have long imagined and described U.S. society as suffering from religious and moral decline.[463] Disaffiliation only increases that sense of threat. In this context, conflict among sects becomes less important than countering the dangers of disaffiliation and secularism. Traditionalist believers across the denominational landscape thus find common cause, despite their theological differences. Evangelicals, conservative Catholics, Mormons, and Orthodox Jews are regularly on the same side now on issues such as abortion, LGBTQ rights, and church-state separation.[464] More importantly, white evangelicals play a decisive role in the Republican Party. They voted overwhelmingly for President Trump,[465] formed the core once again of his electoral base as he sought reelection,[466] and are well represented by legal elites who form a religious branch of the conservative legal movement.[467]

Meanwhile, the nones have no denominational or distinct political location. They are unorganized and diffuse, and their views on myriad subjects skew left though their positions on separationism tend to vary.[468] And, at least currently, there is no concept of institutionalized secularism in the United States. A church-state regime built on denominational détente will thus fail to account for the nones' interests. Professor David Campbell and his coauthors considered the possibility of a rising Secular Left as a counterweight to the Religious Right, but they ultimately concluded that without a common affective identity, "secularism will remain inchoate and politically ineffectual."[469]

An important consequence of religious disaffiliation is that there is little organized *religious-based* opposition to recent

---

[463] *See generally* STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018); PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018).

[464] *See* Smith, *supra* note 453, at 12.

[465] *See* JOHN FEA, BELIEVE ME: THE EVANGELICAL ROAD TO DONALD TRUMP 5–6, 6 n.4 (2018).

[466] *See* Samuel Perry, *Why Evangelicals Went All In on Trump, Again*, TIME (Jan. 24, 2024), https://perma.cc/49XP-2X26.

[467] *See generally* AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW & LEGAL CULTURE (2020).

[468] CAMPBELL, LAYMAN & GREEN, *supra* note 444, at 49 ("Democrats' opinions [on the relationship between religion and government] are more divided than Republicans . . . .").

[469] *Id.* at 212.

changes in church-state doctrine, unlike in the separationist era.[470] On questions of religious freedom, the groups that have mattered most are conservative Christian legal organizations like the Becket Fund for Religious Liberty, Alliance Defending Freedom (ADF), the Thomas More Society, Liberty Counsel, and the First Liberty Institute. These groups have designed and litigated virtually all the religion cases that have reshaped church-state jurisprudence at the Supreme Court and in the federal courts more generally.[471] For just a small sample, consider *303 Creative v. Elenis*, which was brought by ADF; *Carson v. Makin*, litigated by the First Liberty Institute; and *Fulton v. City of Philadelphia*, litigated by Becket.[472]

For our purposes, what is most notable about the institutional structure of lawyering on questions of religion and government is its asymmetry. While religious interests are highly organized and well funded, advocates for the separation of church and state are much less well staffed and coordinated.[473] General civil rights organizations such as the ACLU do regularly face off against ADF and Becket, but they are not specifically dedicated to questions of religious freedom. That difference among lawyers reflects the organizational gap between the disaffiliated and conservatives who remain aligned with religious institutions. It also highlights the comparative lack of influence of those mainline denominations that had, in prior eras, regularly appeared as advocates before the Supreme Court with well-developed positions on church-state relations. With the collapse of those denominations, there has been no cohesive social and political mobilization to resist the emergence of structural preferentialism.

---

[470] *See, e.g.*, Tebbe et al., *The Quiet Demise*, *supra* note 157.

[471] *See* Hannah Bailey, *A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 230–34 (2023) (collecting cases brought by ADF, Becket, First Liberty, and other Christian legal organizations); Joanna Wuest & Briana S. Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State*, 52 J.L. MED. & ETHICS 151, 152, 154 (2024) (same); Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct and the Road to* 303 Creative v. Elenis, 112 CALIF. L. REV. 1879, 1886 (2024) (describing ADF's legal strategy).

[472] Bailey, *supra* note 471, at 230, 239.

[473] *See* Sarah Posner, *Inside the Christian Legal Army Weakening the Church-State Divide*, TALKING POINTS MEMO (Oct. 4, 2019), https://perma.cc/8DG9-3KFJ.

C. Political Economy of School Choice

Recent changes in church-state doctrine can also be explained, in part, by the material interests of specific religious denominations. Historically, chief among those interests has been school funding. We have told the story of how separationism arose amidst Protestant resistance to public funding of Catholic schools, and then how collapse of the no-aid paradigm reflected a new alignment between Catholic and evangelical groups, with the absence of unified opposition to government financial support for schools or religious organizations more generally.[474]

The movement from no aid, to permissive aid, to mandatory aid was completed in 2022 with *Carson v. Makin*,[475] which went well beyond the permissive voucher regime affirmed by the Court in *Zelman* two decades earlier. One explanation for *Carson* is that *Zelman* failed to deliver. *Zelman*'s upholding of voucher programs might have been expected to produce a financial windfall for private religious schools across the country, but that did not come to pass, at least not immediately.[476] In many states, including some under Republican control,[477] vouchers have been politically unpopular.[478] Moreover, Catholic schools have continued to struggle.[479] Over two decades ago, when Jeffries and Ryan were predicting the outcome in *Zelman*, Catholic schools were already being abandoned, and they have continued to draw lower enrollments.[480]

Vouchers' limited uptake has multiple causes. Teachers' unions have long opposed school choice, though the strength of

---

474 *See supra* Part II.B–C.

475 142 S. Ct. 1987.

476 *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2079 (2002); Mark Tushnet, *Vouchers After* Zelman, 2002 SUP. CT. REV. 1, 37.

477 *See, e.g.*, Ed Kilgore, *Rural Republicans Revolt Against School Vouchers*, N.Y. MAG. (Apr. 10, 2023), https://perma.cc/JWM9-HAR3 (noting that Republican opposition was responsible for recent defeats of statewide voucher programs in Georgia and Texas).

478 *See* Christopher Lubienski, *The School Choice Movement Has a Voter Problem,* THE TENNESSEAN (Jan. 14, 2023), https://perma.cc/K6QV-DYHV ("In fact, voters have been allowed to weigh in on school choice programs only nine times since 2000, and they almost always reject them, often by overwhelming margins.").

479 *See* Quentin Wodon, *Declining Enrollment in Catholic Schools in the West and Insights from the United States*, 24 J. CATH. EDUC. 285, 286 (2021) ("In the United States in particular, enrollment has been declining for more than 50 years.").

480 *See* Jonah McKeown, *U.S. Catholic School Growth Slows After Two Years of Notable Increases, Data Show*, CATH. NEWS AGENCY (Feb. 10, 2023), https://perma.cc/5Q4U-YEV9 (reporting that enrollments in Catholic schools remain below pre-pandemic levels).

their opposition has diminished over the years.[481] More significantly, as Professor James Ryan has previously observed, voucher programs have been resisted by suburbanites who are loathe to see tax funds diverted from public to private schools.[482] Universal vouchers and other school choice programs that cross metropolitan boundaries have been rare because "suburbanites already 'chose' schools for their children when they purchased their homes, and most are satisfied with the schools they selected."[483]

Public schools also appear to be culturally congenial for many suburban residents. The segregation academies in the South and the flight to suburban schools in the North were a function of white flight from desegregation.[484] And the Supreme Court made it clear when it decided *Milliken v. Bradley*[485] in the early 1970s that suburban schools would be protected from desegregation mandates,[486] thus eliminating one of the push factors into private schools. If implemented without discrimination, voucher programs could threaten the existing suburban school advantage, and "white, middle-class parents usually get what they want when it comes to education."[487]

Rural Republicans have also resisted voucher programs. In Texas, for instance, rural conservatives have joined with liberal urban and suburban residents to oppose school vouchers over the last few years.[488] Their shared fear is that school choice programs

---

[481] *See generally* Robert Maranto & Evan Rhinesmith, *Losing the War of Ideas? Why Teachers Unions Oppose School Choice*, *in* THE WILEY HANDBOOK OF SCHOOL CHOICE 450 (Robert A. Fox & Nina K. Buchanan eds., 2017).

[482] *See* RYAN, FIVE MILES AWAY, *supra* note 354.

[483] *Id.* at 16; Laura McKenna, *Why Don't Suburbanites Want Charter Schools?*, THE ATLANTIC (Oct. 1, 2015), https://www.theatlantic.com/education/archive/2015/10/why-dont-suburbanites-want-charter-schools/408307/ ("[S]uburbanites simply aren't looking for alternatives because they're already satisfied with their traditional public schools.").

[484] *See supra* Part II.B.

[485] 418 U.S. 717 (1974).

[486] *See id.* at 745 (rejecting busing across district lines without proof of interdistrict segregation).

[487] RYAN, FIVE MILES AWAY, *supra* note 354, at 17; *see also* James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 566, 585 (2007) (arguing that vouchers failed to gain traction partly because of tension between religious and racial justice justifications and partly because of the accountability movement in education, which requires greater oversight over private schools receiving vouchers).

[488] Brian Lopez, *No Teacher Raises, No Vouchers: Lawmakers Fail to Reach Compromise on School Funding Bill*, TEX. TRIB. (May 27, 2023), https://perma.cc/H4P8-5EFB ("Democrats and rural Republicans for decades have joined forces against [school voucher] programs, fearing they would siphon funds away from public schools, which serve as important job engines and community hubs across the state.").

will divert government funding from public schools, which enjoy widespread support, partly as regional employers and as social hubs for local communities. Moreover, rural areas often lack private schools, or good ones, so their residents see vouchers as educational options that do not directly benefit them.[489]

More recently, the combination of pandemic lockdowns and culture-war politics around critical race theory and gender identity appear to have weakened support for public schools and buoyed the school choice movement on the right.[490] Yet while voucher programs or educational savings accounts recently have been enacted in states like Arizona, Arkansas, Florida, Indiana, Iowa, Ohio, Oklahoma, and Utah, school-choice programs still face opposition in many parts of the country, including in red and purple states like Idaho, Virginia, Kentucky, and Georgia, in addition to Texas.[491] Last year, Illinois became the first state to end its statewide school-choice program.[492]

The political economy of school choice has meant that *Zelman* has had less impact than its proponents anticipated. And that has led to even stronger demands for mandatory funding of religious schools. The school-choice movement won an important victory in *Carson v. Makin*, which prohibits states from excluding religious schools from voucher programs. But because vouchers face serious political opposition, states may not enact them in the first place, and, if they do, legislatures may not continue to support them over time.

To obtain funding for religious schools, school-choice proponents cannot rely entirely on vouchers. That strategy puts them at the mercy of suburban and rural voters. But they might be able to overcome that political problem by tying the interests of those voters to the funding of religious schools. And to accomplish that goal, advocates have now pivoted to claiming that charter schools are private schools and that, following the *Carson* trilogy, any state that operates charter schools must allow religious schools to

---

489 Kevin Mahnken, *As Rural Republicans Derail School Vouchers in Texas, Gov. Abbott Vows a Special Legislative Session for His Top Education Priority*, THE74 (June 8, 2023), https://perma.cc/Q4GX-KRSS.

490 *See* Andrew Prokop, *The Conservative Push for "School Choice" Has Had Its Most Successful Year Ever*, VOX (Sept. 11, 2023), https://perma.cc/3JSH-8TK8.

491 *Id.*; Glenn Daigon, *Why Red States Are Blocking New School Voucher Programs*, THE PROGRESSIVE (July 3, 2023), https://perma.cc/L5NV-KRRN.

492 Peter Greene, *Illinois Becomes First State to Roll Back School Voucher Program*, FORBES (Nov. 10, 2023), https://perma.cc/KJ4D-W9HW.

participate.[493] According to this view, since charter schools are fully funded by the state, it follows that religious charters must also be fully funded.[494] If this strategy is successful, it will mean that every jurisdiction that supports charter schools—currently forty-five states and the District of Columbia[495]—will be required to extend that support to religious education.

Unlike vouchers, which face a more uncertain future, charter schools appear to have been more successful in attracting support across the political spectrum,[496] and they serve a rapidly expanding student population.[497] It would be extremely difficult for states that currently support charter schools to relinquish them. If the Supreme Court were to decide that charter schools are private and subject to free exercise protections under *Carson*, it would radically alter the political economy of school choice by yoking the interests of charter school supporters to those who demand funding for private religious schools. In short, structural preferentialism would deliver to proponents of religious school funding what the deferential regime of *Zelman* did not.[498]

---

493 Nicole Stelle Garnett, *Time for Religious Charter Schools*, CITY J. (Dec. 7, 2022) [hereinafter Garnett, *Time for Religious Charter Schools*], https://perma.cc/P6Q2-VWDF.

494 *See id.* ("Because charter schools enjoy this autonomy from government control . . . they are not state actors. And because they are not, *Carson* and *Espinoza* make clear that the state cannot prohibit them from being religious.").

495 *See Public Charter School Enrollment*, NAT'L CTR. FOR EDUC. STAT., https://perma.cc/D3RQ-ZPSQ.

496 *See* Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 NOTRE DAME L. REV. 1891, 1906 (2012) [hereinafter Garnett, *Enough Choice?*] ("For present purposes, it suffices to say that private-school choice is intensely controversial and that charter schools enjoy broad, bi-partisan political support.").

497 Charter schools vastly exceed voucher programs in terms of enrollment numbers. In 2022, voucher programs served about 700,000 U.S. students (approximately 1% of all K–12 students), whereas charter schools served 3.5 million students (or about 7% of all public-school students). *See* Garnett, *Time for Religious Charter Schools*, *supra* note 493; *Public Charter School Enrollment*, *supra* note 495.

498 As this Article was in process, the Oklahoma Supreme Court held that the creation of a publicly funded religious charter school violates the Oklahoma state constitution and the federal Establishment Clause. Drummond v. Okla. Statewide Virtual Charter Sch. Bd., 2024 WL 3155937, at *3–5, *9 (Okla. June 25, 2024), petition for cert. filed, Nos. 24-394, 24-396 (U.S. Oct. 7, 2024). The court also rejected a federal Free Exercise challenge under the *Carson* trilogy. *Id.* at *9–10. The Archdiocese of Oklahoma has indicated that it will seek review in the U.S. Supreme Court. *See* Kate Quiñones, *Oklahoma Catholic Charter School to Appeal to Supreme Court in Public Funding Dispute*, NAT'L CATH. REG. (July 9, 2024), https://perma.cc/DXF4-RBXX.

IV. PREFERENTIALISM'S STABILITY

How stable is the emerging church-state regime of structural preferentialism? The separationist regime, as we have described it, lasted roughly thirty years. The replacement of that regime, first with the deferentialism of the Rehnquist Court and now with structural preferentialism, took about two generations. Of course, contingencies abound. The Supreme Court is not a directly representative institution, judicial appointments are not predictable, and one or two Justices can make a significant difference on a decision-making body of nine.

Nevertheless, in this Part, we consider the relative stability of the preferentialist coalition and ask whether there are potential counterforces to it. The current cultural moment is in some ways puzzling. In the United States, rising nonaffiliation and increasing religious diversity coincide with a resurgence of Christian nationalism. How does same-sex marriage coexist with abortion bans? More generally, how can a minority religious coalition sustain a contested legal paradigm given conditions of widespread cultural pluralism? It is one thing for a conservative religious movement to gain traction in a relatively homogenous society, such as Hungary or Poland,[499] but it is quite another for it to achieve the same in a heterogeneous society like that of the United States. The reality of U.S. religious pluralism might therefore place limits on preferentialism. Here, two possibilities suggest themselves: first, that preferentialism is a rearguard action to protect a steadily dwindling religious-political minority, or, second, that this regime is majority-sustaining insofar as it favors and provides substantial benefits to a range of overlapping groups, thus extending and consolidating their political and legal power. There is evidence for both possibilities, which we canvass below.

A. Consolidation

In the short term, it is possible to predict some doctrinal developments, so long as the Court remains dominated by a conservative supermajority. First, the formal bar to direct funding of religious organizations is certain to fall, if it has not already. Beginning with *Zelman* in 2002, government funding was permitted

[499] *See generally* WOJCIECH SARDURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2023); ANDRÁS L. PAP, DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY (2017).

to flow, even to core religious uses, so long as it was interrupted by the independent choice of private citizens.[500] School vouchers were the leading example. Even a program that directed virtually all its tax dollars to religious schools—which could use them for prayer, indoctrination, and worship—would be upheld because individual choice intervened between government and denomination. That was known as the indirect-aid rule.[501]

With respect to direct funding, however, the rule was different and more restrictive. Tax dollars could not be diverted to core religious uses.[502] Even if the funding was apportioned neutrally among religions, and between religion and nonreligion, it was unconstitutional if it went to support religious activities such as prayer, worship, or theological instruction.[503] At least as a technical matter, that rule may still stand today.

As a political matter, however, it is a dead letter.[504] Chief Justice Roberts signaled as much recently, when he wrote for the Court that "[w]e have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[505] The implication was that direct-aid programs would not be invalidated solely because they diverted aid to religious uses.[506] All the politics we have identified suggest that the ban on direct funding will not stand, if it has not already been removed.

A second prediction is that taxpayer funding for religious charter schools may well become not simply permitted but required. Though charter schools are generally understood to be public schools,[507] religious schools now have a strong argument that they should be able to structure themselves as charter schools and receive state funding. Professors Ira Lupu and Robert

---

500 536 U.S. 639.

501 *See* Lupu & Tuttle, *Remains of the Establishment Clause, supra* note 9, at 1776–81 (tracing the distinction between direct and indirect aid).

502 *See* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring). Under the *Marks* rule, Justice O'Connor's concurrence was the controlling opinion. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

503 Lupu & Tuttle, *Remains of the Establishment Clause, supra* note 9, at 1781 (explaining the prohibition on actual diversion of government funds to core religious uses).

504 *See id.* at 1788 ("[T]here is not a syllable in the trilogy that gives rise to any reasonable hope for survival of that prohibition.").

505 *Espinoza*, 140 S. Ct. at 2254.

506 Confirming that impression, Chief Justice Roberts went on to say that the program in that case was "particularly" unproblematic because it involved indirect aid. *Id.*

507 *See* Driver, *supra* note 10, at 232 ("[C]harter schools bear a closer resemblance to public schools than they do to private schools.").

Tuttle have argued that, for this Court, the constitutionality of religious charter schools will turn not on whether they are deemed public or private, but solely on whether the schools exist in sufficient variety that families are not coerced to send their children to religious schools. After *Kennedy* and *Carson*, that is all that is required for constitutionality, on their analysis.[508] The result will be nothing less than a "constitutional revolution" in church-state doctrine, mandating public funding of religious schools on a massive scale, far beyond existing voucher programs.[509]

One factor that may make the politics of charter schools more uncertain, however, is that a victory for religious school choice at the Supreme Court would not allow for local variation, unlike the model of abortion or school prayer. Instead, all states and localities with charter schools would be *required* to include religious schools in their programs. And that could have a far more divisive and destabilizing effect.

Third, governments that have been required to extend funding to religious entities under the *Carson* trilogy risk losing the ability to condition that funding on compliance with antidiscrimination policies. As noted above, shortly after *Carson* was decided, Maine specified that all schools receiving state funding are bound by its Human Rights Act, which bars discrimination on the basis of sexual orientation and gender identity.[510] Maine has now been sued (again) on religious freedom grounds.[511] If our analysis of the forces shaping structural preferentialism is correct, then the Supreme Court is likely to rule in favor of religious schools and against attempts to require their compliance with antidiscrimination laws.[512] In that event, any hope that *Carson* represented a stable political settlement,[513] requiring funding but allowing regulation, would be quashed.

---

[508] *See* Lupu & Tuttle, *Remains of the Establishment Clause, supra* note 9, at 1805 (noting that today any constitutional limitation on prayer in public schools concerns only coercion, not sponsorship).

[509] *Id.*; *see also* Part III.C.

[510] *See supra* Part I.D.

[511] *See supra* note 169.

[512] *See* John O. McGinnis, *The Death of Separationism and the Life of School Choice*, L. & LIBERTY (June 23, 2022), https://perma.cc/SR64-DGUC (noting that if states grant any exemptions to nondiscrimination conditions on school-choice funding, as they likely will, then their refusal to exempt religious schools will face strict scrutiny under *Fulton*).

[513] *Cf.* Tang, *Who's Afraid?*, *supra* note 171, at 507 (recommending Maine's antidiscrimination condition on funding as an example of "smart and impactful lawmaking").

Fourth and related, religious exemptions from civil rights regulations will continue to be expanded. Recently, the Court ruled in favor of 303 Creative, a website design company that planned to provide its services for weddings.[514] The company objected on religious grounds to complying with a state public accommodations law that prohibits discrimination against customers based on sexual orientation.[515] Though the Supreme Court considered only the free speech issue, free exercise claims were raised in the lower courts as well.[516]

No one should expect *303 Creative* to be the last decision to carve out exemptions from civil rights statutes.[517] Though half the states do not yet provide basic protections to LGBTQ citizens,[518] those that do will find that the Supreme Court requires them to grant extensive religious exemptions from their antidiscrimination laws. And those moves will not be limited to the wedding industry itself. In *Fulton v. City of Philadelphia*, the Court had little trouble exempting a Catholic child welfare agency from a rule that prohibited it from excluding married same-sex couples who aspired to be foster parents.[519] Additional contexts for exemptions from antidiscrimination laws continue to proliferate.[520]

Whether the Roberts Court will decide to overrule *Smith* is more uncertain. In *Fulton*, Justice Alito argued vociferously for that change, joined by Justices Gorsuch and Thomas.[521] But the Chief Justice opted for more incremental reasoning,[522] and Justice Barrett, joined by Justice Kavanaugh, expressed doubt about whether to overturn that precedent.[523] She worried about reinstating a categorical rule of strict scrutiny, as Justice Alito had urged, and she wondered whether a more "nuanced" approach is available.[524]

---

514 *303 Creative*, 143 S. Ct. at 2308.

515 The case involved the same antidiscrimination statute at issue in *Masterpiece Cakeshop*. *See id.* at 2308–09.

516 303 Creative LLC v. Elenis, 6 F.4th 1160, 1188, 1190 (10th Cir. 2021) (rejecting a free exercise challenge to a public accommodations law), *rev'd*, 143 S. Ct. 2298 (2023).

517 *See id.*; Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 274–75 (2023).

518 *State Public Accommodations Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), https://perma.cc/FA89-CZTC.

519 141 S. Ct. at 1882.

520 *See supra* Part III.A.2.

521 141 S. Ct. at 1924 (Alito, J., concurring).

522 *Id.* at 1881 (majority opinion) (reasoning that because Philadelphia's nondiscrimination requirement was not generally applicable, there was no reason to reconsider *Smith*).

523 *Id.* at 1882–83 (Barrett, J., concurring).

524 *Id.*

This hesitancy to reverse *Smith* may have puzzled those who are following the internal logic of recent religious freedom cases, but it makes perfect sense from an external perspective. Conservatives in the judiciary are getting everything they want from the existing legal framework, including robust free exercise exemptions. *Tandon*'s "most-favored nation" rule is potent enough to deliver virtually everything religious conservatives demand, and statutes like RFRA can do the rest.[525] While the conservative legal movement would appreciate a symbolic victory, its leaders must appreciate the benefits of not appearing too radical, while nevertheless delivering results. That arrangement satisfies two audiences at once: movement elites and moderates among the voting public.[526] More importantly, it allows *Smith* to be deployed selectively, for instance, against free exercise challenges to abortion bans.[527]

School prayer's future is also uncertain. After *Bremerton*, it seems clear that teachers may "take a moment" before the bell rings to engage in prayer,[528] even if they do so in public, even if there is record evidence of a coercive effect on students, and even though the teachers are on the job. Its logic weakens the foundations of the school-prayer decisions,[529] inviting states to bring further challenges to test the limits of the doctrine.[530] But official school prayer would add an element of institutional sponsorship, which would take the Court a significant step beyond *Bremerton*.

If the school-prayer cases from the early 1960s are overturned, the result would not be nationalized invocations. Rather, the politics of school prayer would likely resemble those of abortion bans in the wake of *Dobbs*. Geographic sorting would mean that school prayer would be reinstated in conservative states and localities, not in urban centers or the Northeast. This limited uptake might make overruling the prayer cases more attractive to the judiciary, but it would also diminish the practical victory.

---

525 *See* Tebbe, *Liberty of Conscience*, *supra* note 72, at 300–01 (arguing that the *Fulton* Court ruled for religious interests without having to overrule *Smith*).

526 *Cf.* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 4 (2010) (explaining how stealth overruling allows the Justices "to speak to two separate audiences simultaneously").

527 *See* Schwartzman & Schragger, *Religious Freedom and Abortion*, *supra* note 416, at 2324–25.

528 Brief for Petitioner at 28, *Bremerton*, 142 S. Ct. 2407 (No. 21-418).

529 *See* Lupu & Tuttle, *Remains of the Establishment Clause*, *supra* note 9, at 1802.

530 *See, e.g.*, Lubet, *supra* note 438 (discussing the mandatory posting of the Ten Commandments in Louisiana public schools); Mervosh & Dias, *supra* note 438 (analyzing required Bible reading in Oklahoma public schools).

B. Entrenchment

The consolidation and expansion of structural preferentialism might have political and economic effects that serve to reinforce it. The first is that state funding will beget more state funding and activate a political constituency that seeks to maintain it. Separationists would call this "dependence";[531] historically, those who worry about church independence have strongly cautioned churches against accepting government money.[532] In political economy terms, the availability of state funding creates new incentives for parties to maintain that arrangement, contributing to its durability.

School funding provides the most straightforward example. When religious private schools win tax support through constitutional rulings, they build buildings and hire staff based on that funding, and they then have strong reasons to lobby for its continued existence—reasons that extend beyond simple ideological agreement.[533] More importantly, however, state funding becomes necessary to support the religious mission, not just for those denominations that favor funding, but also for those that would otherwise resist government support. Any principled refusal to accept government funds becomes almost prohibitively costly, as religious schools that receive state funds can readily outcompete religious schools that do not.[534] The availability or requirement of public funding will have a predictable cascading effect, leading many religious groups to seek state support, even if they are ambivalent about doing so. Moreover, once they have accepted

---

[531] *See generally, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS 30 (Jack N. Rakove ed., 1999).

[532] *See Zelman*, 536 U.S. at 715 (Souter, J., dissenting) ("When government aid goes up, so does reliance on it; the only thing likely to go down is independence."). *See generally* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WILLIAM & MARY L. REV. 1831 (2009) [hereinafter Koppelman, *Corruption*] (surveying historical sources of this objection to government aid to religion).

[533] *See Zelman*, 536 U.S. at 714 (Souter, J., dissenting) (noting that "there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income" and that increases in voucher funding in other states have "induced the creation of" private schools, presumably including religious ones).

[534] *Cf.* Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 5 (1989) ("Religious institutions require both money and members, and for these and other reasons (including, for some, the duty to spread the faith) compete among themselves as well as with nonreligious providers of substitute services, such as public and secular private schools.").

[534] *See supra* Part III.C.

government aid, those groups will have powerful incentives to maintain it into the future.

If religious groups win the right to run charter schools, as we cautiously predict, then the entrenchment effect will be dramatically amplified. The political economy of school choice has not favored voucher programs unambiguously, as we have seen.[535] Political majorities have stood in the way of such programs, mostly because suburban and rural parents have fought to protect their public schools.[536] *Carson* requires states to include religious schools in any school-choice program, tying the interests of religious parents to those who seek choice for secular reasons.[537] But *Carson* does not require them to have any such program in the first place. Extending funding through charter schools would lead to a far more profound change in the political economy, because most states already have such schools.[538] Moreover, a legal ruling would work outside electoral politics, obviating the need to assemble majority support. Once religious organizations start schools that receive high levels of government funding, they will be intensely incentivized to maintain the constitutional arrangement that makes their funding possible.

Exemptions doctrine also provides a means for creating a class of beneficiaries strongly committed to maintaining their privileged status—a second form of "dependence."[539] The Roberts Court has extended religious freedom rights to for-profit corporations,[540] and those businesses dependent on regulatory exemptions will have financial incentives to maintain and expand them. A preferentialist free exercise doctrine thereby creates economic motives both to adopt particular religious beliefs and to lobby for the entrenchment of those legal doctrines that protect them.

Moreover, with respect to nonprofits and other government aid beneficiaries, the Court's exemption decisions delinking public funding from compliance with antidiscrimination norms may have the effect of legitimating discriminatory beliefs, making

---

535 *See supra* Part III.C.

536 *See* Ryan & Heise, *supra* note 476, at 2080–81.

537 *See* McGinnis, *supra* note 512.

538 *See* Nicole Stelle Garnett, *Supreme Court Opens a Path to Religious Charter Schools*, 23 EDUC. NEXT 8, 11 (2023) (noting that charter schools make up a large portion of K–12 education in the United States).

539 Madison, *supra* note 505, at 30.

540 *Hobby Lobby*, 573 U.S. at 719.

them more apt to be embraced and asserted.[541] We have already observed how religious commitments and political positions are not unidirectional—the influence runs in both directions. Religious beliefs and practices may be influenced by legal recognition. The Court's authorization of discriminatory practices forms a type of feedback mechanism that furthers political-religious entrenchment.

C. Instability and Limits

The features of preferentialism that support its entrenchment may eventually contribute to its demise. A classic principle of church-state separation holds that the fusion of religion and politics corrupts both the church and the state.[542] The problem of corruption animates the idea of the "wall of separation," which protects the garden from the wilderness, in Roger Williams's famous vision.[543] But corruption can also be useful when thinking about the persistence of a conjoined regime. Historically, corruption of religion has induced reformist movements within churches, but corruption of politics has also led to campaigns aimed at extricating the state from matters of religious and theological controversy.[544]

An intriguing possibility is that structural preferentialism will induce further alienation from organized religion, increasing the numbers of the disaffiliated and accelerating the country's secularist trend. Some have already attributed the rapid rise of disaffiliation to the politicization of religion in the United States, and specifically to the identification of religion with the political right.[545] If this is correct, then preferentialism may, ironically, contribute to a shrinking religious sphere. State funding and exemptions may buttress that sphere in the short term but nevertheless undermine it in the long term.[546]

---

[541] *See* Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEG. STUD. 75, 95–101 (2021).

[542] *See* Koppelman, *Corruption*, *supra* note 532, at 1841–42.

[543] *See id.* at 1854–87.

[544] Perhaps most famously, at least in U.S. history, are President James Madison's and President Thomas Jefferson's efforts to defeat the proposed Virginia assessments and to secure a statute for religious freedom. *See* JACK N. RAKOVE, BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF FREE EXERCISE OF RELIGION 85–97 (2020).

[545] *See supra* Part III.B.

[546] *See* Dan Koev, *The Influence of State Favoritism on Established Religions and Their Competitors*, 16 POL. & RELIGION 129, 131–35 (2023); Jonathan Fox & Ephraim

Another possibility is institutional collapse. Churches have already faced ideological and theological battles, along with formal schisms, over the treatment of women's equality, reproductive rights, same-sex marriage, and LGBTQ rights.[547] As denominations fracture along political lines, some congregants may decide to withdraw from the political sphere or to create countermovements that reject the close identification of religion with a particular partisan construction of the state.[548] Those movements could reinvigorate a separationist politics, especially if the benefits and burdens of citizenship increasingly seem to be distributed along religious lines.

In terms of political interest groups, powerful forces will continue to resist regimes that weaken their rights in the face of religious demands for state support and exemptions. Political support for certain LGBTQ rights remains strong. It is notable that the Trump Administration did not take the most dramatic steps to weaken marriage equality, for instance by crafting the broadest possible religious exemptions.[549] Broad public support may place some limits on judicial action. While the Court has granted exemptions for wedding vendors,[550] and while it will continue to develop those permissions and extend them beyond the wedding context,[551] it may hesitate before demanding exemptions for general retail businesses that wish to exclude same-sex couples or LGBTQ customers. It might also balk at for-profit employers who wish to refuse benefits to workers who are married to someone of the same sex, although this seems more uncertain.[552]

Tabory, *Contemporary Evidence Regarding the Impact of State Regulation of Religion on Religious Participation and Belief*, 69 SOCIO. RELIGION 245, 258 (2008).

547 *See, e.g.*, Ruth Graham, *With a Deadline Looming, the United Methodist Church Breaks Up*, N.Y. TIMES (Dec. 18, 2023), https://www.nytimes.com/2023/12/18/us/the-united-methodist-church-schism.html.

548 *See, e.g.*, JAMES DAVIDSON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD 6–17 (2010) (criticizing Christian evangelical political strategies as based on false understandings of cultural change).

549 Narrower exemptions were promulgated. *See generally* Robert W. Tuttle, *Foster Care and the Growing Tension Between the Religion Clauses: A Comment on* Rogers v. HHS, 60 FAMILY CT. REV. 70 (2022) (discussing a federal waiver for a South Carolina adoption agency).

550 *See 303 Creative*, 143 S. Ct. at 2318; *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

551 *See Fulton*, 141 S. Ct. at 1882.

552 The Fifth Circuit's recent decision in *Braidwood Management, Inc. v. EEOC*, 70 F.4th 914, 940 (5th Cir. 2023), granting a RFRA exemption from Title VII to allow a for-profit religious employer to engage in sex discrimination, is some evidence pointing the other way.

Another example is reproductive rights. The *Dobbs* decision has generated a backlash, as recent pro-choice electoral successes (even in conservative states) have shown.[553] Support for abortion rights has remained fairly consistent in the United States since the 1970s.[554] The pro-life movement's close identification with evangelicals and conservative Catholics may lead the Court's decision to be perceived as religiously aligned.[555] This too may create energy for a broader separationist movement among supporters of reproductive rights.

Black Americans and other minority groups may also be troubled by the fusing of religion and race represented by Christian nationalism, which is strongly associated with white evangelicals in the United States.[556] We have argued that the history of church-state doctrine was influenced by opposition to integration. The resurgence of a racially inflected Christian nationalism will certainly generate backlash, though whether it takes the form of a more robust separationism is uncertain. Our basic point, however, is that the political constituencies that might reject preferentialism are similar to those that comprise much of the current Democratic coalition: women, ethnic and religious minorities, LGBTQ persons, and Black Americans. That is no surprise considering the close identification between religion and politics on the right and the intensifying religious-political divide in the United States.

These political forces are relevant in the longer term, over the next generation or so. In the short term, the Court might find that it has created tension between its political constituency and its legal doctrine. Recent litigation asserting a free exercise right to exemptions from abortion bans illustrates this tension.[557]

---

553 *See* Russell Berman, *The Abortion Backlash Reaches Ohio*, THE ATLANTIC (Aug. 8, 2023), https://www.theatlantic.com/politics/archive/2023/08/ohio-special-election-issue-1-abortion/674957 (reporting that "statewide abortion-rights ballot measures have been undefeated," including in Ohio and in Republican-controlled states like Kansas, South Dakota, and Arkansas).

554 *See supra* note 402 (citing polling evidence).

555 *See* Gregory Smith, Michael Rotolo & Patricia Tevington, *Religion and the Supreme Court*, PEW RSCH. CTR. (Oct. 27, 2022), https://perma.cc/9R72-A2JE (observing a "significant jump in the share of U.S. adults who say the Supreme Court is 'friendly' to religion," and that "non-Christians and Democrats are more inclined than Christians and Republicans" to hold that view).

556 *See* Samuel Perry, *American Religion in the Era of Increasing Polarization*, 48 ANN. REV. SOCIO. 87, 95 (2022) (noting that "the vast majority of White evangelicals affirm Christian nationalist ideology").

557 *See* Schwartzman & Schragger, *Religious Freedom and Abortion*, *supra* note 416, at 2301 n.5 (collecting cases).

Religious plaintiffs have asserted that under the Court's "most-favored nation" approach, they too are entitled to an exception—in this case to abortion bans that already include secular exceptions for rape, incest, in vitro fertilization, or protecting the life of the mother.[558] In the abortion context, the Court is put to a stark choice: fully embrace its robust free exercise holdings and undercut its antiabortion constituency, or avoid applying those holdings to claims raised by liberal believers and risk displaying a preference for conservative religious denominations over others.

The free exercise challenges to abortion bans suggest a broader possibility, namely, the proliferation of free exercise claims by religious minorities, such as Muslims, Hindus, Sikhs, Reform Jews, and Indigenous Peoples, among others. Historically, the Supreme Court's repeated experiences with exemption cases from such groups coincided with a retrenchment of free exercise doctrine, even under the *Sherbert* regime.[559] *Smith* was a "conservative" reaction to religious pluralism, and it rested on an anarchy objection. The Court was concerned there would be an uncontrollable proliferation of religious claims for special treatment.[560] Especially if such claims (now newly reinvigorated) come from nonwhite and non-Christian groups, the politics of reestablishment could start to shift. Imagine that a majority-Muslim town begins to use public funds for religious schooling, for instance, and seeks exemptions to state-mandated curricular requirements and perhaps also to prohibitions on religious discrimination in school admissions, in order to favor Muslim students over those of other faiths.[561] Separationist theory predicts that religious-political alliances that favor particular denominations will fracture when other religious groups seek to participate. If that theory is at all correct, then structural preferentialism will generate social conflicts that tend to undermine its long-term stability.

CONCLUSION

The Roberts Court has ushered in a period of church-state doctrine that we have termed *structural preferentialism*. This new regime reverses the *separationist* model that existed only a

---

[558] *Id.*

[559] *See* Lupu, *supra* note 324, at 51–53.

[560] *See Emp. Div.*, 494 U.S. at 888.

[561] Some Christian schools have recently asserted such claims. *See supra* note 169 (collecting complaints).

few decades ago and replaces the period of *deferentialism* that immediately preceded it. It is characterized by an expansive Free Exercise Clause and an almost nonexistent Establishment Clause. The implications of this constitutional revolution are startling and cannot easily be explained through doctrinal analysis alone. Instead, following previous scholars, we have argued that the Court's decisions are better understood as if they reflect the demands of competing religious interest groups.[562] We have provided a periodization of historical church-state regimes that describes the ebb and flow of these interests, and we have offered a political-economy explanation for the sudden shift in the Court's emerging doctrine.

Our primary contribution, however, has been to name and explain the current constitutional arrangement. Structural preferentialism reestablishes religion in the United States by mandating massive funding of religious institutions—including direct funding of churches and religious schools—while dramatically limiting the ability of the government to regulate those religious entities. The regime has been extended to business corporations that assert a religious purpose, and it has been applied to require exemptions from basic civil rights statutes. Furthermore, although the regime purports to apply principles of religious freedom equally, legislative implementation has predictably shown favoritism to religion over nonreligion, and to certain religions over others.[563] So, too, judicial implementation has been inconsistent. When faced with claims by minority religions, such as Muslims, the Supreme Court has been less than receptive.[564] There is evidence indicating that the same is true in the lower federal courts as well.[565]

Three decades ago, when the Court was moving from its separationist paradigm to its period of deference, Professor Douglas Laycock coined the term "disaggregated neutrality" to describe what he was seeing in the doctrine.[566] What he meant was that the Court applied the idea of religious neutrality inconsistently. When the government regulated religious groups, the Court

---

562 *See* Jeffries & Ryan, *supra* note 15, at 280–81.

563 *See supra* Part I.D.

564 *See, e.g.*, *Trump*, 138 S. Ct. at 2423.

565 *See generally* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Trump's Lower-Court Judges and Religion: An Initial Appraisal* (Va. Pub. L. and Legal Theory Rsch. Paper No. 2023-49, 2023) (available on SSRN) (reporting evidence of religious favoritism in free exercise cases among Trump-appointed federal circuit judges).

566 *See* Laycock, *Neutrality Toward Religion, supra* note 12, at 1007–08.

adopted a position of formal neutrality (under *Smith*), which meant treating them just like nonreligious groups. But when the government funded religious schools, the Court applied a substantive principle of neutrality (under *Lemon*), which prohibited their advancement, even if they were funded in the same way as nonreligious schools.[567] When taken together, these doctrines seemed to treat religious believers and institutions worse than their secular counterparts. The result was: no exemptions *and* no equal funding. What could make sense of this doctrinal structure? "The most obvious explanation," Laycock wrote, "is simply hostility to religion."[568] And then he added this: "If you have the opposite preferences, you are equally in need of a good explanation."[569]

In our view, that is precisely the situation of the Roberts Court today. Its approach can be understood as disaggregated, but to opposite effect. When it comes to public funding, the Court insists on formal equality toward religion, so that state policies designed to separate church and state are construed as impermissible discrimination toward religion.[570] But when it comes to regulation, the rule is substantive neutrality, under which religious actors are exempted from rules that burden their practice or observance.[571] Though either of these rules, viewed in isolation, could be seen as neutral toward religion, in combination they work systematically to preference religion over nonreligion and some (mainly conservative) religious denominations over others.

If history is a guide, this form of religious preferentialism will continue for a generation, but then, as with prior regimes, it will collapse. Theories of separation hold that sects beholden to states and states beholden to sects weaken each other, ultimately resulting in reform. The stability of preferentialism ultimately depends on forces that, while influenced by the Court, are also part of a much larger religious and political culture. That culture is in the process of significant social change, marked by polarization, disaffiliation, and the fusion of religious and political identities. Our argument is that understanding those forces is necessary to explain the doctrinal shifts in the Court's jurisprudence. Surveying the shifting periods of Religion Clause doctrine provides ample support for that thesis.

---

567 *Id.* at 1009–10.

568 *Id.* at 1008.

569 *Id.*

570 *See supra* Part I.A.

571 *See supra* Part I.B.