Equal Liberty
Preserving Religious Freedom for All Texans

A JUSTICE FRAMEWORKS REPORT BY
Texas Interfaith Center for Public Policy
The Texas Interfaith Center for Public Policy is a faith-based, 501(c)(3) non-profit organization providing theologically grounded public policy analysis to people of faith and other Texans. The Center is the research and education partner of Texas Impact, the state’s oldest and largest interfaith legislative network. Texas Impact was established by Texas religious leaders in 1973 to be a voice in the Texas legislative process for the shared religious social concerns of Texas’ faith communities. Texas Impact is supported by more than two dozen Christian, Jewish and Muslim denominational bodies, as well as hundreds of local congregations, ministerial alliances and interfaith networks, and thousands of people of faith throughout Texas.

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The United States pioneered the radical ideal of religious liberty. The Founding Fathers renounced the power of governments to dictate religious doctrine, compel religious belief, or prohibit religious expression. In doing so, they changed the course of civilization, and they created the unique sociopolitical context that Americans today too often take for granted.

In the 18th century, the roles of government and religious institutions were thoroughly entwined. In a time before public schools or social service agencies, the ministers and vestries of the tax-supported church often served those functions. Governments maintained jurisdiction over individual religious beliefs and over civil-religious institutions that had the power to control the lives and livelihoods of citizens.

James Madison and Thomas Jefferson envisioned a religiously egalitarian society where the roles of government and religious institutions were completely disentangled. Their constituents consisted of Presbyterians, Baptists, and other religious “dissenters.” Madison and Jefferson championed their cause first in Virginia, then in the U.S. Constitution, and later in other states. They asserted that religion did not need the state’s support to flourish, and that separating the institutions of religious organizations and civil government benefited both.

The Jeffersonian/Madisonian ideal avoided the religious wars of Europe and the secularization that followed. Their ideal is still a model to the world. Our nation has avoided the tyranny of theocracies prescribing religious practices, and we’ve avoided the tyranny of secular states proscribing religious practices.

The uniquely American challenge is to maintain “equal liberty.” Equal liberty means that no individual enjoys special rights or unfettered liberty to abridge the equal liberty of another. Special rights—for any individual or group—under the guise of religious liberty would be tyranny by another name.

The Establishment Clause:
“Congress shall make no law respecting an establishment of religion…” When “separation of church and state” is invoked, it is often referring to this clause. An example is public taxpayer dollars funding parochial schools that promote a particular religion. The degree of separation has been, and continues to be, contentiously debated.

The Free Exercise Clause:
“Congress shall make no law… prohibiting the free exercise thereof…” When “liberty of conscience,” “rights of conscience,” or religious exemptions from generally applicable laws are invoked, it is often referring to this clause. Historically the less controversial clause, American jurisprudence has differentiated between belief and conduct. While the right to belief is unquestioned, the limits to which conduct is protected is currently a contentious debate, especially post-Obergefell.
To maintain “equal liberty,” Madison drafted the First Amendment to contain two co-equal religion clauses. The equal liberty of Americans on matters of religion depends on a careful calibration of the two clauses. If either clause subsumes the other, someone’s liberty is infringed. When the two clauses are interpreted as symmetrical buttresses, religious liberty is maximized for all.

Colonial Foundations of Religious Diversity

Though the majority of colonists were Protestant Christians, evidence abounded throughout the Revolutionary period that all religions were to be equal before the law in the new nation. The Baptist minister, John Leland, wrote in “A Chronicle of His Time in Virginia,” “the notion of a Christian commonwealth should be exploded forever…Government should protect every man in thinking and speaking freely, and see that one does not abuse another. The liberty I contend for is more than toleration. The very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest to grant indulgence, whereas all should be equally free, Jews, Turks, Pagans and Christians.”

John Carroll, the first Roman Catholic bishop in the United States, found opportunities to defend the religious freedom of Catholics and non-Catholics alike. Carroll championed not “toleration,” but rather “equal liberty,” “religious freedom,” and “a free participation of equal rights.” At the same time, Carroll worked to remove “exterminare haereticos” from the list of tasks American bishops were expected to perform—a vital step toward ecumenism in a republic committed to treating all religions equally. Carroll founded Georgetown University in 1791 to “be open to Students of Every Religious Profession.”

After centuries of persecution in Europe, Jews found equal rights in most of colonial America. A census conducted in 1775 reports five synagogues, and the American Jewish population was estimated to be around
3,000 in 1800. America’s Jews attracted little animus compared to Catholics and some evangelical groups. Unlike Catholics, Jews had few ties to rival foreign powers. Unlike evangelicals, Jews largely refrained from proselytizing. After Virginia passed its Statute for Religious Freedom in 1786, other states followed removing any restrictions on holding office or other religious liberties.

Muslims were not excluded from American religious freedom either. Thomas Jefferson purchased a copy of the Qur'an in 1765, 11 years before writing the Declaration of Independence. Quoting John Locke, Jefferson wrote “neither Pagan nor Mahamedan [sic] nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion.” Anglican lawyers James Iredell and Samuel Johnston argued for the rights of Muslims in North Carolina’s disestablishment struggle, and John Leland agitated for Muslim equality in the state disestablishment struggles in Connecticut in 1818 and Massachusetts in 1833.

The Establishment Clause

The First Amendment protects religious liberty in two ways. The first protection is known as the Establishment Clause, and reads: “Congress shall make no law respecting an establishment of religion.” This clause enshrines the principle typically referred to as “separation of church and state.”

Prior to the Revolution, religious “establishment” varied widely across the colonies. For example, Virginia supported the Church of England with a tax; Massachusetts assessed a similar tax but applied the revenue to multiple denominations; and Pennsylvania did not support any religious institutions with public funds.

Discrimination Among Religions:
If a law facially differentiates among religions, such as Oklahoma’s “anti-sharia law” bill in 2010, then it is unconstitutional unless the government proves a “compelling state interest” that cannot be achieved using “less restrictive means” — an exceptionally high burden government can rarely prove.

The Lemon Test:
If a law does not facially discriminate, then the prevailing Establishment Clause test is known as “The Lemon Test,” so-called after the 1971 case Lemon v. Kurtzman. To be constitutional, the government action must have a secular purpose, the primary effect must neither advance not inhibit religion, and must not excessively entangle government with religion.
Under the Establishment Clause, the new federal government could never levy a tax to support a religion. Furthermore, while the Establishment Clause did not specifically disestablish government-sponsored religion at the state level, the minority of states that had not disestablished before the Bill of Rights, subsequently disestablished in the decades that followed.

The First Amendment: Jefferson & Madison

As Americans, we owe our religious liberty largely to James Madison and Thomas Jefferson. Over the course of decades, working individually and collaboratively, these two men conceived, refined, and enshrined in law our unique model of religious pluralism.

The Constitution was drafted in 1787 and ratified by 11 states in 1788. The Constitution as it was initially ratified did not contain a Bill of Rights—in fact, the very idea of a Bill of Rights was divisive. Federalists thought a Bill of Rights would be unnecessarily duplicative, given the intentionally limited powers the federal government had under the provisions of the Constitution. Nevertheless, there was popular demand for the inclusion of a Bill of Rights, and it became an electoral issue in the election of the First Congress.iii

In the election of 1789, James Madison was a Federalist (he would split with the Federalists and help Thomas Jefferson form the Democratic-Republicans in 1791). The Virginia General Assembly had drawn Congressional districts in 1788 after the Constitution was ratified. Madison was left to campaign for Congress in a heavily Anti-Federalist district. When Anti-Federalists attacked Madison for his opposition to a Bill of Rights, Madison's longstanding support for religious liberty helped to shore up his base of support.

Baptists in Madison's district represented a voting bloc with the potential to swing the election.iii The Baptist General Committee opposed the Constitution on the grounds that it did not protect religious liberty.
adequately. Madison had been championing the
Baptists’ cause for more than a decade in the Virginia
General Assembly, and now he wrote to a politically
influential Baptist leader, the Reverend George Eve,
pledging support for a national bill of rights protecting
religious freedom. At a political rally at the Blue Run
Baptist Church, Eve preached on Madison’s support for
religious liberty, helping to secure the Baptist vote.

By the time the Bill of Rights was drafted in 1789,
most states had ended the colonial practice of having
a government-supported church, if they ever had
one. However, a minority of states retained a system
of established churches. To address this, Madison
initially proposed an amendment to make the Bill of
Rights’ religious freedom provisions binding on state
governments. He believed disestablishing the remaining
state churches to be the most important of the proposed
amendments, but the proposal failed to pass the Senate.

In advancing his proposed religious freedom provisions,
Madison faced strong resistance from Congregationalist
New England—for example, Representative Huntington
of Connecticut argued disestablishment would lead
to a breakdown in civic virtue and order. Ultimately,
though, Madison prevailed largely due to mutual
distrust: the dominant denominations in states with
established churches feared other denominations might
prevail if Congress ever chose to establish a national
church. While the Senate did not agree to make the First
Amendment binding on the states, the movement toward
disestablishment would continue at the state level until
the last state establishment fell in 1833.

Church-state issues were so politicized at the turn
of the 19th century that when Thomas Jefferson
ran for President in the election of 1800, the rival
Federalist party assailed him for his religious beliefs.
The Federalists alleged Jefferson was an atheist and
secretly a Jacobite (the violent secularists of the French
Revolution). Federalists renewed the attacks during
Jefferson’s presidency after he ended the practice of
proclaiming a national day of fasting and thanksgiving.

**Voluntaryism:**
a term that evolved into our notions
of “disestablishment,” or the idea that
any support for a religious institution
be voluntary from individuals, and
not derived from a government levy
or subsidy.
Disestablishment: the State Experience

By the time of the American Revolution, the right of “private judgment” (free exercise) was largely unquestioned. Once other faiths were openly permitted, the subsequent controversy that followed was “voluntaryism” (disestablishment), or how to disentangle the institutions of religion from the new institutions of civil government.

Madison thought making the First Amendment binding on the States was the most important amendment of all the proposals to be put in the Bill of Rights. Though that proposal failed, Madison and others continued the struggle for disestablishment state by state. By 1789, 8 of the 13 colonies had no established church. Four states never had an established church, and four others had disestablished. By 1833, no state would have an established church.

The form establishments took varied, and Massachusetts and Virginia provide good examples of the disestablishment trend. Massachusetts did not have a statewide established church, but a form of “multiple establishment” decided at the local level, where individuals paid a tax but were permitted to redirect it. In Virginia, establishment was statewide and included laws requiring a license for non-Anglican clergy; approved locations for houses of worship; restrictions on disserter clergy from performing marriages; restrictions on incorporation of churches and religious organizations; the criminalization of certain religious doctrines; required worship attendance; prescribed modes of worship; and taxes on individuals of non-established churches.

Virginia

In late 1774, several Baptist ministers in Virginia were jailed for preaching without a license and publishing those sermons. A young James Madison was outraged. Brought up Anglican, Madison was educated at the ecumenical Princeton in New Jersey. He wrote to his college friend from Philadelphia to learn about the Pennsylvania model for church-state relations. Madison became a lifelong champion for the cause.

Shortly thereafter, Madison was elected to the Virginia General Assembly that had been tasked by the Second Continental Congress with writing a state constitution. As a freshman, Madison proved adept at working through elder statesman. Objecting to the term “toleration,” Madison penned the amendment to the initial draft of what would become Article 16. Madison believed “toleration” implied subordination and a mere permission of what was truly an inalienable right. It was a term inseparable from an established church. Instead, Madison used “free exercise” because it signified the equality of all faiths. It is the first known use of the term “free exercise.”

Madison’s amendment also included language to disestablish the Church of England. In early 1776, that language proved to be a sticking point, and Madison had pragmatically stripped it. However, with war declared in July of 1776, dissenters such as Presbyterians and Baptists began flooding the General Assembly with petitions. The Presbytery of Hanover stressed the need to unify every denomination behind the war effort and called for a suspension of divisive laws. Soon thereafter, the tax supporting the Church of England was suspended, and Baptists were allowed to marry couples without going through an Anglican minister. While laws requiring licensing of ministers and approval of meeting house locations went unenforced, laws barring Baptists from the local vestry that administered the tax dollars collected for the poor continued to be a sticking point.

In 1779, Thomas Jefferson filed Bill No. 82, A Bill for Establishing Religious Freedom. Like most legislation, it did not pass on the first try. After the war, Patrick Henry championed the cause of the established church arguing government needed to support religion to help former soldiers transition back into moral, productive citizens. Jefferson’s bill was stalled, and debate throughout the war had been over which form a “multiple establishment” system might take. Predictably, previous versions of multiple establishment bills died over articles of faith defining what was too heterodox to be taxpayer funded. Henry and proponents of a general assessment to support religion strategically waited until late in 1784 to unveil a written version of A Bill Establishing a Provision for Teachers of the Christian Religion. Nevertheless, Madison was able to use delay tactics in a divided legislature to postpone the bill until the next legislative session.
Over the interim, Presbyterians, Baptists, other dissenters and their allies, like Madison, mobilized. George Mason, who was married to a Catholic, prompted Madison to write the Memorial and Remonstrance with 15 points in opposition to multiple establishments. Lobbyists for the Presbyterians and Baptists flooded legislators with numerous other petitions from the dissenter strongholds of the middle and western counties. When the Virginia Legislature reconvened in October of 1785, Henry’s bill was dead on arrival. With Jefferson serving in Paris by 1785, Madison took up his Bill No. 82 and seized the moment. In January of 1786, Virginia passed Jefferson’s Bill for Establishing Religious Freedom.

**Massachusetts**

To be permitted to redirect the tax to the faith community of the individual’s choosing under Massachusetts’s “multiple establishment” system, a person had to obtain special permission through a certificate. Such persons were known as “certificate men.” Certificate men were subject to ridicule and ostracism. In the 1740s, property values fell wherever Baptists moved.

Despite its Puritan history, the disestablishment struggle was strong even in New England. Congregationalist churches were supportive of the Revolution, unlike the Church of England’s clergy with Tory sympathies in the South. Nevertheless, the disestablishmentarians produced stiff resistance when the state constitution was debated in 1780. Professor John Witte has cast doubt on whether the controversial Article 3 ever had the two-thirds majority necessary to become part of the state constitution. It was ratified along with the remainder of the whole document.

Though slower in Puritan regions compared to the other states with more diversity, the tide was against the establishmentarians. As a public school system developed after the Revolutionary period, controversy ensued over disentangling from civil government what had previously been the role of religious societies. In 1827, Massachusetts made it unlawful to teach sectarian doctrines in the common school system and effectively ended public funding of religious schools.

In the early 19th century, Unitarianism was on the rise in Congregationalist dominated Massachusetts. Unitarians were becoming the majority in many of the towns surrounding Boston. In those towns, Congregationalists were now “certificate men.” Faced with becoming the stigmatized “other” having to obtain permission from Unitarians to divert their taxes to their own church, Congregationalists gave up. Massachusetts passed a state constitutional amendment and became the last state to disestablish all churches in 1833.

**Colonies and Early States’ Actions Regarding Disestablishment:**

<table>
<thead>
<tr>
<th>Year</th>
<th>State</th>
</tr>
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<tbody>
<tr>
<td>1775-1786</td>
<td>Virginia</td>
</tr>
<tr>
<td>1798</td>
<td>Georgia</td>
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<tr>
<td>1807</td>
<td>Vermont (not original 13)</td>
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<tr>
<td>1818</td>
<td>Connecticut</td>
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<tr>
<td>1819</td>
<td>New Hampshire</td>
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<td>1820</td>
<td>Maine (not original 13)</td>
</tr>
<tr>
<td>1832-1833</td>
<td>Massachusetts</td>
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<tr>
<td>1836</td>
<td>Republic of Texas</td>
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**1775 Census of Houses of Worship in the 13 Colonies**

- Congregational — 668
- Presbyterian — 588
- Anglican — 495
- Baptist — 494
- Quaker — 310
- German Reformed — 159
- Lutheran — 150
- Dutch Reformed — 120
- Methodist — 65
- Catholic — 56
- Moravian — 31
- Congregational-Separatist — 27
- Dunker — 24
- Mennonite — 16
- French Protestant — 7
- Sandemanian — 6
- Jewish — 5
- Rogerene — 3

Never established: PA, RI, DE, NJ

1776: North Carolina
1777: New York
1785: Maryland
1790: South Carolina
1798: Georgia
1807: Vermont (not original 13)
1818: Connecticut
1819: New Hampshire
1820: Maine (not original 13)
1832-1833: Massachusetts
1836: Republic of Texas
The Federalist smear campaign on his faith prompted Jefferson to write a letter to the Danbury Baptist Association, a religious minority in Congregationalist Connecticut that was fighting for disestablishment at the state level. It is in this letter that Jefferson coined the phrase “a wall of separation between church and state” to describe the Republican position on the subject. Jefferson would later say he most wanted to be remembered for his work on Virginia’s Statute for Religious Freedom, the bill that he wrote and Madison passed in 1786.

The authors of our religious liberty predicted accurately that religion would not require state support to flourish. The Second Great Awakening occurred as the final state-level establishments were ending. While the population of the new nation increased eight-fold, Baptist churches increased fourteen-fold and Methodists, twenty-eight fold. New denominations sprang up, such as the Disciples of Christ, which had not even existed at the time of the Revolution but had more than 2,000 congregations by 1860. As Madison would later put it, “we are teaching the world that great truth that governments do better without kings and nobles than with them. The merit will be doubled by the other lesson: that Religion flourishes with greater purity without than with the aid of Government.”

**Theories of Establishment**

As the ultimate arbiters of the law in the United States, the nine justices of the Supreme Court review and interpret the Constitution. In interpreting the Establishment Clause, every justice serving on the Court today agrees that the federal government may not create a church, discriminate among religions, or give preference to one religion over another. Beyond these points of agreement, the justices have conflicting theories over what relationship the Establishment Clause creates between religions and civil government. Modern Establishment Clause jurisprudence may be understood by roughly categorizing the theories into three camps: accommodation, strict separation, and neutrality.

——— Thomas Jefferson, Letter to the Danbury Baptists, January 1, 1802
Accommodation

Accommodationists do not mind favoring religion over secularism. They hold that religion always has had an important place in American society, and government may act to “accommodate” its presence. Government may encourage religiosity, they contend, because America is a religiously pluralistic nation, not a secular nation; therefore, the Establishment Clause is only violated if government creates a church, compels religious participation, or favors one religion over another.

As with all three interpretative philosophies of the Establishment Clause, there is a spectrum within Accommodationism. At the most extreme end of the spectrum, Justice Thomas has argued that the Establishment Clause should not apply to state and local governments, and only restricts the federal government from establishing a national church that might compete with state churches. Many accommodationists draw the line at “coercion,” though they differ as to what exactly constitutes coercion. For example, in the 1992 case Lee v. Weisman, a school district allowed a member of the clergy to offer a nondenominational invocation at a graduation ceremony. Justice Kennedy, writing for a divided court, ruled that featuring a minister at a government sponsored graduation ceremony was coercive. Justice Scalia, however, disagreed and argued that coercion only occurs if government makes a requirement and then punishes for noncompliance.

 Critics point out that coercion alone would violate free exercise rights, making the Establishment Clause a subset of the Free Exercise Clause. The plain language of the First Amendment creates two coequal clauses. An interpretation that subordinated one clause under the other would render the drafting redundant. Critics of accommodationism who favor a neutrality theory say the Establishment Clause is meant to limit government from using its power and influence to advance religion. Justice O’Connor wrote that coercion “fails to take
account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others. Critics of accommodationism who favor strict separation say limiting Establishment Clause violations to “coercion” would not address government policies that corrupt religion and lead to religious strife.

Strict Separation

Strict separationists argue that church and state should be disconnected to the greatest extent possible. Separationists argue that government aid corrupts both religious institutions and government by causing faith communities to have conflicts over the allocation of the funds, and forcing a taxpayer of one faith to pay for the propagation of another faith. From the 18th century to the present day, separationists have included both secular humanists and the devout faithful. James Madison laid out the intellectual foundations for separationism in his “Memorial and Remonstrance Against Religious Assessments.” Many religious experts conclude James Madison’s revolutionary idea has stood the test of time and that “separation of church and state is good for both.”

Separationists are deeply skeptical of the use of public funds to support religious organizations. Many separationists oppose even the transfer of public funds to religious organizations for secular purposes. For instance, if government gives public money to religious schools for math textbooks, then the religious school can reallocate those dollars to the teaching of religion. Those separationists argue that even if there were a reliable way to separate the secular function from the religious instruction, it would require inappropriate government monitoring of religious organizations to provide appropriate government transparency and accountability to the taxpayer.

Some extreme separationists would forbid every form of public aid. Others are comfortable with incidental assistance so long as it has a secular purpose, does not advance or inhibit religion, and does not lead to
excessive entanglement. Some distinguish between the use of public facilities and direct funds. For example, Thomas Jefferson attended worship services held in the House chamber led by the ardent separationist Baptist minister John Leland. Jefferson thought if Leland was comfortable with the practice, then it was permissible for him to attend.xxvii

Critics of strict separation argue that a rigid interpretation of the Establishment Clause renders the Free Exercise Clause ineffective. Some accommodationists argue that strict separation amounts to discrimination against religion, resulting in state-imposed secularization. Those favoring neutrality point out the absurdity of completely withholding government aid to religion, which would make it impermissible for police, fire, and sanitation workers to provide city services to any religious community.

**Neutrality**

The third interpretative theory of the Establishment Clause is known as “neutrality.” Supporters of this position hold that government may not endorse or disapprove of any religion. While accommodationists argue only that government cannot discriminate between religions, neutralists contend that government cannot give preference to the religious over the secular. Likewise, neutralists differs from strict separationism in their assertion that government aid is permissible so long as government does not distinguish between the religious and the secular.

Justice O'Connor argued that government's neutrality ensures the individual's religious beliefs are not relevant to his or her standing in the community. In her view, government must not create the perception that adherence to a particular religion—or even non-adherence to any religion—is superior. O'Connor argued that the appearance of a government opinion (either endorsement or disapproval) about any religious matter (either belief or disbelief) sends a message that an individual is an outsider, or less than a full member of society.xxviii

**Neutrality:**

The Establishment Clause interpretation that generally argues government may not favor one religion over another, nor may it favor religion over no religion. Religion must be irrelevant to a person's standing in the community, and government may not send a message that non-adherents are anything less than full members of society by favoring a religion. Often in modern jurisprudence, justices who favor separation and justices who favor accommodation will make neutrality arguments to swing other justices to the desired outcome for a case.
The spectrum of neutrality includes those who argue government action must be "formally neutral" and those who argue government action must be "substantially neutral" toward religion. *Zelman v. Simmons-Harris*, xxix a 2002 school voucher case, provides an example where this distinction determined the outcome. The majority argued from a "formally neutral" viewpoint, but Justice Rehnquist argued the voucher program was "neutral" because funding went directly to the parent, who was free to choose a religious or secular school. The dissent argued from a "substantially neutral" viewpoint. Justice Souter cited Madison extensively, questioning such "formalism," xxxi and highlighting that "96.6 percent of all voucher recipients [went] to religious schools." xxxi

Critics of neutrality point to inconsistent outcomes in cases where justices on both sides invoke "neutrality." Accommodationists argue that it is unnecessary to evaluate whether government is favoring religion over non-religion. They point to historical figures, like John Adams and Justice Joseph Story (whose views differed from Jefferson and Madison), to support their positions. Strict separationists argue that neutrally appropriating government funding to religious organizations still creates the maladies of divisiveness and corruption the Establishment Clause was designed to prevent.

**Private Religious Speech**

Still today, there are those who would "re-litigate" Madison's ideal that the separation of religion and state benefits both. Like their 18th century counterparts, modern accommodationists argue that government assistance to religion promotes good morals in society.

There are also those who hold that separation of religion and state has a chilling effect on some believers' ability to practice their faiths to the fullest. Since the 1971 Supreme Court ruling in *Lemon v. Kurtzman*, xxiii accommodationists have likened religious activity to "free speech," and used "free speech" jurisprudence to argue that separation amounts to discrimination against religion.
In 1971, the Supreme Court formulated “the Lemon test,” which sets forth clear principles to synthesize prior decisions under the Establishment Clause. In *Lemon v. Kurtzman*, the Supreme Court struck down two states’ laws reimbursing teachers at private (mostly religious) schools. The three-part Lemon test requires that government must have a **secular purpose**, must not **advance or inhibit religion**, and must not lead to **excessive entanglement**.

Immediately after the *Lemon* ruling, many lawyers representing public schools advised their clients to prohibit religious student groups from using school facilities for group activities. These lawyers feared that providing a space would be an impermissible aid to religion due to the benefit religious groups received from the incidental costs to the school district of maintaining a building. Accommodationists argued the schools’ barring of religious student groups, but permitting other extracurricular activities, amounted to discrimination against religion.

Accommodationists sought a workaround. The Establishment Clause has historically been understood as a limitation on government, as opposed to an affirmation of an individual civil right. Therefore, even if accommodationists could show that permitting religious student groups to meet in a public school facility did not violate the Lemon test, that alone would not require the schools to allow religious student groups to use the facility.

To create an individual right, accommodationists argued that religious activity amounted to free speech. In free speech jurisprudence, if government restricts speech based on its content, then the state must show it has a compelling interest and has used the least restrictive means of limiting that speech. Therefore, public schools’ barring of religious student groups from equal access to the facilities constituted impermissible discrimination based on the content of the speech.

In the initial “private religious speech” cases involving equal access to facility usage, the Supreme Court agreed

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**Is religion merely speech?**

“[The majority’s decision is] founded on the proposition that, because worship uses speech, it is protected by the Free Speech Clause of the First Amendment…this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning…” – Justice White, sole dissenter in *Widmar v. Vincent*
with the plaintiffs. The Court determined—using the Lemon test—that the Establishment Clause was not implicated, and that public schools did not have a compelling interest in restricting the students’ private religious speech. However, the Court’s decision to create an affirmative right has become more complicated as accommodationists push to expand the doctrine. Previously, accommodationists have advanced to the Supreme Court cases involving direct financial support, monuments and prayer. Currently, advocates for public school privatization are using private religious speech arguments to attack disestablishment provisions in state constitutions.

Equal Access to Facilities

In 1981, the Supreme Court took up *Widmar v. Vincent*. In *Widmar*, the University of Missouri at Kansas City did not allow student groups to use school facilities for religious worship or discussion. The university did permit facility usage for secular student activities. From a strict separation view, the use of the facility for religious worship constituted an impermissible subsidy to religion. The majority of justices, however, disagreed with this interpretation. The Court ruled 8-1 that religious worship and discussion were protected forms of speech and association.

By allowing other student groups to use school facilities to meet, the university had created a public forum with their facilities. Under free speech jurisprudence, once that public forum had been created, the public university needed a compelling interest to discriminate against the content of speech. The Court explained that while protection of the Establishment Clause would have been a compelling state interest, the Court did not find the Establishment Clause implicated. Applying the Lemon test, the Court found a secular purpose in fostering many viewpoints on campus, determined there was no excessive entanglement with religion, and held that any advancement of religion would be “incidental.”

In 1984, Congress passed the *Equal Access Act*, extending the public higher education decision in

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**The Equal Access Act (1984):**

A Congressional Act extending *Widmar v. Vincent* to all public secondary schools. In *Widmar*, the Supreme Court ruled that public schools did not need to exclude religious groups from using facilities to which other secular groups had access to protect the Establishment Clause.
Widmar to all public secondary schools. Consistent with Widmar, the Act requires nondiscrimination on the content of speech so long as meetings are student-initiated and student-led. In 1990, the Supreme Court upheld the constitutionality of the Equal Access Act in Board of Education v. Mergens. The concurrences in Mergens, and the subsequent Lamb's Chapel v. Center Moriches Union Free School District in 1993, reveal a shift in the disposition of the Court over the decades toward accommodationism. The majority opinions in both cases use Lemon to find that the Establishment Clause is not implicated. However, Justices Scalia, Kennedy, and Thomas wrote concurrences objecting to the use of the Lemon test at all.

 Expansion of Doctrine

In 1995, the Supreme Court expanded the “religious speech” doctrine to cases involving the receipt of government funds and private monuments on public property. However, in 2000, the free speech tactic did not succeed in overturning prior school prayer decisions by reclassifying prayer as “religious speech.”

In the 1995 case Rosenberger v. Rector & Visitors of the University of Virginia, the University of Virginia denied funding to a Christian student group that published an expressly religious magazine. The funding for student groups came from a student activity fee collected as part of tuition. Unlike a facility-use case where the building was being made available to all, funds from students of all faiths were being directed to a publication promoting the views of one particular faith. In a 5-4 opinion, Justices Kennedy, Rehnquist, O'Connor, Scalia and Thomas found for the students, ruling the university's actions to be impermissible content-based discrimination. Justice Kennedy wrote that it was not the university speaking, but rather, the university “expends funds to encourage a diversity of views from private speakers.” The majority found no violation of the Establishment Clause as the program was “neutral” in acting to help all student groups so there would be a wide array of activities and viewpoints on campus.
Justice Kennedy also argued that denial of funds was akin to government examining publications. Justices Souter, Stevens, Ginsberg and Breyer dissented. The justices were concerned about the precedent of creating an affirmative right for a religious organization to receive government funds. Justice Souter wrote, “using public funds for the direct subsidization of preaching the Word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.” He then cited extensively from James Madison’s “Memorial and Remonstrance Against Religious Assessments,” and quoted the preamble of Jefferson’s “Bill for Establishing Religious Freedom,” which reads “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”

In that same term, the Court also took up the issue of private monuments placed on government property. In *Capitol Square Review & Advisory Board v. Pinette*, the Court ruled that a state agency violated the “private religious speech” of the Ku Klux Klan when it refused to let the Klan put up a cross in a park across from the state capitol of Ohio for Christmas. Justice Scalia wrote for a plurality of Justices Rehnquist, Kennedy and Thomas, stating that “religious speech” was no different than secular private expression. For the plurality, so long as government permitted religious speech in same manner as secular speech, there was no Establishment Clause concern. Justices O’Connor, Souter and Breyer concurred using different reasoning. For those three justices, the question was whether government was endorsing religion. Justices Stevens and Ginsberg dissented. They objected to Justice O’Connor’s application of a “symbolic endorsement test” as an inadequate separation of religion from civil government.

In 2000, school prayer proponents used the “religious speech” doctrine in an attempt to overturn nearly four decades of precedent prohibiting government-led school prayer. In *Sante Fe ISD v. Doe*, school officials selected students to deliver invocations before high

“Ultimately, America’s answer to the intolerant man is diversity, the very diversity which our heritage of religious freedom has inspired.” —Robert Kennedy
school football games over the public address system. The school argued the students’ prayers constituted private speech. The Court disagreed. In a 6-3 opinion, Justice Stevens wrote, “[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.” The public school restricted the message by maintaining control over the public address system. Students were not free to say whatever they wanted, and many were required to attend for academic credit. Justice Stevens noted the coercion implicit in the choice students were forced to make between academic credit and avoiding religion. Stevens wrote, “it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”

**Criticisms & Implications**

Conceptual inconsistencies arise when justices treat religion like speech. In the initial Widmar case, Justice White agreed with the outcome, but disagreed with the reasoning strongly enough to be the lone dissenter rather than write a concurrence. Before discussing all the precedents he believed were in danger, Justice White stated that the majority’s decision was “founded on the proposition that, because worship uses speech, it is protected by the Free Speech Clause of the First Amendment…this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.”

The full implications of classifying religion as speech require exploration. If religion constitutes speech in Establishment Clause cases, then it is unclear why religion would not constitute speech in Free Exercise Clause cases as well. As the following section discusses, the Free Exercise Clause protects all of the belief and some of the conduct that arises from religious adherence. In free speech jurisprudence, various forms of conduct are considered “symbolic speech.” Also called “expressive conduct,” symbolic speech constitutes speech because...
the conduct conveys the message. The wearing of black
armbands to protest a war,\textsuperscript{lvii} burning a draft card,\textsuperscript{lviii}
burning a flag,\textsuperscript{lix} and nude dancing\textsuperscript{lx} are all examples of
"symbolic speech."

In \textit{U.S. v. O'Brien},\textsuperscript{lxii} the Supreme Court found that
government has sufficient justification for the regulation
of "symbolic speech" if it has an important interest
unrelated to the suppression of the message, and if
the impact on the communication is no more than
necessary to achieve the government's purpose.\textsuperscript{lxii} The
\textit{O'Brien} standard is a form of "intermediate scrutiny."
Intermediate scrutiny would be more protective of
religion than the outcome in \textit{Employment Division v.}
\textit{Smith}, debatably less protective of religion than the
outcome under \textit{Lukumi}, and certainly less protective
than the strict scrutiny required under the \textbf{Religious
Freedom Restoration Act} (see below).

**The Free Exercise Clause**

The second religious liberty protection found in the First
Amendment is known as the Free Exercise Clause. It
reads, "Congress shall make no law...prohibiting the free
exercise thereof..." This clause enshrines the principle
typically referred to as "liberty of conscience"—the right
to choose what one believes in matters of religion.

**Pre-Revolutionary Roots of Free Exercise**

Reflecting the norms of 17th century Europe, many early
colonies were not exemplary models of religious liberty.
More often, they provided an environment for formerly
persecuted European minorities to enforce their own
religions on others.
There were notable exceptions. The mid-Atlantic colonies were exceptionally diverse. For example, the Quaker William Penn founded Pennsylvania, which never had a state-supported church, and would be studied by a young James Madison as a model of church-state relations. \textsuperscript{lxiii} Rhode Island was founded by Roger Williams, whose writings on religious liberty pre-date John Locke’s. Williams was banished from Massachusetts for spreading the “heretical” idea that civil government lacked authority to punish religious dissent. \textsuperscript{lxiv}

Despite having experienced persecution in Europe, early New England colonists were quick to persecute others. Perhaps the most well-known instance of religious persecution in colonial America was the infamous Salem witch trials, which began in the early 1690s. Significantly, the first three women accused of witchcraft in Salem lived on the margins of society: a beggar, a slave, and a litigious woman. \textsuperscript{lxv}

Less celebrated in American popular culture and predating the Salem unpleasantness by a generation, four Quakers were hanged in the Boston Commons in 1661. The Quakers’ crimes consisted of unauthorized religious gatherings, refusing to recant and join the Congregationalists, publishing tracts, and proselytizing. Cropping ears and public floggings had not deterred the Quakers. When the Quakers refused to be banished from the colony, the Congregationalists found execution reasonable. \textsuperscript{lxvi}

The Christian Europe that produced the colonists was anything but tolerant. In the 1500s, those who preached tolerance toward Jews and Muslims were often killed for heresy. \textsuperscript{lxvii} Inquisitions pursued those who dared question religious authorities. The religious wars of Europe were numerous. Early colonization of North America coincided with England’s participation in the Thirty Years War (1618-1648), which began with a Protestant uprising against the Catholic Hapsburgs. Shortly thereafter, England went through the civil war of the 1640s and early 1650s. Scottish Presbyterians and Puritans, like Oliver Cromwell, deposed the Anglican king. In 1688, Protestants in England deposed Catholic

\textit{The execution of Ann Hibbins on Boston Common, by F. T. Merrill.}
James II in the Glorious Revolution. Well into the 1700s, English conflict with the Catholic empires of France and Spain contributed to denominational tensions in the colonies.

The turmoil of the period influenced revolutionary thinkers like John Locke to write on toleration and “private judgment” in matters of religion. After the Glorious Revolution, Parliament’s relationship to the Crown was settled. In 1689, Protestants enacted the Act of Toleration of 1689 for other Protestants. Having just deposed a Catholic king, Protestants remained suspicious of church governance structures that supported the divine right of kings and did not provide for popular representation.

Toleration seemed a revolutionary idea for 17th century Europe. In the coming years, however, it would become apparent that toleration was inseparable from an established church and incompatible with liberty.

By the 1730s, many in the British colonies had gained the right to worship privately, direct their tax payments to their own ministers, and participate in colonial politics. Nevertheless, there were still established churches; faiths still were unequal under the law; and individual eligibility for civil offices, military positions, and university posts still was predicated on faith. As the term “toleration” implies, government assumed one faith to be superior to another. The permission bestowed to “inferior faiths” could be revoked.

The Great Awakening (mid-1730s to mid-1750s) fractured existing denominations — such as the Anglicans, Presbyterians, and Congregationalists — into “New Lights” and “Old Lights,” which greatly diversified religion in the colonies. The Awakening was a source of social disruption. Itinerant preachers disregarded parish lines and “stole” church members. Printing presses, like the one Benjamin Franklin operated, circulated the itinerants’ writings via a vastly improved transportation system. The active challenge to religious authorities could not be quarantined. By the middle of the 18th century, established churches either learned to tolerate
an unprecedented level of heterodoxy, or split apart. The Great Awakening expanded the notion of what it meant to be “tolerant.” Before the Awakening, “private judgment” meant tolerating dissenters so long as they kept heterodox worship unseen in the privacy of their homes. After the Awakening, “private judgment” meant tolerating public dissent against religious authorities, and an individual’s right to privately decide where to seek religious fulfillment.

The itinerants sparked a political backlash. Connecticut and New York enacted legislation to prohibit unlicensed “vagrant Teachers, Moravians, and disguised Papists.” In Virginia, dissent was curtailed by fines, arrests, and public whippings. In an anti-New Light tract entitled “Seasonable Thoughts on the State of Religion in New England,” written in response to Jonathan Edwards, the Congregationalist Charles Chauncy concluded the tract with the signatures of several hundred dignitaries including the governors of Massachusetts, Connecticut, Rhode Island and the Providence Plantations. It was clearly meant to bring down the weight of civil and religious power on the New Light adherents.

One of the most influential New Light tracts was entitled “The Essential Rights and Liberties of Protestants” (1744). A former minister turned law student, Elisha Williams, wrote the sermon in opposition to a proposed bill that would have limited itinerant preaching. The tract articulated religious society and civil society as two distinct concepts. Williams argued that religious societies were conditional bodies from which hardly anyone could be excluded, and to which no one could be bound. As conditional bodies, individuals could opt out of religious society, but not civil society. Religious societies, Williams argued, benefited from being continually made and remade. However, perpetual reformation was only possible if religious society was divorced from civil society—forced to stand on its own merit and liberated from government subsidy.

By the mid-1750s, the wounds of the Great Awakening were healing. For those who read the newspaper, went to the market, or went to college, encountering other

“Contractarian political philosophy calls for the state to ensure the maximum liberty of citizens and their associations and to intervene only where one party’s exercise of liberty intruded on that of the other.”—Michael McConnell
The growing sentiment of pre-Revolutionary colonial America can be summarized by St. Augustine’s motto: “in essentials unity, in nonessentials diversity, in all things charity.” The German Lutheran minister, Count Nikolaus von Zinzendorf, would apply the Augustinian motto to his ecumenical work in Pennsylvania.

Meanwhile, the growing North American population needed more ministers. Increased affluence meant non-clergy also wanted access to higher education. To meet the demand, new universities like Princeton, Brown, Rutgers, Dartmouth, and the University of Pennsylvania were founded. These new universities intentionally set ecumenical policies, which pressured then-sectarian institutions like Harvard, Yale, and William & Mary to reform. Gone were the days when Congregationalist Harvard could renege on a promise to a Baptist donor that adult baptism would not disqualify candidates for an endowed professorship.

Politically, interdenominational cooperation was becoming an electoral necessity. For instance, in Pennsylvania, Quaker control over the legislature had waned due to a combination of pacifism in the French and Indian War and population growth from immigration. Two coalition parties emerged. One party consisted of Quakers, Herrnhuters, Mennonites, and Schwenkfelders. The other party consisted of Anglicans, Presbyterians, German Lutherans, and German Reformed. In New York, two families dominated state politics: the Anglican DeLanceys and the Presbyterian Livingstons. To win an electoral majority, both needed to court the other denominations.

As Revolution approached, the question of whether individuals had a right to “private judgment” was well-settled. The terms “dissenter” and “toleration” had become offensive to the literate classes by the 1760s. Toleration increasingly held the connotation of a condescending gesture from state-supported clerics and oppressive rulers. As religious toleration gave way to religious liberty, controversies no longer centered around whether an individual possessed certain liberties.
As liberty was increasingly assumed, controversies centered around when one party’s liberties infringed on another’s. For instance, when England tried to send an Anglican bishop at the turn of the decade, all sides claimed persecution and argued their liberties were being infringed.

After the end of the Seven Years’ War, control of North America was settled. For the colonists, 80 years of intermittent skirmishes with the French had come to an end. England turned to the colonies to pay for its war debts by passing the Stamp and Molasses Acts. It was just after Parliament imposed this “taxation without representation” that the Church of England contemplated sending a bishop to the colonies in the late 1760s. The non-Anglican denominations were outraged. At that time, there was an well known saying, “no bishop, no king.” The phrase went back to James VI and I in his struggles against the Scottish Presbyterians (Presbyterians having no bishops) in the early 1600s, and was inseparable from the notion that kings had a divine right to rule. History had taught many Protestants to equate bishops with political tyranny.

When met with resistance, the Anglicans claimed persecution. They claimed their liberty was being infringed, as it was a burden for their ministers to go all the way to England to be ordained. Congregationalists feared a wolf in sheep’s clothing. Presbyterians went a step further arguing that “where there is a full toleration, there can be no establishment.” The controversy went on for five years, with each side accusing the other of appealing to toleration while secretly desiring the power of persecution. Neither side was able to give the religious liberty that they desired for themselves. The controversy, however, solidified in the minds of many that tolerance depended on state recognition and was insufficient to protect the equal liberty of all religions.

“No sect can, because it includes a majority of a community or a majority of the citizens of the State, claim any preference whatever... The ideal is absolute equality before the law, of all religious opinions and sects.” — Alphonso Taft in 1870 while a Superior Court Justice dissenting in Minor v. Board of Education
Modern Interpretation of Free Exercise

Under the Free Exercise Clause, “the freedom to hold religious beliefs and opinions is absolute.” The freedom to act on those beliefs, however, is not.

Prior to 1963, justices handled Free Exercise claims on a case-by-case basis. In the landmark 1963 case Sherbert v. Verner, the Supreme Court formulated a test for Free Exercise by applying “strict scrutiny.” The Court struck down a state decision to deny a woman unemployment benefits when she was discharged from her job for not working on her Saturday Sabbath.

“Strict scrutiny” is a standard of review that requires the government to prove “a compelling state interest” to abridge a liberty. Subsequently, the government must show that the compelling interest cannot be achieved through any less restrictive alternative.

When strict scrutiny is applied, it usually proves fatal to government’s action. However, from 1963 to 1990, free exercise cases were the exception to the “usually fatal” rule. During this period, the Supreme Court invalidated government actions in only two types of cases: when a person was forced from a job and denied benefits, and a challenge to compulsory school attendance laws for the Amish.

The Supreme Court upheld minimum wage laws when Tony Alamo Christian Ministries claimed a free exercise right to pay employees below the minimum wage. The Supreme Court upheld the revocation of Bob Jones University’s tax exempt status, which the Internal Revenue Service revoked due to the university’s policy prohibiting interracial dating and marriage on campus. The Supreme Court rejected the free exercise challenge of Jimmy Swaggart Ministries, which claimed constitutional entitlement to a tax exemption although government had not granted such an entitlement to any other secular or religious nonprofit. Texas courts rejected the free exercise claims of Lester Roloff, whose

Rational Basis Review:
The lowest level of judicial review, a law is constitutional if it is “rationally related to a legitimate government purpose.”

Intermediate Scrutiny:
Also called “heightened scrutiny,” the burden is shifted to the government to show that a law is “substantially related to an important government purpose.”

Strict Scrutiny:
Government must show a law is “necessary to achieve a compelling government purpose.” If so, the government must show the law is the “least restrictive means” of accomplishing that purpose.

Employment Division v. Smith:
In 1990, the Supreme Court ended the application of “strict scrutiny” for free exercise claims, and ruled there was no free exercise rights from facially neutral laws of general applicability.
unlicensed children’s homes shackled and beat children until they “accepted Jesus.”

**Employment Division v. Smith**

In 1990, the Supreme Court ceased using “strict scrutiny” as the test for free exercise claims. In *Employment Division v. Smith*, members of the Native American Church in Oregon were denied unemployment benefits after being fired for the ceremonial use of peyote. Justice Scalia wrote for the Court that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”

Supporters of the Court’s decision in *Smith* argue that, given the number of cases in which the Supreme Court denied Free Exercise claims, the court had already abandoned strict scrutiny in practice and merely synthesized prior decisions. Supporters also contend that strict scrutiny impermissibly favors religious justifications over secular justifications for exemptions to generally applicable laws. They argue that favoring religious over secular justifications violates the Establishment Clause by preferring religion to non-religion.

Critics of the *Smith* decision argue that religion is different from other categories like race where strict scrutiny is applied. Therefore, strict scrutiny is not the wrong standard. The government simply is more likely to have a compelling state interest in regulating religious conduct as opposed to regulations based on racial classifications. Those critics argue that strict scrutiny was applied appropriately in prior cases. They note that the facts of *Smith* could be distinguished clearly from *Sherbert*: enforcing drug policy was a compelling state interest, unlike refusing to give a Sabbatarian the day off work, which Justice O’Connor argued in her concurrence in *Smith*. Opponents also argue that “neutral laws of general applicability” offers no protection to religious practice apart from the democratic process, which puts the rights of minority faiths in jeopardy. For instance,

**Roloff Homes:**

Taking the Proverb “withhold not correction from the child: for if thou beatest him with the rod, he shall not die” to extremes, Lester Roloff’s People’s Baptist Church battled the State of Texas for more than four decades, often raising First Amendment/Free Exercise claims. With nearly every other religious organization contracting with the state calling for licensing requirements for their ministries, Lester Roloff defied state licensing requirements and ran children’s homes with prison-like conditions, imposing his perverted religion on minors. Children were routinely shackled with leg-irons, chained to beds, and put in stocks in a shed. “Offenses” could be as minor as failing to label a towel before putting it in the laundry, or failing to clean the kitchen. In the girls’ home, an isolation room was used as a form of solitary confinement where sermons from Lester Roloff were played continuously on speakers. Punishment would stop when children “accepted Christ.” State officials had a difficult time gathering evidence to build a case against Roloff, as mail was censored, calls monitored, and many saw the youthful offenders as unreliable witnesses.
while the National Prohibition Act included an exemption for sacramental wine at Catholic Mass and Jewish Seders, such a legislatively established protection easily could be undone. Catholics and Jews would have had no free exercise right to sacramental wine during Prohibition under the standard formulated in Smith.

*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*\(^{xcvi}\)

Almost immediately after Smith, the city of Hialeah, Florida, passed an ordinance regulating the slaughter of animals. The ordinance was a “neutral law of general applicability” however, there was evidence the ordinance’s actual intent was to curb the practice of Santeria.\(^{xcvii}\) To avoid overturning Smith, the Supreme Court ruled in 1993 that the law was not actually “neutral” and applied strict scrutiny.

The net impact of Smith and Lukumi on the federal constitutional law of the Free Exercise Clause can be summed up this way: if a law is neutral and of general applicability, it only needs to pass a rational basis review. However, if a law’s actual intent is to target a religion, then it is not considered to be neutral or of general applicability. If a law is not neutral nor of general applicability, then it is unconstitutional unless it passes strict scrutiny.\(^{xcviii}\)

*The Religious Freedom Restoration Act*

While Lukumi was working its way to the Supreme Court, Smith sparked strong political backlash from across the political spectrum. In 1993, Congress passed the *Religious Freedom Restoration Act* (RFRA), which statutorily instructed federal and state courts to apply “strict scrutiny.” At the time, it was noncontroversial and passed the House of Representatives on a voice vote and the Senate 97-3.\(^c\)

Shortly thereafter, the historical commission of Boerne, Texas, prevented a local church from expanding its building. In the 1997 case *City of Boerne v. Flores*,\(^{ct}\) the Supreme Court ruled that Congress had exceeded its power under Section 5 of the 14th Amendment.

*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*\(^{xcvi}\)

In 1993, the Supreme Court narrowed Smith ruling that a law was not neutral if its actual intent is to target a religion. In such a case, strict scrutiny is still applied.

*City of Boerne v. Flores:*

In 1997, the Supreme Court ruled Congress had exceeded Section 5 powers under the 14th amendment in passing the Religious Freedom Restoration Act and applying it to the States.
in enacting RFRA. The ruling struck down RFRA’s applicability to the states, leaving states uncovered by any kind of religious freedom legislation. State laws fell back under the “neutral law of general applicability” standard of Smith. Congress responded by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. Congress extended RLUIPA’s applicability to the states using their powers under the Commerce Clause and Spending Clause. However, those clauses allowed RLUIPA to apply strict scrutiny only to local zoning laws and inmate cases. If states wanted strict scrutiny to apply to other state and local laws, then it was up to each state.

Texas RFRA

In the late 1990s, and throughout the 2000s, several states enacted “state RFRA’s” modeled on the federal law. By 2014, nineteen state legislatures had adopted such legislation, and the courts of an additional twelve states had ruled that their respective state constitutions protect the exercise of religion from neutral and generally applicable laws.

State RFRA’s identical to the original 1993 federal law have protected individuals from religious discrimination and have not allowed individuals to discriminate against the equal liberty of others. However, one faction of Christian activists has launched a campaign to undermine the impact of the same-sex marriage decision in Obergefell v. Hodges. These activists have drafted new RFRA’s without broad stakeholder input or consensus, and they promote these bills as “religious freedom” legislation, but with language that differs from the 1993 federal RFRA language in significant ways. While proponents characterize the differences as incidental, the fact remains that even a single word’s deviation from the 1993 federal law can have profound impacts, potentially disrupting the current careful calibration between individual rights and the rights of others.

Texas passed its RFRA in 1999 as Senate Bill 138. Like the federal RFRA in 1993, the Texas RFRA in 1999 had broad support from more than 50 organizations from

Warren Jeffs and the YFZ Ranch:
The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) has been in a protracted legal battle with various branches of government for many decades over bigamy, child labor, and sexual abuse of children as young as twelve. In 2003, the FLDS began building the Yearning for Zion Ranch in Schleicher County outside of El Dorado, TX. In 2008, law enforcement showed probable cause to obtain a search warrant, and discovered hundreds of children, many who were underage girls and pregnant. Twelve men were arrested. In Emack v. State, Texas Courts rejected claims by one of those defendants convicted for the sexual assault of children that the Texas Religious Freedom Restoration Act could be used to throw out evidence. However, in subsequent litigation over a child labor investigation in Utah in 2014, a U.S. District Court Judge ruled the Federal RFRA exempted Mr. Vergel Steed from answering questions from the Department of Labor because he took “religious vows not to discuss matters related to the internal affairs” of the church in Perez v. Paragon Contractors, Corp.
across the political spectrum. SB 138 was adopted on a voice vote in the House and passed unanimously in the Senate. The existing Texas RFRA has been successful and noncontroversial. It has been effective in calibrating individual free exercise rights with compelling government interests like health and safety, and not infringing on the rights of others. For example, Texas’ RFRA protected a Native American child’s right to wear ceremonial long hair despite the school’s dress code, but did not provide a defense for the sexual assault of a child by a member of the Fundamentalist Church of Jesus Christ of Latter Day Saints at the Yearning for Zion Ranch near El Dorado, Texas.


Religious communities typically establish an operational and governance structure for communal decision making. This structure, known as “ecclesiastical polity,” reflects the community’s theology and doctrine.

Ecclesiastical polity serves as an example of a religious community’s deeply held beliefs about what the world should look like. For instance, during the Protestant Reformation, certain religious communities challenged the prevailing theology that kings had a “divine right” to rule by creating governance structures that were representational or participatory democracies.

Periodically, a theological controversy causes a schism within a religious community. Examples in American history include issues such as slavery, Bolshevism, and women’s ordination. Religious communities have internal conflict resolution processes in their ecclesiastical polities. Sometimes, however, one faction in a schism is unsatisfied with the outcome, and wishes to involve secular government in what is inherently a religious dispute. To prevent government intrusion into
ecclesiastical polity, courts rely on what is known as the Church Autonomy Doctrine.

The Church Autonomy Doctrine often is invoked in a civil court during a property or employment dispute. While civil courts handle ordinary property and employment disputes regularly, in religious property or employment disputes, the Establishment and Free Exercise Clauses are implicated. In going to a civil court, the losing faction is not asking a simple question of property or employment law. The losing faction often is asking the civil government to change the rules of the religious community, and to entangle itself in an inherently theological dispute.

**The U.S. Supreme Court**

After the Civil War, conflict arose at a local Presbyterian Church in Kentucky between abolitionists and pro-slavery factions. Theologically opposed to slavery, the national Presbyterian Church sided with the abolitionist faction as their “true church.” The pro-slavery faction went to court hoping government would award them possession of the local church property. In the 1871 case *Watson v. Jones*, the Supreme Court ruled for the national church, writing, “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final.” The *Watson* doctrine is known as “deference to the highest ecclesial authority.” In a congregational polity, the highest authority is a majority vote of the members of the local church. In a hierarchical polity, the highest authority might be an individual or a representative body.

During the Red Scare of the 1950s, a Russian Orthodox congregation in New York fractured over whether the hierarchy in Moscow had become a tool of the Soviet Government. Both sides had elected bishops and claimed the ownership of the cathedral. The New York Legislature passed a law recognizing the anti-Moscow faction as the authoritative governing body. The pro-Moscow faction challenged the law in court. In *Kedroff*
v. St. Nicholas Cathedral, the Supreme Court struck down the New York law. Since the Russian Orthodox Church vests property in the office of the Bishop, the case simultaneously involved property and employment. The Supreme Court ruled the controversy was “strictly a matter of ecclesiastical government.” In passing authority from one faction to another, the New York Legislature had intruded the “power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.”

In the 2012 case Hosanna Tabor v. EEOC, the U.S. Supreme Court once again reaffirmed this long standing doctrine. In a unanimous decision, the Supreme Court ruled that both the Free Exercise and Establishment Clauses bar employment suits by ministers against their employer religious organization. Often in employment cases, this principle is referred to as “the ministerial exception.” Justice Roberts discussed the English Crown’s role in appointing ministers to the established Church of England and wrote, “requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”

Texas & Church Autonomy

In 1979, in a 5-4 opinion, the U.S. Supreme Court did not strike down another approach states may use to resolve church property disputes. In Jones v. Wolf, the Supreme Court said that so long as courts were not involved in questions of doctrine, they could consider 1) governing documents of the general church, 2) governing documents of the local church entities, 3) deeds, and 4) state statutes governing church property. This approach is known as “neutral principles of law.” The Supreme Court in Jones made clear this was not a new approach for all states, but merely a permissible approach for a state if properly applied.

The dissent in Jones thought “neutral principles” was unworkable. The justices argued that adding new rules would make the decisions of civil courts more difficult, risking forbidden intrusion into church polity.
new, more complicated doctrine continues to encourage litigation, putting hierarchical denominations at a disadvantage. States that choose the neutral principles approach give leverage to dissident factions against their denominations because of the threat of prolonged litigation. In states that maintain the deference standard, dissidents continue to go to their state courts urging the adoption of the “neutral principles” approach.

Historically, Texas was a deference state. In the 1980s, Texas courts declined invitations to switch standards from the deference approach formulated in state law in 1909. In 2013, the Texas Supreme Court departed from over 100 years of well-settled law that protected hierarchical denominations’ polity. In two opinions, the Texas Supreme Court remanded litigation occurring within the Episcopal Church back to the trial court to apply a “neutral principles” approach. The outcome is still uncertain, with neither side yet having been awarded the property.

In even the least onerous scenario, the Texas Supreme Court’s reversal in Masterson will cost religious organizations additional litigation expenses to achieve the same outcome. In a worst case scenario, application of the “neutral principles” doctrine will lead to property being awarded to a disloyal faction imposing a congregational polity onto hierarchical denominations. As the Supreme Court wrote nearly 150 years ago, “[i]t would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”

During the 84th Texas legislative session, lawmakers passed Senate Bill 2065, known as the “Pastor Protection Bill.” Focused on protecting clergy and religious organizations from lawsuits coming from the outside, SB 2065 did not immunize, and arguably exposed, religious organizations from suits from within. The plain language of the law does not clarify who prevails if the “sincerely held beliefs” of an employee and the religious organization are in conflict. Protestant leaders advanced a clarifying amendment, but the Legislature rejected it.

“Free exercise was never meant to be an unlimited individual liberty. Free exercise is “understood as freely exercised in the context of a citizen's concomitant responsibility to the community; that is, rights are not divorced from one's civic duties.”—Carl Esbeck, former Director of the Center for Law & Religious Freedom

Masterson v. Diocese of Northwest Texas:
In 2013, the Texas Supreme Court reversed more than 100 years of precedent and replaced the doctrine of “deference” with “neutral principles of law” in religious property disputes. Will they expand the doctrine to employment?
Policy Horizons

The radical religious liberty the Founding Fathers gave us is built on the solid foundation of three coequal principles:

1. Government must not prefer or disadvantage one faith relative to another faith or no faith at all.
2. Government must not force any person to act against their conscience unless there is a state interest that compels it.
3. Government must not permit adherents of one faith to harm non-adherents as an expression of faith.

The judiciary preserves religious liberty by maintaining calibration among these three principles, but legislators also bear significant responsibility for safeguarding our equal liberty. Rather than adopting laws that appease constituents and expecting courts to clean them up later, lawmakers should focus on ensuring that legislation is consistent with the Constitutional rights they have sworn to “preserve, protect, and defend.”

When applying principles of equal liberty in legislative deliberation, lawmakers are bounded by the equal protection clause of the 14th Amendment. Echoing the core tenet of every major faith tradition, the equal protection clause affirms that every individual is of equal status—that, in the language of Abrahamic traditions, we are all each others’ “neighbors.”

To ensure that legislation conforms to the principles of equal liberty and the equal protection clause, lawmakers should seek guidance from those they serve. Stakeholder processes are critical to religious freedom because they provide legislators a complete picture of the diversity of the community. To be effective, stakeholder processes must be substantive, not pro forma exercises.

Texas legislators are grappling with a range of issues that revolve in whole or in part around religious liberty concerns. The following categories of policy provide examples of current issues and religious principles.

The Fourteenth Amendment:
One of three “Reconstruction Amendments,” the amendment was meant to overturn Dred Scott v. Sandford and provide Congress with authority to “reconstruct” southern states.
Transfer of Public Funds to Religious Institutions

Texas currently provides public funds to religious institutions through grants and contracts and through tax benefits, which have the impact of government expenditures. In both cases, Texas has protections in place to prevent the state from preferring or disadvantaged particular faiths over others. In the case of grants and contracts, Texas has robust processes in place to ensure faith-based organizations receive “equal treatment,” including training for state agency staff members about how to work with faith-based providers.

In the future, lawmakers will need to take care that their interest in encouraging faith-based organizations to partner with the state does not lead to the use of public funds to discriminate in violation of equal liberty principles or the equal protection clause. For example, lawmakers should not permit public funds to support organizations that refuse to serve individuals who do not share the organization’s beliefs or values.

Limitations on Individual Liberties

Texas lawmakers have struggled for several legislative sessions to address the demands of some constituents to limit various kinds of individual liberties. For example, in the past, some constituents have demanded that their legislators prevent same-sex couples from getting married, because same-sex marriage conflicts with the constituents’ religious beliefs. Other constituents have urged their legislators to forbid certain kinds of faith-based mediation, because the constituents object to the faith of the mediator.

Legislation that established such limitations would allow the faith of one constituent to dictate truncated rights for another constituent, and would interfere with the rights of the disadvantaged constituent to act according to their conscience. Lawmakers should identify explicitly the state interest that compels them to take such steps—and the outcomes for disadvantaged parties—through the use of extensive stakeholder engagement. Furthermore, such

Incorporation:
Throughout the 20th century, the Supreme Court made various rights under the Bill of Rights binding on state and local government, and not just the federal government.
legislation should make explicit the expectation of “least restrictive means” to achieving the compelling state interest at issue.

Forbidding Discrimination

The job of state lawmakers in protecting religious liberty is further complicated by local policies. In recent years, many local Texas communities have adopted ordinances that exceed the civil liberty protections found in state legislation. For example, some cities have adopted anti-discrimination policies that require private businesses to serve customers whose behavior conflicts with the businesses’ religious values. Likewise, some cities have adopted policies that provide tax-supported benefits to individuals who engage in behavior other taxpayers oppose.

Here, lawmakers face the dual challenges of protecting equal liberty while also preserving local autonomy. As in the other examples cited, lawmakers’ primary concern should be the careful calibration of the rights of all individuals.

It can be tempting to think of public officials as “referees” on the field of religious liberty, watching for obvious violations but otherwise allowing the strongest team to prevail. But American religious liberty does not aspire to survival of the fittest. Rather, our radical religious liberty is intended to ensure the survival of all.

In the end, the role of lawmakers is not to referee, but to reconcile. Texas legislators can find no better guidance in their task than in the wisdom, (commonly attributed to St. Augustine), “In necessariis unitas, in dubiis libertas, in omnibus caritas,” translated “In necessary things unity; in uncertain things freedom; in everything compassion.”

We imagine the Founding Fathers would agree.
ENDNOTES

¹ Religious liberty equally applies to every human being. It equally protects individuals who choose to explore the existential and individuals who choose not to. Equality and religious liberty are a complementary American innovation. In 1776, the Virginia General Assembly met to write a state constitution for the Second Continental Congress. Freshman Assemblyman, James Madison, objected to the initial draft of what would become Article 16 of Virginia’s state constitution, which called for religious “toleration” and an established church. He was successful in removing “toleration” and inserting the phrase “all men are equally entitled to the free exercise of religion.” Scholars believe this was the first use of the term “free exercise.” Assemblymen that supported an established church voted against the amendment. They believed the phrase was another step toward giving equality to all religions and disestablishing the Church of England. A decade later in 1786, Madison would finally succeed at disestablishing the Anglican Church in Virginia. See Carl H. Esbeck, Protestant Dissent and the Virginia Disestablishment, 1776–1786, 7 Geo. J.L. & Pub. Pol’y 51, 65–70 (2009).


⁵ Id. at 10.


⁷ Michael McConnell et al., Religion and the Constitution 56 (2d ed. 2006).

⁸ Ibid.

⁹ Esbeck, supra note i, at 58.

⁸ McConnell, supra note vii, at 57.

¹ McConnel, supra note vii, at 57 – 58.

¹ Beneke, supra note iii, at 2767.


¹iv Ibid.

¹v Beneke, supra note iii, at 3156.


Id. at 642 (Scalia, J., dissenting).


Baptist Joint Committee, bjconline.org/top-5-myths-of-separation-of-church-and-state.


Id. at 711 (Souter, J., dissenting).

Id. at 703 (Souter, J., dissenting).


Id. at 612.


http://ij.org/case/harrison-v-gregoire/#back grounder

xxxvii Id. at 269.

xxxviii Id.


xlii Justice Thomas joined the court after Mergens was decided.

xliii Mergens, supra note xl, at 258; Lamb's Chapel, supra note xli, at 397.


xlv Id. at 834.

xlvi Id. at 840.

xlvii Id. at 835.

xlviii Id. at 868.

xlix Id. at 871.


li Id. at 760.


liv Id. at 302.

lv Id. at 307.

lvi Widmar, supra note xxxvi, at 284-285.


Id. at 377.

Beneke, supra note iii, at 293. See also Esbeck, supra note i, at 56.

Beneke, supra note iii, at 472 – 479.


Beneke, supra note iii, at 224.

Spellberg, supra note iv, at 6.

Esbeck, supra note i, at 56.

Beneke, supra note iii, at 800.

Beneke, supra note iii, at 281, 805.

McConnell, supra note vii, at 36.

Beneke, supra note iii, at 1667.

Id. at 1176.

Id. at 335.

Id. at 1326.

Id. at 1682 – 1733.

Ibid.


Ibid.


Chemerinsky, supra note xix, at 671.


State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 696 (Tex. 1984); see also Pamela Colloff, Remember the Christian Alamo, Texas Monthly, Dec. 2001.


Ibid.

Id. at 879.

Marci Hamilton, God vs. the Gavel 6-7 (2nd ed. 2014).

Chemerinsky, supra note xix, at 1250, 1260.

Smith, 494 U.S. at 891 (O'Connor, J., concurring).


Id. at 543.

Ibid.


Ken Camp, Legislature to take up vouchers and guns, Baptist Standard, January 13, 1999; See also Ken Camp, Texas RFRA moving in Legislature, but gambling bill is languishing, Baptist Standard, March 31, 1999.


cxi Id. at 727.


cxiii Id. at 115.

cxiv Id. at 119.


cxvi Ibid.

cxvii Ibid.


cxix Id. at 610


cxxi Masterson v. Diocese of Northwest Texas, 422 S.W.3d 594 (Tex. 2013); Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646 (Tex. 2013).


cxxiii H.J. of Tex., 84th Leg., R.S. 3969 (2015)(House Floor Amendment #1 by Howard of Travis).

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