What Did Those Sixteen Justices Say?

Leslie C. Griffin

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WHAT DID THOSE SIXTEEN JUSTICES SAY?

LESLIE C. GRIFFIN*

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*William Boyd Professor of Law, UNLV Boyd School of Law; Ph.D. (Yale, Religious Studies); J.D. (Stanford Law School). Thanks to Christopher Dykes, of the University of Houston Law Center, and to Allison Hedrick, Jim Rich, Servando Martinez and Alyssa Williams of UNLV Law School for their good suggestions about this article. I am grateful to Adam Froehlich and Ben F. DeFord of Willamette College of Law, for all the work they did to publish this article.
Everyone is finally noticing that the current Supreme Court is changing its jurisprudence on religious freedom. The commentators are finally paying more attention to the fact that seven of the Court’s current Justices were raised Catholic.1 What role have Catholics played in the Supreme Court’s history? This article traces their contributions on religious freedom and civil rights, starting with Chief Justice Taney and ending with Justice Barrett.

All nine Justices voted unanimously for religious freedom over LGBTQ rights in Fulton v. Philadelphia.2 In that case, Catholic Social Services won the argument that they have a religious right to participate in Philadelphia’s foster parent program while discriminating against same-sex couples when they choose who gets foster children, even though such LGBTQ discrimination is against Philadelphia law.3 The religious exemption defeated Philadelphia’s anti-discrimination laws with a unanimous vote.

3. Id.
The current Court has also expanded public school teachers’ right to pray, given more funding to religious schools, and overruled Roe and Casey, the cases that protected women’s constitutional right to abortion. The Establishment Clause is weaker now than it was when Justice Brennan was the only Catholic on the Court.

At stake is what religious freedom means today, as the Justices intensely debate just what the First Amendment’s Religion Clauses protect. Do religious institutions’ members have to obey the law, or do they get an automatic exemption so that they can do whatever they want? Many Court cases, especially those about the ministerial exception, give religions the right to disobey all antidiscrimination laws. Religion is winning more victories at the Court every year.

Religion has defeated COVID legislation by a closer vote in the Supreme Court’s numerous shadow docket cases about government restrictions on religious ceremonies to prevent the spread of the virus. The shadow docket cases do not receive full briefing and oral argument but are instead decided by the Court without full review.

It was different at COVID’s beginning. In May 2020, the Court refused an injunction in favor of a church asking for a limitation on California’s anti-COVID policies. Chief Justice John Roberts joined Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor in denying the injunction. Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh dissented. Two months later, the same

10. See discussion infra Section V.F.
13. Id.
14. Id. at 1614 (Kavanaugh, J., dissenting).
Court refused an injunction against Nevada’s COVID law.\textsuperscript{15} Justices Alito, Thomas, Kavanaugh, and Gorsuch dissented.\textsuperscript{16}

Then, Justice Ruth Bader Ginsburg died in September 2020 and was replaced by Justice Amy Coney Barrett in October 2020.\textsuperscript{17} That one vote changed the result of the 5–4 rulings. On the eve of Thanksgiving 2020, Justice Barrett joined the four previous COVID dissenters and ruled that New York had violated the First Amendment Free Exercise rights of the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish congregations.\textsuperscript{18} Chief Justice Roberts dissented, as did Justices Breyer, Kagan, and Sotomayor.\textsuperscript{19} In February 2021, Justices Breyer, Kagan, and Sotomayor again dissented from the Court’s ruling in favor of the church’s challenge to the state laws.\textsuperscript{20} The other six Justices voted for the church, although they disagreed about just how far the injunction should go.\textsuperscript{21} In another 2021 case, Justices Thomas, Alito, Kavanaugh, Gorsuch, and Barrett voted for the religion, while Chief Justice Roberts rejoined the dissenters, Justices Breyer, Sotomayor, and Kagan.\textsuperscript{22} \textit{Tandon} gave more protection to religions than to public health laws and suggested a new, more religion-friendly approach to religious freedom.\textsuperscript{23} A Reuters analysis of the shadow docket confirmed that religious groups were “repeatedly favored” by the Court.\textsuperscript{24}

The Court then refused to grant an injunction pausing Maine’s regulation requiring healthcare workers to be vaccinated against

\begin{itemize}
  \item \textsuperscript{15} Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (denying application for injunctive relief).
  \item \textsuperscript{16} \textit{Id.} (Alito, J., dissenting); \textit{Id.} at 2609 (Gorsuch, J., dissenting); \textit{Id.} (Kavanaugh, J., dissenting).
  \item \textsuperscript{17} Barbara Sprunt, \textit{Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath}, NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.
  \item \textsuperscript{18} Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).
  \item \textsuperscript{19} \textit{Id.} at 75 (Roberts, C.J., dissenting); \textit{Id.} at 76 (Breyer, J., dissenting); \textit{Id.} at 78 (Sotomayor, J., dissenting).
  \item \textsuperscript{20} S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (granting, in part, application for injunctive relief) (Kagan, J., dissenting).
  \item \textsuperscript{21} \textit{Id.} at 716; \textit{See also id.} at 717 (Roberts, C.J., concurring) (“Defersence, though broad, has its limits.”).
  \item \textsuperscript{22} Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).
  \item \textsuperscript{23} See \textit{id.} at 1297.
\end{itemize}
COVID-19. 25 No religious exemptions were allowed by the state. 26 If the workers are not vaccinated, they lose their jobs. 27 Justices Gorsuch, Thomas, and Alito dissented. 28 They would have granted the injunction, arguing that the law did not satisfy strict scrutiny under the Court’s jurisprudence of Lukumi, Fulton, and Tandon. 29 The Justices repeatedly debate just how much and why religion should be protected, and continue to do so this term.

On the full docket, religious freedom remains in the news in 2022. The Court decided, 6–3, that a Maine program that allows parents to receive tuition money to send their children to public or private schools, but does not pay for religious schools, violates the Free Exercise Clause. 30 The parents’ case was influenced by Espinoza v. Montana Department of Revenue, where five Supreme Court justices—Chief Justice Roberts, with Justices Thomas, Alito, Gorsuch, and Kavanaugh—modified the Court’s jurisprudence of the First Amendment’s Religion Clauses. 31 The First Amendment contains the Free Exercise Clause and the Establishment Clause. 32 The Court ruled that if private schools get state aid, religious schools must also receive it. 33 The religious schools have a free-exercise right to such aid. 34 The five Justices agreed that the Establishment Clause does not block aid to religious schools. 35

The concurrences added additional arguments. Justices Thomas and Gorsuch said the Establishment Clause does not apply to the states who should be free to choose whatever religion they want. 36 Justice Alito emphasized that the Montana Constitution’s no-aid section, like
other Blaine amendments, was based on anti-Catholic bias and accordingly could not be upheld as constitutional.  

Some commentators on the cases have noted that the ideal of separation of church and state is gone. Justice Sonia Sotomayor dissented in *Carson*, *Espinoza*, and *Trinity Lutheran Church of Columbia v. Comer*. In *Espinoza*, Justice Sotomayor reiterated her *Trinity Lutheran* point, that the decision “weakens this country’s longstanding commitment to a separation of church and state beneficial to both.” In *Carson*, her dissent was even stronger: “In 2017, I feared that the Court was leading us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.’ . . . Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.”  

Making separation of church and state a constitutional violation is a huge change in the Court’s interpretation of religious freedom.  

Free exercise won, and establishment lost, in another 2022 case, *Kennedy v. Bremerton School District*. Kennedy was a public-school high school football coach who led his students in prayer at the end of each football game. The school asked him to stop, insisting that as a public employee he must respect the Establishment Clause. Kennedy won 6-3 on free exercise grounds. The Court overruled previous Establishment Clause cases, leaving readers wondering once again what is left of that clause.

37. Id. at 2272 (Alito, J., concurring).  
40. *Espinoza*, 140 S. Ct. at 2292 (Sotomayor, J., dissenting) (quoting *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting)).  
41. Id. at *4.  
43. Id. at *4.  
44. Id. at *4–6.  
45. Id. at *3.  
46. The majority did not explicitly overrule *Lemon*, instead asserting that the Court previously “abandoned” the *Lemon* test and supplanting it with a “historical practices and
And, five Catholic Justices voted to overrule *Roe* and *Casey*, leaving the decision about abortion’s legality to the states because abortion is not a right protected by the Constitution. Robert concurred, saying the Court should have upheld the Mississippi law but not overruled the earlier cases. Justice Sotomayor dissented.

The current Court is composed of *seven* Catholic Justices: Roberts, Thomas, Alito, Sotomayor, Gorsuch, Kavanaugh, and Barrett. Justice Gorsuch is currently an Episcopalian but is included in this essay because he was raised Catholic. Catholic Justice Barrett replaced the Jewish Justice Ginsburg. A Court with *seven* Catholic justices (and two Jewish justices) is an incredible creation. No Protestant was on the Court from Justice John Paul Stevens’s retirement on June 29, 2010 until Justice Breyer retired in June 2022. We have never had a Muslim, Hindu, Buddhist, or openly atheist Supreme Court Justice. The recent religion cases raise the question of what Catholics have done as Justices, and whether the Religion Clause teaching has changed, because there are so many Catholics who have replaced the mainly-Protestant justices who supported church-state separation.
Judge Ketanji Brown Jackson replaced Jewish Justice Stephen Breyer on June 30, 2022.\textsuperscript{53}

The numbers should draw attention to the need for religious diversity on the Supreme Court of the United States. The Catholics have varied in their perspectives on religious freedom. Justice William Brennan, known as one of the most prominent and productive twentieth-century Justices from 1956–1990, was a strong defender of separation of church and state.\textsuperscript{54} Many of his successors have been much less separationist, and Justice Sotomayor now argues that separation has become a constitutional violation.\textsuperscript{55} Brennan also favored strict scrutiny in religion cases, while Justice Antonin Scalia upheld neutral and generally applicable laws for everyone, including religious believers.\textsuperscript{56}

What have the Catholics done? This article examines the decisions they wrote to see if we can understand what they have emphasized and accomplished. There have been sixteen Catholic Justices in the history of the U.S. Supreme Court.\textsuperscript{57} In chronological order, their names are:

Roger B. Taney
Edward Douglass White
Joseph McKenna
Pierce Butler
Frank Murphy
Sherman Minton
William J. Brennan, Jr.
Antonin Scalia
Anthony Kennedy
Clarence Thomas
John Roberts
Samuel Alito
Sonia Sotomayor


\textsuperscript{55} See infra Section III.A.

\textsuperscript{56} Justice Scalia wrote the majority opinion in the famous \textit{Smith} case, while Brennan dissented. See \textit{Emp. Div. v. Smith}, 494 U.S. 872 (1990); infra Section III.A.

\textsuperscript{57} Although Sherman Minton was a Protestant while he was a justice, he was married to a Catholic and became Catholic after retirement, and he is usually included on lists of Catholic justices. See \textit{supra} note 48.
Neil Gorsuch
Brett Kavanaugh
Amy Coney Barrett.

The cases show differences among the Catholic justices. Justices Brennan and Sotomayor are more similar to each other than they are to their colleagues Justices Scalia, Kennedy, Thomas, Roberts, Alito, Gorsuch, Kavanaugh, and Barrett. Some Catholic justices want a strong Establishment Clause and others a weak one. Some want strict scrutiny in the Free Exercise Clause and others neutrality.

There are some definite trends in this Catholic Court, however. It has approved more funding for religion than earlier Courts. It continues to approve government-sponsored religious monuments as well as government and government employees’ prayer. It also allows religious institutions to fire or otherwise discriminate against their employees’ conduct. It is certainly a religion-friendly Court. You might agree with Linda Greenhouse’s conclusion: “When it came to religion, the project involved reinterpreting—one might say weaponizing—the Constitution’s Free Exercise Clause, turning it from its historic role as a shield that protected believers from government interference into a sword that vaulted believers into a position of privilege.”

Now the stories of the Catholics’ differing perspectives on religion and civil rights.

I. THE FIRST CATHOLICS: TANEY TO MINTON

A. Chief Justice Taney

The first six, pre-Brennan Catholic justices have several noteworthy decisions. The first Catholic on the Court, Chief Justice Roger B. Taney, was nominated by President Jackson and was a member of the Court from 1836–1864. He was the author of the terrible, racist
opinion in *Dred Scott v. Sandford*, which was a precursor to the Civil War. Dred Scott was a slave who had lived in slave and freed states. He sued for his freedom. The Court denied jurisdiction over Scott’s lawsuit and did not allow him to be a citizen. The decision is long remembered for its racist message, which represented much of what the Civil War was fought over. The Civil Rights Thirteenth, Fourteenth, and Fifteenth Amendments undid some of *Dred Scott’s* message.

Catholics were both racist and anti-racist. In sharp contrast to Chief Justice Taney was Justice Frank Murphy, who was nominated by President Franklin Roosevelt and served from 1940–1949. Justice Murphy is one of the strongest critics of racism in the Court’s history. He started tentatively with a concurrence in *Hirabayashi*, one of the Japanese internment cases. He dissented in *Korematsu*, another horrible case in which the majority upheld the internment of Japanese Americans. Justice Murphy said the Japanese program “falls into the ugly abyss of racism.” Justice Murphy wrote a consistent concurrence in *Ex parte Endo*, which allowed a loyal Japanese American to be released. In that case, he was “of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.”

Justice Murphy also concurred in *Oyama*, concluding that the California Alien Land Law was “nothing more than an outright racial discrimination.”

Later, Justice Murphy was vote number five to allow parents to be reimbursed for bus rides to send their children to parochial schools. *Everson* was a significant law and religion case in an era when the

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63. Scott v. Sandford, 60 U.S. 393 (1857), superseded by constitutional amendment, U.S. CONST. amend XIV.
64. *Id.* at 400.
65. *Id.*
66. *Id.* at 454.
67. *See* Justices 1789 to Present, supra note 60.
70. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).
72. *Id.* at 307.
Court vigorously debated whether religions should be funded or not, an issue that they continue to debate today.

Today some writers believe Justice Murphy was gay, although that claim has not been definitively proven. He lived most of his life with a male college friend and never married. Perhaps his experience as a silent gay man made him more attentive to the damages of racism.

B. White, McKenna, and Butler

Chief Justice Edward White was nominated by President Cleveland and served from 1894–1921. Justice Joseph McKenna was chosen by President McKinley and served from 1898 to 1925. Justice Pierce Butler served on the Court from 1923–1939; he was nominated by President Harding. Thus, from 1898–1921, two Catholics, Justices White and McKenna, were on the Court at the same time. Justices McKenna and Butler were together from 1923–1925.

Justice White concurred and Justice McKenna dissented in the Prohibition cases. They disagreed about the concurrent powers of Congress and the states. Justice White also authored a unanimous 1918 approval of the draft laws. He described the religious exemption written into the act as follows:

The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a noncombatant character to be defined by the President.

76. Id.
77. See Justices 1789 to Present, supra note 60.
78. See Justices 1789 to Present, supra note 60.
79. See Justices 1789 to Present, supra note 60.
81. Id.
83. Id. at 376.
Justice White concluded the exemption was legal, arguing:

[W]e pass without anything but stating the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.\(^{84}\)

In *Crane v. Johnson*, Justice McKenna wrote a decision about religion and medicine.\(^{85}\) P.L. Crane was a drugless practitioner who used “faith, hope, and the processes of mental suggestion and mental adaptation” in his business but did not use prayer.\(^{86}\) He claimed the health law violated Equal Protection by requiring him to get training and a medical license but not doing the same for those who used prayer or religion to heal.\(^{87}\) The Court upheld the difference between drugless practitioners and prayer practitioners; the state could regulate the first but not the second group.\(^{88}\) Religious freedom kept the Court from regulating religion too much.

Justice Pierce Butler served on the Court from 1923–1939; he was nominated by President Harding.\(^{89}\) He is the author of one well-known religion case, *Hamilton v. Regents of the University of California*.\(^{90}\) The University of California required students to enroll in military training and would not give them an exemption for religious and conscientious objection to such training.\(^{91}\) The Court dismissed the students’ Fourteenth Amendment claim as “untenable.”\(^{92}\) Moreover, the Court made a significant point that conscientious objection was a statutory claim, not a constitutional one.\(^{93}\) In Justice Butler’s words:

The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy

\(^{84}\) *Id.* at 389–90.  
\(^{85}\) *Crane v. Johnson*, 242 U.S. 339 (1917).  
\(^{86}\) *Id.* at 340.  
\(^{87}\) *Id.* at 342.  
\(^{88}\) *Id.* at 343.  
\(^{89}\) *See Justices 1789 to Present*, supra note 60.  
\(^{90}\) *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).  
\(^{91}\) *Id.* at 250–51.  
\(^{92}\) *Id.* at 262.  
\(^{93}\) *Id.* at 264.
of Congress thus to relieve him. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress.\textsuperscript{94}

Today, many people continue to argue that conscientious objection is a constitutional right, even though its source is in statutory law.

\textbf{C. Back to Justice Murphy}

Remember Justice Murphy, the strong anti-racist who dissented in \textit{Korematsu}? He replaced Justice Butler on the Court in 1940.\textsuperscript{95} Murphy wrote a few interesting opinions about religion and joined some key law and religion decisions. He often had a stake in “preserving freedom of conscience to the full.”\textsuperscript{96}

Although Justice Murphy joined the majority in \textit{Minersville School Dist. V. Gobitis}, which required students to say the pledge of allegiance,\textsuperscript{97} he wrote a concurrence in \textit{West Virginia State Board of Education v. Barnette}, which overruled \textit{Gobitis} and protected religious freedom not to pledge to the flag.\textsuperscript{98} He first noted that the Constitution “specifically shelters” freedom to believe and worship, and that “[r]eflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.”\textsuperscript{99} He also wrote:

The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: “... all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, ...” Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the

\textsuperscript{94} Id.
\textsuperscript{95} See Justices 1789 to Present, supra note 60.
\textsuperscript{98} Barnette, 319 U.S. at 644–46 (Murphy, J., concurring).
\textsuperscript{99} Id. at 645.
example of persuasion, not in force and compulsion, that the real unity of America lies.\textsuperscript{100}

In \textit{Rescue Army v. Municipal Court of City of Los Angeles}, Justice Murphy, joined only by Justice Douglas, dissented from the Court’s dismissal of Charles Murdock’s claim that ordinances governing charity solicitations violated his free exercise of religion.\textsuperscript{101} In a very short dissent, Justice Murphy wrote that the Court could have determined the issues in the case, summarized by the following questions:

(1) Does it violate the constitutional guarantee of freedom of religion to prohibit solicitors of religious charities from using boxes or receptacles in public places except by written permission of city officials? (2) Is that guarantee infringed by a requirement that such solicitors display an information card issued by city officials?\textsuperscript{102}

He said the time was “ripe” for the Court to answer the questions instead of passing on them.\textsuperscript{103} Presumably he would have answered the questions, “Yes”.

Justice Murphy was one of four dissenter in \textit{Prince v. Massachusetts}, a well-known case about children and religious freedom.\textsuperscript{104} The majority upheld the conviction of Sarah Prince for letting a child sell magazines on the streets in violation of child labor law.\textsuperscript{105} Writing alone, however, Justice Murphy said Massachusetts’s attempt “to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot . . . be sustained.”\textsuperscript{106} He said the state could not prove that the child’s religious exercise endangered the community in any way.\textsuperscript{107} He was also skeptical whether any harm could come to the child from the activity.\textsuperscript{108} He did not believe that this

\textsuperscript{100} \textit{Id.} at 646 (Murphy, J., concurring) (emphasis added) (quoting Virginia’s State for Religious Freedom, today codified at \textsc{Va. Code Ann.} § 57-1 (2022)).


\textsuperscript{102} \textit{Id.} at 585 (Murphy, J., dissenting).

\textsuperscript{103} \textit{Id.}


\textsuperscript{105} \textit{Id.} at 171.

\textsuperscript{106} \textit{Id.} at 171 (Murphy, J., dissenting).

\textsuperscript{107} See \textit{Id.} at 174–75.

\textsuperscript{108} \textit{Id.}
activity subjected children to any dangers from the streets.\textsuperscript{109} In a long paragraph about religious freedom, he wrote:

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah’s Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. \textit{We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression.} Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.\textsuperscript{110}

Justice Murphy also dissented in \textit{Cleveland v. United States}, where Mormons were convicted of violating the Mann Act, taking girls or women across state lines because of their practice of polygamy.\textsuperscript{111} Justice Murphy said their actions had nothing to do with white slavery:

\begin{quote}
I disagree with the conclusion that polygamy is “in the same genus” as prostitution and debauchery and hence within the phrase “any other immoral purpose” simply because it has sexual connotations and has “long been branded as immoral in the law” of this nation. Such reasoning ignores reality and results in an unfair application of the statutory words.\textsuperscript{112}
\end{quote}

Justice Murphy recognized polygamy’s long religious history and objected to the Court’s characterization of polygamy as “a notorious

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 175.
\item \textsuperscript{110} \textit{Id.} at 175–76 (emphasis added) (internal citation omitted).
\item \textsuperscript{111} \textit{Cleveland v. United States}, 329 U.S. 14, 24–29 (1946) (Murphy, J., dissenting).
\item \textsuperscript{112} \textit{Id.} at 25 (quoting the majority opinion).
\end{itemize}
example of promiscuity." Instead, like monogamy, it was a different form of marriage.

Justice Murphy was a repeated friend to the Jehovah's Witnesses as he was in Prince, the child labor case. He dissented in a 5–4 opinion when the Court originally upheld the state's licensing of Jehovah's Witnesses who were going door to door. That case, Jones v. City of Opelika, was vacated. Justice Murphy joined Justice Douglas's 5–4 decision in Murdock v. Commonwealth of Pennsylvania, concluding that a state requirement for Jehovah's Witnesses to pay for licenses before they could solicit door to door was unconstitutional. In another Jehovah's Witness case, he concurred that a licensing requirement was unconstitutional. In that opinion, he argued in response to the dissent's point that the majority exempted religions from all taxes:

It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom . . . There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.

It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.

Justice Murphy also joined some important religious freedom decisions. He joined Justice Black's 5–4 decision in Everson v. Board of Education of Ewing Township, allowing reimbursement of school bus ride fares to parochial school children. He joined Justice Black's 8–1 decision in People of State of Illinois ex rel. McCollum v. Board of

113. Id. at 19 (majority opinion).
114. Id. at 25–26 (Murphy, J., dissenting).
116. Id.
119. Id. at 578–79 (Murphy, J., concurring).
Education of School District No. 71, Champaign County, Illinois, which banned, as a violation of the Establishment Clause, letting public school students take religion classes taught by clergy that were held on public school grounds.121 As Justice Black wrote:

[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.122

Justice Murphy was a pro-religious freedom justice, and especially pro-religious minorities, just as he had been pro-racial minorities in Korematsu.

D. From Minton to Brennan

Justice Sherman Minton123 served from 1949–1956, was chosen by President Truman, and was replaced by Justice William Brennan in 1956.124 Justice Minton joined Justice Douglas’s opinion in Fowler v. Rhode Island, which ruled that it was unconstitutional for the state to allow some religions, but not Jehovah’s Witnesses, to preach in Slater Park.125 Fowler, a Jehovah’s Witness minister, had been arrested after giving his religious talk even though “Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance.”126 Justice Douglas cited Niemotko v. Maryland as being “on all fours with” Fowler.127 Justice Minton had previously joined Chief Justice Vinson’s opinion in Niemotko, ruling that Maryland could not preclude Jehovah’s Witnesses from preaching in public parks while allowing other groups to do so.128 Justice Minton

122. Id. at 212.
123. Although Sherman Minton was a Protestant while he was a justice, he was married to a Catholic and became Catholic after retirement, and he is usually included on lists of Catholic justices. Nomi Stolzenberg, Religious Identity and Supreme Court Justices—a Brief History, THE CONVERSATION (Oct. 19, 2020, 8:24 AM), https://theconversation.com/religious-identity-and-supreme-court-justices-a-brief-history-146999.
124. See Justices 1789 to Present, supra note 60.
126. Id. at 69.
127. Id. (citing Niemotko v. Maryland, 340 U.S. 268, 272–73 (1951)).
had also joined Justice Douglas’s 6–3 opinion in *Zorach v. Clauson*, which ruled New York’s program allowing public school students to go to religious schools for religious instruction while leaving other students in public school was constitutional. Justice Douglas distinguished this scenario from *McCollum*, the 8–1 decision that Justice Murphy had joined, because, in *Zorach*, everything was held in and paid for by the religious schools.

Justice Minton wrote a majority opinion in *Adler v. Board of Education of City of New York*, upholding a New York rule not to hire teachers connected to organizations advocating the overthrow of the government, including Communists. Such teachers could speak and assemble as they wanted but were not entitled to work in a state school system.

And then it was Justice Brennan’s turn. In 1967, in *Keyishian v. Board of Regents of University of State of New York*, Justice Brennan wrote a 5–4 majority opinion overruling *Adler* and ruling that state university provisions requiring public employees to renounce Communism were unconstitutional. Justice Brennan served on the Court for 34 years.

II. MODERN CATHOLICS TAKE THE BENCH, STARTING WITH JUSTICE WILLIAM BRENNAN (1956–1990)

Justice William Brennan was nominated by President Dwight D. Eisenhower, and took office in 1956, replacing Justice Minton. Justice Brennan was a devout Catholic who went to Mass every week. He is also remembered as a strict separationist, a position which many of his Catholic successors later repudiated.

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130. *Id.* at 309–10.
134. See Justices 1789 to Present, supra note 60.
135. See Justices 1789 to Present, supra note 60.
137. See infra Section V.
Brennan’s long history on the Court, three features of his religious freedom jurisprudence dominate. First, he wanted to protect every individual’s religious freedom against attack no matter what the religion was. Second, he agreed with other Court members that public welfare legislation, like busing, should go to the religions. Third, he was strict in keeping government from funding religion. Such separation protected the state from the church and the church from the state. If individual religious freedom were really to be protected, the government could not intrude on it, and neutrality must be observed.138

A. For the Free Exercise of Religion

Justice Brennan dissented in a 1961 case, *Braunfeld v. Brown*, where the majority upheld the constitutionality of Sunday closing laws.139 The majority upheld Sunday laws as neutral days of rest without fully appreciating their influence on religion.140 In contrast, Justice Brennan said the state had wrongly “put an individual to a choice between his business and his religion.”141 “Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.”142 Justice Brennan did not want religious people to be forced to leave their religions behind as the closing laws required.

This perspective on religious freedom was made even more emphatically in Justice Brennan’s most famous decision about religion: his opinion for the Court in *Sherbert v. Verner*.143 Sherbert would not work on Saturdays because she was a Seventh Day Adventist.144 South Carolina refused to pay her unemployment benefits because she could have worked on Saturday.145 Justice Brennan’s majority ruled that the state had forced Sherbert to choose between religion and work, just as

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140. *Id.* at 605 (majority opinion) (“[T]he Sunday law simply regulates a secular activity . . .”).
141. *Id.* at 611 (Brennan, J., dissenting).
142. *Id.* at 613.
144. *Id.* at 399–400.
145. *Id.*
it had in *Braunfeld*. Justice Brennan used a strict scrutiny test to protect Sherbert’s freedom, meaning the government had to have a “compelling state interest” to put a burden on her religion. He saw no such interest in her case. He was promoting neutrality toward religion so that Saturday and Sunday worshippers could be treated the same.

Of course, if *Braunfeld* had come out differently, *Sherbert* might have as well. Without a Sunday closing law, Sherbert would not have run into trouble with the state in the first place. *Sherbert* is discussed frequently today because of its apparent differences with Justice Antonin Scalia’s free exercise opinion in *Employment Division v. Smith*.

In reaching his *Sherbert* conclusion, Justice Brennan cited *Everson*, the Catholic school bus case where Justice Murphy had provided the fifth vote to uphold provision of bus costs to parochial school children’s parents. Brennan said:

> This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”

Justice Brennan later wrote the majority opinion protecting the unemployment rights of Seventh-Day Adventist Paula Hobbie who could not work on her Sabbath, which ran from sundown Friday to sundown Saturday. Relying on *Sherbert*, Justice Brennan concluded she could not be penalized for setting her work schedule in order to obey her religion. Justice Antonin Scalia, who joined the Court in 1986, agreed with Justice Brennan’s *Hobbie* argument. Justice Brennan joined Justice Burger’s opinion reaching a similar conclusion in

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146. *Id.* at 406.
147. *Id.* at 402.
148. *Id.* at 408.
150. *Sherbert*, 374 U.S. at 410 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).
153. *Id.*
154. Justices 1789 to Present, supra note 60; *Hobbie*, 480 U.S. at 136.
Thomas v. Review Board of the Indiana Employment Security Division.\textsuperscript{155}

Justice Brennan cited \textit{Sherbert} in his concurrence in \textit{McDaniel v. Paty}, a case about a Tennessee law that disqualified religious ministers from holding elective office:

If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy. \textit{Sherbert} and \textit{Torcaso} compel the conclusion that because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.\textsuperscript{156}

Justice Brennan had previously joined Justice Burger’s unanimous decision in \textit{Torcaso}, which invalidated a state rule requiring public officials to believe in God.\textsuperscript{157}

Justice Brennan wrote a dissent in \textit{Goldman v. Weinberger}, while the majority upheld an Air Force regulation that prohibited Simcha Goldman, who was Jewish, from wearing a head covering.\textsuperscript{158} Brennan wrote with his usual emphasis on individual religious freedom:

Simcha Goldman invokes this Court’s protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court’s response to Goldman’s request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity. I dissent.

The First Amendment, however, restrains the Government’s ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke.\textsuperscript{159}

\textsuperscript{158} Goldman v. Weinberger, 475 U.S. 503 (1986).
\textsuperscript{159} Id. at 513–14 (Brennan, J., dissenting).
Congress later allowed Jews to wear yarmulkes in the military by statute.\textsuperscript{160} But \textit{Goldman} stood against it over Justice Brennan’s dissent.

Justice Brennan dissented from Justice Sandra Day O’Connor’s well-known decision in \textit{Lyng v. Northwest Indian Cemetery Protective Association}, where the majority upheld the federal government’s use of Native American property for its own construction projects.\textsuperscript{161} Justice Scalia joined Justice O’Connor’s majority opinion.\textsuperscript{162} Justice Brennan, in contrast, believed that the government was harming Native Americans’ religion without a compelling interest and that the government’s action “threatens the very existence of a Native American religion[].”\textsuperscript{163}

Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision “should be read to encourage governmental insensitivity to the religious needs of any citizen.” I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government’s determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents’ religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become “more difficult” as a result of the Government’s actions, they remain free to maintain their religious beliefs. Given today’s ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir]

\begin{itemize}
  \item \textsuperscript{161} \textit{Lyng v. Nw. Indian Cemetery Protective Ass’n}, 485 U.S. 439 (1988).
  \item \textsuperscript{162} \textit{Id}.
  \item \textsuperscript{163} \textit{Id.} at 458 (Brennan, J., dissenting).
\end{itemize}
traditional religions,” it fails utterly to accord with the dictates of the First Amendment.164

Justice Brennan wrote the majority decision in Johnson v. Robison, allowing the government to distinguish between conscientious objectors and those who agree to the draft by giving educational benefits to the draft people only.165 In this case, Justice Brennan said there was not really a burden on religion.166

In addition to Free Exercise, Brennan had a lot to say about the Establishment Clause and public funding of religion. He defended funding of public welfare, but not funding of religion.

B. Public Welfare Should Go to Religions

As we read above, Justice Murphy joined some important religious freedom decisions. He was vote number five in Justice Black’s 5–4 decision in Everson v. Board of Education of Ewing Township, allowing reimbursement of school bus ride fares to parochial school children.167 He joined Justice Black’s 8–1 decision in People of State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, which banned letting public school students take religion classes in their public schools as a violation of the Establishment Clause.168

Lemon v. Kurtzman is the influential Establishment Clause case that has long puzzled and divided the Court.169 Justice Brennan joined the majority in refusing government aid to Pennsylvania and Rhode Island religious schools.170 He dissented from the Court’s decision to give aid to religious universities.171 The majority’s Establishment Clause test in Lemon, which the Court has applied repeatedly throughout the years, as in Edwards v. Aguillard, says that, to avoid an Establishment violation, “[f]irst, the legislature must have adopted the law with a secular purpose. Second, the statute’s principal or primary effect

164. Id. at 476–77 (Brennan, J., dissenting) (quoting id. at 453–55 (majority opinion) (internal quotation marks omitted)); see also American Indian Religious Freedom Act, 42 U.S.C. § 1996.
166. Id. at 384–86.
170. Id. at 642 (Brennan, J., concurring).
171. Id.
must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.72

In Justice Brennan's view, no government aid should go to religion but must go to public welfare. Justice Brennan was the only Catholic on the Court when Lemon was decided.173 In a concurring opinion, he explained his own, three-part Lemon test, which differed from the majority's:

What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.174

In Lemon, Justice Brennan wanted to know if the universities were sectarian because the Act "is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions[.]."175 "Sectarian" means religious; the rule is no government aid for religion.

In 1970, the Court upheld a tax exemption for the properties of religious organizations.176 Chief Justice Burger ruled the state statutory exemption for organizations using their properties "exclusively" for religious purposes did not violate the Establishment Clause.177 Justice Brennan concurred for reasons he had set out in School District of Abington Township, Pennsylvania v. Schempp, which set out the same test he used again in Lemon.178 Defending a historical account of the text, he used the same three-part test quoted above. He reasoned that

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173. See Justices 1789 to Present, supra note 60.
174. Lemon, 403 U.S. at 643 (Brennan, J., concurring).
175. Id. at 642.
177. Id. at 666–68.
178. Id. at 680–81 (Brennan, J., concurring) (citing Sch. Dist. Of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963)); see also Lemon, 403 U.S. at 643 (Brennan, J., concurring)).
the tax exemption was not a subsidy to religion but an action that had
tons of history behind it in the states and let the organizations engage
in secular activities.\textsuperscript{179} Additionally, tax money is more passive than a
subsidy, and this exemption shows that the state "values religion
among a variety of private, nonprofit enterprises that contribute to the
diversity of the Nation."\textsuperscript{180}

Justice Brennan wrote an often-cited rule about the Establishment
Clause in his 5–4 majority decision in \textit{Larson v. Valente}, which ruled
that a Minnesota law that imposed registration and reporting require-
ments on religious organizations that solicit more than 50\% of their
funds from nonmembers violated the Establishment Clause.\textsuperscript{181} As he
put it, in an often-quoted text from the opinion, \"[t]he clearest com-
mand of the Establishment Clause is that one religious denomination
cannot be officially preferred over another.\"\textsuperscript{182} The 50\% rule did just
that, so it was unconstitutional.

Tax law did not always protect the religions. Justice Brennan
joined Justice Burger’s decision denying tax-exempt status to Bob
Jones University because of its racism.\textsuperscript{183} He dissented from Chief Jus-
tice Rehnquist’s decision to deny standing to Americans United for
Separation of Church and State, which had complained that the gov-
ernment was giving property to Valley Forge Christian College without
getting any payment for it.\textsuperscript{184} Justice Brennan said the majority’s stand-
ing decision would "obfuscate, rather than inform, our understanding
of the meaning of rights under the law[,]" which was supposed to pre-
vent the government from funding religion.\textsuperscript{185}

Justice Brennan was consistent on this test. He defended the
Court’s decision in \textit{Everson} and also joined \textit{Board of Education of Central
School District No. 1 v. Allen}, a case upholding textbook aid to
religious schools.\textsuperscript{186} \textit{Everson} and \textit{Allen} were limited to reimbursing
parents’ bus money or book loans, which Brennan did not see as fund-
ing \textit{religion}.\textsuperscript{187} In \textit{Lemon}, Justice Brennan cited \textit{Bradfield v. Roberts},

\begin{itemize}
\item \textsuperscript{179} \textit{Walz}, 397 U.S. 680.
\item \textsuperscript{180} \textit{Id.} at 693.
\item \textsuperscript{181} \textit{Larson v. Valente}, 456 U.S. 228 (1982).
\item \textsuperscript{182} \textit{Id.} at 244.
\item \textsuperscript{183} \textit{Bob Jones Univ. v. United States}, 461 U.S. 574 (1983).
\item \textsuperscript{184} \textit{Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.}, 454 U.S. 464 (1982).
\item \textsuperscript{185} \textit{Id.} at 490 (Brennan, J., dissenting in part).
\item \textsuperscript{186} \textit{Bd. of Educ. V. Allen}, 392 U.S. 236 (1968).
\item \textsuperscript{187} \textit{Id.; Everson v. Bd. of Educ.}, 330 U.S. 1 (1947).
\end{itemize}
which allowed aid to a Catholic hospital because the hospital itself was secular.\textsuperscript{188} In contrast, the aid in \textit{Lemon} was “too close a proximity” between church and state, which risked “the secularization of a creed.”\textsuperscript{189} At the religious schools, secular education was “inextricably intertwined” with a religious mission, so funding could not be given.\textsuperscript{190} In his words, “for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions.”\textsuperscript{191}

Justice Brennan repeated his “no-aid to religion” rule in numerous cases. In \textit{Hunt v. McNair}, citing his earlier cases, he dissented from a majority decision giving aid to South Carolina Baptist colleges.\textsuperscript{192} In \textit{Meek v. Pittenger}, he agreed with Justice Stewart’s majority decision refusing too much aid to religious schools.\textsuperscript{193} But he disagreed with Part III of Justice Stewart’s opinion, which ruled that \textit{Allen}—a textbook precedent that Justice Brennan had joined—made the provision of textbooks constitutional.\textsuperscript{194} Following \textit{Lemon}, he thought such aid would encourage political divisiveness among citizens who agreed or disagreed with the program, so it was prohibited:

For \textit{Allen}, which I joined, was decided before \textit{Kurtzman} [i.e., \textit{Lemon}] ordained that the political-divisiveness factor must be involved in the weighing process, and understandably neither the parties to \textit{Allen} nor the Court addressed that factor in that case. But whether or not \textit{Allen} can withstand overruling in light of \textit{Kurtzman} and \textit{Nyquist}, which I question, it is clear that \textit{Kurtzman}—which, I repeat, applied the factor to a Pennsylvania program that included reimbursement for the cost of textbooks—requires that the plurality weigh the factor in the instant case. Further, giving the factor the weight that \textit{Kurtzman} and \textit{Nyquist} require, compels, in my view the conclusion that the textbook loan program of Act 195, equally with the program for loan of instructional materials and equipment, violates the Establishment Clause. The plurality’s answer is that a

\begin{itemize}
\item \textsuperscript{188} \textit{Lemon v. Kurtzman}, 403 U.S. 602, 643 (1971) (Brennan, J., concurring) (citing \textit{Bradfield v. Roberts}, 175 U.S. 291 (1899)).
\item \textsuperscript{189} \textit{Lemon}, 403 U.S. at 649 (1971) (Brennan, J., concurring).
\item \textsuperscript{190} \textit{Id.} at 657.
\item \textsuperscript{191} \textit{Lemon}, 403 U.S. at 648–649.
\item \textsuperscript{192} \textit{Hunt v. McNair}, 413 U.S. 734 (1973).
\item \textsuperscript{194} \textit{Id.}
\end{itemize}
difference in result is justified because Act 195 distinguishes between recipients of the loans: textbooks are lent to students, while instructional material and equipment are lent directly to the schools. That answer will not withstand analysis.\(^{195}\)

Justice Brennan also dissented in *Roemer v. Board of Public Works of Maryland*, where the majority upheld Maryland nonsectarian aid to religious schools, because “[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion.”\(^{196}\) In *Wolman v. Walter*, where the majority upheld Ohio aid to religious schools, he dissented, reiterating his point that religion should not receive state money.\(^{197}\)

The distinction between the religious and the secular carried over to other Justice Brennan opinions. He dissented in *N.L.R.B. v. Catholic Bishop of Chicago*, where the majority ruled that lay teachers at religious schools were not covered by the National Labor Relations Act.\(^{198}\) Justice Brennan was very critical of the majority’s reasoning, arguing that they had amended the legislation in a non-judicial manner.\(^{199}\) In such circumstances, the law should have reached employees of religious schools.\(^{200}\)

But Justice Brennan also wrote important precedents concluding that religious property disputes could not be decided by the courts. He wrote the unanimous decision in *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, concluding that the courts could not decide decisions about church property.\(^{201}\) Brennan rejected the “departure-from-doctrine” rule, which would have allowed


\(^{199}\) *Id.* at 511–14 (Brennan, J., dissenting).

\(^{200}\) Sotomayor agreed with the Court’s conclusion in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), that the statute granted church plans protection from ERISA to many organizations. She worried, however, that some of the large health-care providers should not have been included by Congress. These providers were for-profit, earned billions of dollars, and competed with secular companies that had to comply with ERISA.

\(^{201}\) *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).
courts to decide whether churches had acted in accordance with their own teachings.\textsuperscript{202} This set up a long run of cases where churches were allowed to do what they wanted with property without court intervention. His 7–2 opinion in \textit{Serbian Eastern Orthodox Diocese for U.S. of America v. Milivojevich} followed the same rule and said the civil courts were required to accept that ecclesiastical decisions about faith were made without judicial review.\textsuperscript{203} This was another approach to separation of church and state.

Justice Brennan's First Amendment jurisprudence also led him to conclusions about prayer.

\textbf{C. \textit{Watch Out for Prayer}}

Justice Brennan joined the Court's opinion in \textit{Engel v. Vitale}, a famous decision that removed prayer from public schools.\textsuperscript{204} He concurred in a similar opinion, \textit{School District of Abington Township, Pa. v. Schempp}, which concluded that public school Bible readings and prayer violated the Establishment Clause.\textsuperscript{205} There, too, he gave his \textit{Lemon} test:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.\textsuperscript{206}

He referred to neutrality, which was always significant in his work on religion: "But in the long view the independence of both church and state in their respective spheres will be better served by close adherence to the neutrality principle."\textsuperscript{207}

On government prayer, Justice Brennan dissented in \textit{Marsh v. Chambers}, a case that has recently been vigorously reaffirmed by the

\textsuperscript{202} \textit{Id.} at 450.


\textsuperscript{206} \textit{Id.} at 294–95.

\textsuperscript{207} \textit{Id.} at 246.
Court.\textsuperscript{208} Justice Brennan believed that legislative prayer is unconstitutional as a clear violation of the Establishment Clause.\textsuperscript{209} He acknowledged that, at one point, he may have agreed with the majority:

Moreover, disagreement with the Court requires that I confront the fact that some 20 years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, [i.e., \textit{Schempp}], I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other State Legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court’s opinion.\textsuperscript{210}

Justice Brennan thought it was clear that any group of law students would have found that, under \textit{Lemon}, the prayer was unconstitutional:

Legislative prayer . . . intrudes on the right to conscience by forcing some legislators either to participate in a “prayer opportunity,” with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.\textsuperscript{211}

\begin{itemize}
\item[\textsuperscript{208}]{Marsh v. Chambers, 463 U.S. 783, 795–823 (1983) (Brennan, J., dissenting); \textit{see also} Town of Greece v. Galloway, 572 U.S. 565 (2014).}
\item[\textsuperscript{209}]{\textit{Marsh}, 463 U.S. at 795 (Brennan, J., dissenting).}
\item[\textsuperscript{210}]{\textit{Id.} at 795–76.}
\item[\textsuperscript{211}]{\textit{Id.} at 808 (citation omitted); \textit{see also id.} at 800–01 ("I have no doubt that, if any group of law students were asked to apply the principles of \textit{Lemon} to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").}
\end{itemize}
Justice Brennan also joined the opinion finding Alabama's moment-of-silence law in *Wallace v. Jaffree* unconstitutional.\(^{212}\)

Using the same reasoning as in those cases, Justice Brennan also disliked government-sponsored religious monuments because they represented government support for religion.

### D. Opposing Public Religious Monuments

Because he valued the importance of separation of church and state, Justice Brennan always opposed government religious monuments. He joined a per curiam decision holding a Ten Commandments display unconstitutional in *Stone v. Graham*.\(^{213}\) In *Lynch v. Donnelly*, he dissented from the Court’s decision to find a Rhode Island nativity scene constitutional.\(^{214}\) His dissent observed that the Court’s “less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial,” and expressed concern that the recent *Marsh* test had undermined the standards.\(^{215}\) He thought religious monuments were religious, and, as such, should not be supported by the government:

> [O]ur precedents in my view compel the holding that Pawtucket’s inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the City’s crèche is presented obscures or diminishes the plain fact that Pawtucket’s action amounts to an impermissible governmental endorsement of a particular faith.\(^{216}\)

The Court’s precedents on monuments and other religious freedom cases changed after Catholic Justices Scalia, Kennedy, and Thomas, joined the Court.

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215. *Id.* at 696 (Brennan, J., dissenting).
216. *Id.* at 695.

Justice Antonin Scalia was nominated by President Ronald Reagan and served on the Court from 1986 until his death in 2016. Justices 1789 to Present, supra note 60. Justice Anthony Kennedy was also nominated by Reagan and served on the Court from 1988 until he retired in 2018. They both served with Justice Brennan on the Court until he retired in 1990. Justice Clarence Thomas was nominated by President George H.W. Bush and joined the Court in 1991. He remains on the Court today. Those three new justices revisited some of Justice Brennan’s precedents.

A. Free Exercise is Revisited in Smith

Just as Justice Brennan is famous for writing Sherbert, Justice Scalia wrote a leading and controversial free exercise case in Employment Division, Department of Human Resources of Oregon v. Smith. Justice Kennedy joined Scalia’s majority opinion in that case, while Justice Brennan dissented. Smith was a case about Native American drug counselors who were fired for using peyote at a religious ritual and tried to receive unemployment benefits. Justice Scalia concluded everyone had to follow neutral laws of general applicability, while Justice Brennan still sought Sherbert strict scrutiny. In Smith I, Justice Scalia joined a majority opinion that sent the case back to Oregon, so that the state court could clarify whether peyote was legal in Oregon. Justice Brennan dissented from that opinion, relying on his strict scrutiny opinions in Sherbert, Thomas, and Hobbie. He did not think that the peyote question was ambiguous or

217. Justices 1789 to Present, supra note 60.
218. Justices 1789 to Present, supra note 60.
219. Justices 1789 to Present, supra note 60.
220. Justices 1789 to Present, supra note 60.
221. Justices 1789 to Present, supra note 60.
223. Smith, 494 U.S. at 873.
224. Id. at 883.
225. Compare Id. at 901, with Id. at 908–09 (Blackmun, J., dissenting).
227. Id. at 674–75 (Brennan, J., dissenting).
related to the unemployment compensation statute. Justice Brennan thought the Native Americans should be compensated.

The issue was whether the First Amendment granted Native Americans a free exercise right to receive unemployment compensation benefits even though they, as drug counselors, had been fired for using peyote in a religious ritual. Because drug use was against Oregon law, and because a criminal law was involved, in Smith II, Justice Scalia said the courts had no business granting an exemption. The legislature could do it, but the courts could not. Unlike Sherbert and some other compensation cases, Smith II was a case that involved something illegal, drug activity, and it was not the Court’s job to excuse individuals from complying with the law. Quoting Reynolds, the Court’s old case refusing to exempt a Mormon from the anti-polygamy laws, Justice Scalia wrote, “[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” Justice Kennedy joined Justice Scalia’s opinion. Justice Scalia accepted Sherbert but said it did not apply because there was a criminal law at stake in Smith II that was not present in Sherbert.

In contrast, Justice Brennan joined Justice Blackmun’s dissent with Justice Thurgood Marshall. A statute that “burdens the free exercise of religion . . . may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.” Indeed, the dissent accused the majority of “effectuat[ing] a wholesale overturning of settled law concerning the Religion Clauses of our Constitution.” Examining peyote and the Court’s earlier religion cases in detail, the dissenters concluded that the government could

228. Id. at 678.
229. Id. at 676–77.
230. Id. at 884.
232. Id. at 878–79.
233. Id. at 879.
234. Id. at 873.
235. Id. at 884.
236. Id. at 873.
237. Id. at 907 (Blackmun, J., dissenting).
238. Id. at 908.
not meet strict scrutiny and the least restrictive means tests in its argument that peyote was like all other drugs in the War on Drugs.239

The Court clarified Smith II in Church of the Lukumi Babalu Aye v. City of Hialeah.240 Justice Kennedy wrote this opinion, concluding that Hialeah violated the Church’s rights by banning animal sacrifice while allowing the killing of animals in other contexts.241 The decision was unanimous, with justices making different points.242 Justices Scalia and Thomas joined Justice Kennedy’s opinion.243 Justice Scalia also wrote a concurrence.244 Justice Kennedy’s opinion clarified when a law is neutral and general, explaining that a law targeting animal sacrifice violated the First Amendment by discriminating against religion.245 Justice Scalia took issue with some of Justice Kennedy’s description of what general and neutral laws are. In particular, Justice Scalia did not want the Court to examine legislative intent,246 although Justice Kennedy would allow it.247 Justice Thomas joined them without a separate concurrence.248 We will see later that the status of Smith was at stake in the Court’s recent decision in Fulton.249

Prisoners’ free exercise religious rights often get to the Court. Turner v. Safley was a unanimous case that set a lower threshold for the government to meet when it infringed prisoners’ religious rights.250 Justice Scalia joined Justice O’Connor’s majority opinion, which was fairly deferential to the government.251 Justice Brennan, however, concurred in part and dissented in part.252 He joined only Part IIIB of the majority opinion, which concluded that the state could not restrict marriage as it had in that case.253 Justice Brennan also joined Justice Stevens’s dissent, which argued that the majority had inappropriately accepted the Department of Justice’s mostly speculative arguments about

239. Id. at 908–09.
241. Id. at 537.
242. Id. at 522.
243. Id.
244. Id.
245. Id.
246. Id. at 558 (Scalia, J., concurring in part).
247. Id. at 540.
248. Id.
249. See infra text accompanying notes 727–51.
251. Id.
252. Id.
253. Id. at 87.
prison security. A week later, in *O'Lone v. Estate of Shabazz*, Justice Scalia joined Chief Justice Rehnquist's majority opinion, which made it fairly easy to restrict prisoners' religious freedom. Justice Brennan dissented in the 5–4 case, again rejecting the easy standard of government review and arguing the case should be remanded for review under *Turner*. Justice Brennan thought the Court had too easily rejected the prisoners' argument that their religious rights were violated when they could not attend the central religious ceremony of their Muslim faith.

B. Smith leads to RFRA

*Smith* provoked much outrage among the public and Congress, who did not see anything good in what the Court had ruled. Accordingly, Congress passed the Religious Freedom Restoration Act (RFRA), using its Section 5 of the Fourteenth Amendment powers so that courts would apply *strict scrutiny* to all the states and municipalities. RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest."

RFRA hit the Court in *City of Boerne v. Flores*. The Court ruled that Congress did not have the power to require the states to obey the compelling interest/least restrictive means test. Justice Kennedy wrote the opinion, concluding that Congress had exceeded its Section 5 powers in applying RFRA to the states. Justice Thomas joined his opinion, and Justice Scalia joined most of it. Justice Kennedy reasoned:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in

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254. *Id.*
256. *Id.* at 354 (Brennan, J., dissenting).
257. *Id.*
259. *Id.*
261. *Id.* at 536.
262. *Id.*
operation and effect. History and our case law support drawing the
distinction, one apparent from the text of the Amendment.263

Congress’s ruling was not congruent and proportional because they had
not undertaken enough examination of what was going on in the states
in order to step in to end their discrimination.264

Justice Scalia wrote a separate concurrence in Boerne, with Justice
John Paul Stevens, defending Smith II against other justices’ attacks.265
As Justice Scalia wrote, “[w]e held in Smith that the Constitution’s Free
Exercise Clause ‘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).’”266 Justice Scalia thought the dissenting
justices had not shown that the history of Smith II was wrong.

Although the Court invalidated the application of Congress’s
RFRA to the states, it always, as we will see later, upheld the applica-
tion of RFRA and other pro-religious freedom legislation to the federal
government itself.267

C. Religions Start to Get More Public Funding

Brennan and Scalia often disagreed once Scalia joined the Court
in 1986. The clearest instance in the church funding area is the differ-
ence between Aguilar and Agostini, the case that overruled Aguilar.
Justice Brennan wrote the 5–4 opinion of the Court in Aguilar v. Fel-
ton.268 New York City had paid to send public school teachers into re-
ligious schools in order to give their students remedial instruction.269
Justice Brennan’s opinion for the Court ruled that such use of federal
funds in religious schools violated the Establishment Clause.270 It
raised the same type of divisiveness that Brennan had long worried
about. Aguilar was decided the same day as School District. of Grand
Rapids v. Ball, which was also overruled by Agostini v. Felton.271 In

263. Id. at 520.
264. Id. at 533.
265. Id. at 537 (Stevens, J., concurring).
266. Id.
267. See infra Section IV.D.
269. Id. at 404.
270. Id. at 414.
Ball, Justice Brennan wrote a decision concluding that the school district’s “Shared Time and Community Education programs,” which provided the classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools, had “the ‘primary or principal’ effect of advancing religion and therefore violated dictates of the Establishment Clause of the First Amendment.”272 Justice Brennan still used his own Lemon test to rule against the “Shared Time” program.273

Twelve years later, the Court overruled Aguilar and Ball in Agostini v. Felton.274 Agostini was written by Aguilar dissenter Justice O’Connor.275 She was joined by Justices Scalia, Kennedy, and Thomas.276 Reversing Aguilar, they ruled that the program did not violate the Establishment Clause, and significant change in Establishment Clause law entitled petitioners to relief from permanent injunction.277 The new Court did not believe that students would be indoctrinated by public teachers instructing in parochial schools.278 So, we see the newer Catholics on the Court moving away from Justice Brennan’s restrictions on funding religion.

Texas exempted religious periodicals from its sales and use taxes while funding other publications.279 Justice Brennan’s opinion concluded that such a “subsidy exclusively to religious organizations” violated the Establishment Clause through the Lemon test.280 Justices Scalia and Kennedy dissented, relying on earlier tax and religion precedents to disagree.281

Justice Brennan also disagreed with Justices Scalia and Kennedy in the 5–4 decision, Bowen v. Kendrick, which gave funding to religious and other institutions for teenage sexuality counseling, without expressly stating that the funds could not be used for a religious purpose.282 Justices Scalia and Kennedy were in the majority that upheld

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273. Id.
275. Id. at 208.
276. Id. at 207.
277. Id.
278. Id. at 240.
280. Id. at 15.
281. Id. at 29 (Scalia, J., dissenting).
the legislation, while Justice Brennan dissented. Chief Justice Rehnquist's opinion followed *Lemon.* Justice Kennedy's concurrence, joined by Justice Scalia, examined the "pervasively sectarian" language of the opinion, concluding that the grant in this case was neutral, given to religious and non-religious alike, so the schools' sectarian nature did not have to be questioned.

In contrast, Justice Brennan joined Justice Blackmun's dissent that concluded the majority had departed from Court precedents and relied too heavily on the Court's university funding cases, from which Justice Brennan had dissented. The funds granted to the schools were not limited to previously approved secular textbooks. And the nature and location of the counseling—maybe in a church—made it possible for the funding to be used for religious counselors who talk with the teenagers about a religious subject. Justice Brennan always opposed the funding of religion, but the newer members of the Court disagreed with him.

The Court held onto that line between secular and religious until Justice Thomas directly challenged it in *Mitchell v. Helms.* *Mitchell* overruled *Meek* and *Wolman.* Thomas wrote a plurality, joined by Justices Scalia and Kennedy, upholding federal governmental aid to private schools. He concluded that neutral aid that passes through parents' hands does not violate the Establishment Clause. Justice O'Connor concurred because she thought the plurality's rule allowing funding was far too broad:

Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission

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283. Id.
284. Id.
285. Id. at 624–25 (Kennedy, J., concurring).
286. Id. at 630–31 (Blackmun, J., dissenting).
287. Id. at 593.
288. Id. at 635–36 (Blackmun, J., dissenting).
290. Id. at 835.
291. Id. at 834.
292. Id. at 816.
is permissible. Although the expansive scope of the plurality’s rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality’s treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs. Second, the plurality’s approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.293

Aid has continued to religious schools ever since. Two years later, Justices Scalia, Thomas, and Kennedy joined Chief Justice Rehnquist in upholding, 5–4, a voucher program giving vouchers to religious schools in Zelman v. Simmons-Harris.294 Justice Thomas wrote a concurrence, arguing that the Ohio schools were facing financial emergencies and trying to help students in difficulty.295 Here, as in many other cases, Thomas questioned whether the Establishment Clause should apply to the states and specifically whether the Establishment Clause should be used to “oppose neutral programs of school choice.”296 As Justice Thomas explained it, “[a]s Frederick Douglass poignantly noted, ‘no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education.’”297

Both Justice Scalia and Justice Thomas dissented in Locke v. Davey, a case in which—perhaps surprisingly—Chief Justice Rehnquist wrote an opinion concluding that it did not violate Free Exercise for Washington to refuse scholarship funding to Joshua Davey for his devotional theology degree.298 Justice Kennedy joined Chief Justice Rehnquist’s opinion explaining that this program fell into the “play in the joints” between Establishment and Free Exercise.299 The majority wrote that, in contrast to Justice Scalia’s reasoning, “training for religious professions and training for secular professions are not fungible.”300

293. Id. at 837–38 (O’Connor, J., concurring).
295. Id. at 676 (Thomas, J., concurring).
296. Id. at 680.
297. Id. at 684.
299. Id. at 719.
300. Id. at 721.
Justices Scalia and Thomas dissented together.\textsuperscript{301} Justice Scalia followed \textit{Lukumi Babalu Aye}, concluding that the denial of the scholarship violated Davey’s religious rights.\textsuperscript{302} He also cited \textit{Everson}.\textsuperscript{303} He went back to the neutrality and generality requirements of \textit{Smith II} and found discrimination on the face of the statute.\textsuperscript{304} “The First Amendment, after all, guarantees \textit{free} exercise of religion, and when the State exacts a financial penalty of almost $3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything \textit{but} free.”\textsuperscript{305} Justice Scalia repeated his \textit{Lukumi} argument that intent does not matter.\textsuperscript{306}

Thomas also wrote a separate dissent. “I write separately to note that, in my view, the study of theology does not necessarily implicate religious devotion or faith.”\textsuperscript{307} Instead, he said, the state’s laws “include the study of theology from a secular perspective as well as from a religious one.”\textsuperscript{308} Thus, there was a problem in applying the no funding rule only to those in devotional theology. Thomas continues to criticize \textit{Locke} today, as he did in the recent \textit{Espinoza} case.\textsuperscript{309}

\textbf{D. The Justices Accept More Public Monuments}

Justice Brennan had joined the Court’s 1980 decision, \textit{Graham}, that invalidated a Ten Commandments display in public schools.\textsuperscript{310} He reached the same conclusion in \textit{County of Allegheny v. ACLU}, this time dissenting in a 5–4 opinion, with Justices Scalia and Kennedy in the majority and Justice Brennan in dissent.\textsuperscript{311} In \textit{Allegheny}, the Court ruled that the display of a crèche in a county courthouse was unconstitutional but that the display of a menorah next to a Christmas tree was constitutional.\textsuperscript{312} Justice Brennan opposed both monuments,\textsuperscript{313} Justices

\begin{itemize}
\item \textsuperscript{301} \textit{Id.} at 726 (Scalia, J., dissenting).
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{Id.}
\item \textsuperscript{304} \textit{Id.}
\item \textsuperscript{305} \textit{Id.} at 731.
\item \textsuperscript{306} \textit{Id.} at 726.
\item \textsuperscript{307} \textit{Id.} at 734 (Thomas, J., dissenting).
\item \textsuperscript{308} \textit{Id.} at 735.
\item \textsuperscript{309} \textit{Espinoza} v. Mont. Dept. of Revenue, 140 S.Ct. 2246, 2265 (2020) (Thomas, J.,) (“Thus, as I have explained, \textit{Locke} incorrectly interpreted the Establishment Clause and should not impact free exercise challenges”).
\item \textsuperscript{310} \textit{Stone} v. Graham, 449 U.S 39 (1980).
\item \textsuperscript{311} \textit{Cnty. of Allegheny} v. ACLU, 492 U.S. 573 (1989).
\item \textsuperscript{312} \textit{Id.}
\item \textsuperscript{313} \textit{Id.} at 637 (Brennan, J., concurring in part and dissenting in part).  
\end{itemize}
Scalia and Kennedy supported both of them.\textsuperscript{314} Justice Brennan agreed that the crèche was unconstitutional but dissented about the menorah.\textsuperscript{315} He relied upon Justice O'Connor's endorsement test to conclude that the government had endorsed religion with the menorah.\textsuperscript{316} Relying on his dissent in \textit{Lynch}, he insisted that displaying religious objects violates the separation of church and state:

I continue to believe that the display of an object that "retains a specifically Christian [or other] religious meaning," is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a crèche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause, and join Parts III-A, IV, and V of the Court's opinion. I cannot agree, however, that the city's display of a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the mayor's office shows no favoritism towards Christianity, Judaism, or both. Indeed, I should have thought that the answer as to the first display supplied the answer to the second.\textsuperscript{317}

Justices Kennedy and Scalia agreed that the menorah could be displayed but dissented on the crèche.\textsuperscript{318} These two justices thought the decision about the crèche "reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."\textsuperscript{319}

In \textit{Capitol Square Review and Advisory Board v. Pinette}, the Court ruled that the Ku Klux Klan is allowed to put up a cross display without violating the Establishment Clause.\textsuperscript{320} Justice Scalia wrote the opinion, joined by Justices Kennedy and Thomas.\textsuperscript{321} Justice Thomas concurred with his memorable language:

Although the Klan might have sought to convey a message with some religious component, I think that the Klan had a primarily nonreligious purpose in erecting the cross. The Klan simply has

\begin{itemize}
\item \textsuperscript{314} \textit{Id.} at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} \textit{Id.} at 640-41 (Brennan, J., concurring in part and dissenting in part) (citations omitted).
\item \textsuperscript{317} \textit{Id.} at 637.
\item \textsuperscript{318} \textit{Id.}
\item \textsuperscript{319} \textit{Id.} at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
\item \textsuperscript{321} \textit{Id.} at 757.
\end{itemize}
appropriated one of the most sacred of religious symbols as a symbol of hate. In my mind, this suggests that this case may not have truly involved the Establishment Clause, although I agree with the Court’s disposition because of the manner in which the case has come before us. In the end, there may be much less here than meets the eye.\textsuperscript{322}

Justice Scalia was always pro-religious monuments. In the last two Ten Commandments cases, one in a Texas park and the other in a Kentucky courthouse, Justice Scalia was pro-display.\textsuperscript{323} In the Texas case, \textit{Van Orden v. Perry}, Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist in the majority, concluding that the Texas Ten Commandments monument was constitutional.\textsuperscript{324} Justice Scalia wrote a concurring opinion:

\begin{quote}
I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.\textsuperscript{325}
\end{quote}

Justice Scalia, in dissent, also found Kentucky’s \textit{McCreary County} courthouse display constitutional.\textsuperscript{326} He was joined by Justices Kennedy and Thomas.\textsuperscript{327} As always, they were pro-religious monuments.

Justice Scalia wrote in the context of the 9/11 attack on the United States:

\begin{quote}
The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country’s loss, sadly observed: “How I wish that the Head of State of my country, at a similar time of national tragedy and
\end{quote}

\textsuperscript{322} Id. at 771–72 (Thomas, J., concurring).
\textsuperscript{324} Van Orden, 545 U.S. at 680–81.
\textsuperscript{325} Id. at 692 (Scalia, J., concurring).
\textsuperscript{326} McCreary Cnty., 545 U.S. 844.
\textsuperscript{327} Id.
distress, could conclude his address 'God bless _____.' It is of course absolutely forbidden.'

Quoting Zorach, Lynch, Marsh, and Schempp, Justice Scalia said "[w]e are a religious people whose institutions presuppose a Supreme Being." Justice Scalia opposed a religion-neutral Constitution. He criticized the "brain-spun 'Lemon test' that embodies the supposed principle of neutrality between religion and irreligion." He reminded readers that he has often said it is acceptable for government to perform acts "undertaken with the specific intention of improving the position of religion." He also insisted that the government can prefer religion over irreligion.

Justice Thomas's concurrence offered his frequently repeated theory that the Establishment Clause should not apply to the states and that its test requires "actual legal coercion." Justice Thomas wrote that there was no coercion in Van Orden because the complainant was simply walking by the monument.

Justices Scalia, Kennedy, and Thomas often agreed about monuments but sometimes disagreed about prayer.

E. Justice Kennedy Sometimes Opposes Prayer, While Justices Scalia and Thomas Often Support It

In Lee v. Weisman, Justice Kennedy wrote an opinion for the Court, concluding that a high school graduation prayer was unconstitutional. Justice Kennedy explained that students felt some strong desire to attend their graduation, and that the state should not prepare a prayer for them while they attended. Kennedy was influenced by earlier cases that acknowledged the distinctive pressure faced by school-children at school. Kennedy always liked a coercion test for the Establishment Clause, and concluded that coercion was possible in the circumstances of the prayer because school officials invited clerical

328. Id. at 885 (Scalia, J., dissenting).
329. Id. at 889.
330. Id. at 890.
331. Id. at 891.
332. Id. at 886–910.
334. Id. at 694.
336. Id. at 598.
337. Id. at 596.
members to attend the graduation and lead the prayer, and students wanted to attend their graduation.\textsuperscript{338}

Justices Scalia wrote a dissenting opinion, joined by Justice Thomas.\textsuperscript{339} Justice Scalia wrote that Justice Kennedy had misunderstood American history, with its "component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."\textsuperscript{340} "The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."\textsuperscript{341} Justice Scalia emphasized that students are not really coerced in such a setting and that they can sit or move their heads differently. And he added:

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.\textsuperscript{342}

Justice Scalia dissented from a certiorari denial in \textit{Bunting v. Mellen}, in which the Court was asked to review a ruling that a supper prayer was unconstitutional.\textsuperscript{343} Justice Scalia thought the question deserved further study.\textsuperscript{344}

\textbf{F. There Are Always Religious Issues in the Schools}

The Court faced repeated cases about religious meetings in public schools. Justice Brennan joined the 8–1 decision in \textit{Widmar v. Vincent}, concluding the University of Missouri had discriminated against Cornerstone's free speech rights by prohibiting it from holding religious meetings on the university's campus.\textsuperscript{345} Justice Brennan joined Justices Scalia and Kennedy in another 8–1 decision allowing a Christian club

\begin{itemize}
\item \textsuperscript{338} Id. at 580.
\item \textsuperscript{339} Id. at 631 (Scalia, J., dissenting).
\item \textsuperscript{340} Id. at 632.
\item \textsuperscript{341} Id. at 633.
\item \textsuperscript{342} Id. at 646.
\item \textsuperscript{343} Bunting v. Mellen, 541 U.S. 1019 (2004).
\item \textsuperscript{344} Id. at 1023 (Scalia, J., dissenting).
\item \textsuperscript{345} Widmar v. Vincent, 454 U.S. 263 (1981).
\end{itemize}
to meet after school hours at a public school.\textsuperscript{346} Justices Kennedy and Scalia concurred, while Justice Brennan joined Justice Marshall’s concurrence.\textsuperscript{347} In neither case did the Court find an Establishment Clause violation by allowing the clubs to meet on school grounds.

Justice Kennedy explained that he did not want to join all of Justice O’Connor’s \textit{Mergens} argument;\textsuperscript{348} he preferred the coercion test of the Establishment Clause, while Justice O’Connor always backed the endorsement test.\textsuperscript{349} For Justice Kennedy, an establishment violation occurred when the government coerced people into religion;\textsuperscript{350} for Justice O’Connor, it occurred when the government endorsed religion, leaving insiders in and outsiders out of religion.\textsuperscript{351}

In contrast, Justice Marshall emphasized the many steps the school must take to avoid endorsement. His concurrence worried that the Court had not taken the risk of religious endorsement in a religious school seriously enough: “[S]chools such as Westside must be responsive not only to the broad terms of the Act’s coverage, but also to this Court’s mandate that they effectively disassociate themselves from the religious speech that now may become commonplace in their facilities.”\textsuperscript{352} Justice Marshall’s concurrence was consistent with Justice Brennan’s long desire to keep church and state separate.

In \textit{Lamb’s Chapel v. Center Moriches Union Free School District}, the Court allowed a religiously oriented film series on family values and child rearing to be shown after public school.\textsuperscript{353} The Court ruled it violated free speech to ban the films, and it was not an establishment clause violation to allow them.\textsuperscript{354} Justice Kennedy concurred; Justice Scalia concurred, with Justice Thomas joining him.\textsuperscript{355} Both Justice Kennedy and Justice Scalia agreed that the majority’s use of the \textit{Lemon} was “unsettling and unnecessary,” and both criticized the endorsement test.\textsuperscript{356} It was in this opinion that Justice Scalia used his famous language about \textit{Lemon}: “Like some ghoul in a late-night horror movie that

\textsuperscript{347} \textit{Id.} at 258–62 (Kennedy, J., concurring).
\textsuperscript{348} \textit{Id.} at 258–59.
\textsuperscript{349} \textit{Id.} at 250–53.
\textsuperscript{350} \textit{Id.} at 260–62 (Kennedy, J., concurring).
\textsuperscript{351} \textit{Id.} at 250.
\textsuperscript{352} \textit{Id.} at 270 (Marshall, J., concurring).
\textsuperscript{354} \textit{Id.}
\textsuperscript{355} \textit{Id.} at 397, 400 (Kennedy, J., concurring in part) (Scalia, J., concurring).
\textsuperscript{356} \textit{Id.} at 397.
repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."\(^{357}\) He also added:

I cannot join for yet another reason: the Court’s statement that the proposed use of the school’s facilities is constitutional because (among other things) it would not signal endorsement of religion in general. What a strange notion, that a Constitution which itself gives “religion in general” preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. The attorney general of New York not only agrees with that strange notion, he has an explanation for it: “Religious advocacy,” he writes, “serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.” That was not the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good. It suffices to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the Northwest Territory Ordinance that the Confederation Congress had adopted in 1787—Article III of which provides: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Unsurprisingly, then, indifference to “religion in general” is not what our cases, both old and recent, demand.\(^ {358}\)

In *Rosenberger v. Rector and Visitors of the University of Virginia*, Justices Scalia and Thomas joined Justice Kennedy’s 5–4 opinion, holding that Rosenberger’s newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*, must receive the same funding as secular student-run publications.\(^ {359}\) Justice Kennedy wrote that Rosenberger had suffered from viewpoint discrimination: “That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.”\(^ {360}\) Justice Thomas’s concurrence identified historical errors in the dissent because it did not recognize the Nation’s history of “allowing religious adherents to

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357. *Id.* at 398.
358. *Id.* at 400 (Scalia, J., concurring) (citations omitted).
360. *Id.* at 845–46.
participate on equal terms in neutral government programs,” and he rejected any conclusion that the government “must actively discriminate against religion.”361 “The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.”362

In Good News Club v. Milford Central School, Justice Thomas wrote the opinion and Justice Scalia concurred, again agreeing that, following Widmar and Lamb’s Chapel, the school could not bar a Christian club—the Good News Club—from meeting after school hours.363 Thomas argued that Good News’s free speech would be violated if it were banned and that no establishment of religion was set up by having Good News at the School.

The Court dismissed a student’s challenge to a policy requiring a teacher-led recitation of the Pledge of Allegiance.364 Justice Kennedy joined Justice Stevens in concluding that the student’s father did not have standing to bring the lawsuit.365 Justice Scalia did not take part in the case. Justice Thomas concurred, employing his usual criticism of the Court’s Establishment Clause jurisprudence, explaining that the Court of Appeals had misread Lee v. Weisman, which Justice Thomas believed was wrongly decided anyway.366 Justice Thomas believed Newdow had standing; the Justice would have used the case to redo the Establishment Clause.367 First, as always, it would not be applied to the states.368 Justice Thomas thought the pledge policy was constitutional as it did not violate Free Exercise either:

Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.369

361. Id. at 852–53 (Thomas, J., concurring).
362. Id. at 861.
365. Id. at 3.
366. Id. at 18–49 (Thomas, J., concurring).
367. Id.
368. Id.
369. Id. at 54.
In *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, Justice Kennedy was with the majority saying the government could not set up a school district made for the Satmar Hasidim. Justice Kennedy joined Justice Souter’s opinion saying that the incorporated religious enclave violates the Establishment Clause. Justices Scalia and Thomas dissented. In Justice Scalia’s memorable language:

The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an “establishment” of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,” *Zorach v. Clauson*, 343 U.S. 306, 319, 72 S.Ct. 679, 686, 96 L.Ed. 954 (1952) (Black, J., dissenting)—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. I, however, am not surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.

Justices Scalia and Brennan disagreed again about the place of creation-science in the public schools in *Edwards v. Aguillard*. Justice Brennan wrote the *Lemon*-based majority opinion, concluding: (1) the Act [allowing creation science] serves no identified secular purpose; and (2) the Act has as its primary purpose the promotion of a particular religious belief and is thus unconstitutional. Justice Brennan cited *Epperson v. Arkansas*—a case from when Brennan was the

371. *Id.* at 689.
372. *Id.* at 732 (Scalia, J., dissenting).
373. *Id.* at 732.
375. *Id.* at 585, 593.
only Catholic on the Court—agreeing with the Court’s earlier unanimous decision that the state could not prohibit a teacher from teaching evolution.\(^{376}\) He followed a similar analysis about the religious and the secular in *Aguillard*.\(^{377}\) Scalia dissented in *Aguillard*, however.\(^{378}\) He was always a critic of *Lemon*. As he wrote, “[a]bandoning *Lemon*’s purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today’s decision shows, has wonderfully flexible consequences—would be a good place to start.”\(^{379}\)

Justice Scalia, with Justice Thomas, dissented from the Court’s denial of certiorari in *Tangipahoa Parish Board of Education v. Freiler*, a case about a warning to students about learning evolution.\(^{380}\) Justice Scalia took on the *Lemon* test and suggested this could be a good time to review it.\(^{381}\) He also wrote:

> In view of the fact that the disclaimer merely reminds students of their right to form their own beliefs on the subject, or to maintain beliefs taught by their parents—not to mention the fact that the theory of evolution is the only theory actually taught in the lesson that follows the disclaimer—there is “no realistic danger that the community would think that the [School Board] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.”\(^{382}\)

### G. One Small Case of Discrimination, With More to Follow Later

Religious organizations are frequently allowed to discriminate. For example, engineer Arthur Frank Mayson filed a religious discrimination lawsuit against the Deseret Gymnasium, which was run by the Church of Jesus Christ of Latter-Day Saints.\(^{383}\) Mayson did not qualify

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376. See *Edwards*, 482 U.S. 578, 582, 585, 590, 593–95 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).
377. *Id.*
378. *Id.* at 610.
379. *Id.* at 640 (Scalia, J., dissenting).
381. *Id.* at 1253 (Scalia, J., dissenting).
382. *Id.* at 1254.
for a religious certificate allowing him to participate in the church’s services. His job was non-religious.

The Court unanimously upheld an exemption for the church from a claim for religious discrimination. Justice Scalia joined Justice White’s opinion upholding the exemption from the anti-discrimination laws. The majority applied the Lemon test, even though the employee’s activities were secular. The Court allowed religious employers to choose employees for nonreligious jobs based on their religion. Justice Scalia joined Justice White’s majority opinion. Justice Brennan concurred, arguing that the most relevant issue was that a nonprofit organization was involved. “I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.” Therefore, he concurred with the majority’s rule that Deseret had an automatic exemption from Title VII’s prohibition on religious discrimination.

Later administrations would decide more cases allowing discrimination by religious organizations.


The next three Justices were Catholics. Chief Justice John Roberts and Justice Samuel Alito were both nominated by the second President Bush. Chief Justice Roberts took his seat in 2005, and Justice Alito in 2006. Justice Sonia Sotomayor was nominated by President

\[\text{384. } \text{Id. at 330–31.} \]
\[\text{385. } \text{Id.} \]
\[\text{386. } \text{Id.} \]
\[\text{387. } \text{Id. at 328.} \]
\[\text{388. } \text{Id. at 335.} \]
\[\text{389. } \text{Id.} \]
\[\text{390. } \text{Id. at 328.} \]
\[\text{391. } \text{Id. at 340 (Brennan, J., concurring).} \]
\[\text{392. } \text{Id. at 340.} \]
\[\text{393. } \text{Id. at 345–46.} \]
\[\text{394. } \text{See Justices 1789 to Present, supra note 60.} \]
\[\text{395. } \text{See Justices 1789 to Present, supra note 60.} \]
Obama and took her seat in 2009. They, too, changed the direction of the Court, again moving it in a direction more favorable to religion. Over time, Justice Sotomayor moved in a different direction than her colleagues on those questions.

A. Even More Public Monuments

The Court continued ruling on the constitutionality of government religious monuments. Pleasant Grove City, Utah v. Summum turned out to be a speech case, not a religion case. Summum petitioners asked the local government to include their monument along with the Ten Commandments monument in Pioneer Park, Utah. Their stone monument contains the Seven Aphorisms of Summum. Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, wrote the opinion denying Summum’s request. Justice Scalia filed a concurring opinion with Justice Thomas. There were no dissents. The Court ruled under the Free Speech Clause that the monuments were government speech, and therefore the government did not have to include a monument it did not want. Because it was not a forum for private speech, the government did not violate the free speech rights of Summum.

Justices Scalia and Thomas, while joining the Court’s free speech opinion, also noted that the case had been litigated “in the shadow” of the Establishment Clause. Justice Scalia made clear that they should not be afraid of establishment because Van Orden had settled that the Establishment Clause was not violated by Texas’s Ten Commandments monument. Justice Scalia cited Breyer’s Van Orden concurrence to show that the Utah monument had a secular message. “The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park’s wishing well, its historic granary—and, yes, even its Ten

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396. See Justices 1789 to Present, supra note 60.
398. Id. at 465.
399. Id.
400. Id. at 464–81.
401. Id. at 482 (Scalia, J., concurring).
402. Id. at 481.
403. Id.
404. Id. at 482.
405. Id.
406. Id. at 483.
Commandments monument—without fear that they are complicit in an establishment of religion."\(^{407}\)

A later monument case involved a Latin cross in the Mojave National Preserve monument to World War I soldiers.\(^{408}\) The government transferred the land to private parties in order to avoid violating the Establishment Clause.\(^{409}\) The lower courts stopped the transfer.\(^{410}\) Justice Kennedy wrote the opinion of the Court.\(^{411}\) Chief Justice Roberts, Justice Alito, and Justice Scalia, joined by Justice Thomas, concurred separately.\(^{412}\) Justice Stevens, joined by Justice Sotomayor, dissented.\(^{413}\)

Justice Kennedy reversed the district court’s ruling, ordering it to consider the history and context of the transfer more properly.\(^{414}\) He reminded readers, “[a]lthough certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message.”\(^{415}\) The district court needed to follow the full history and context of the monument. The Court later upheld the transfer of the cross to private land.\(^{416}\)

Chief Justice Roberts wrote a brief concurrence:

At oral argument, respondent’s counsel stated that it “likely would be consistent with the injunction” for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it. “The Constitution deals with substance, not shadows.”\(^{417}\)

407. Id.
409. Id. at 705–11.
410. Id. at 705.
411. Id. at 705.
412. Id. at 723 (Roberts, C.J., concurring).
413. Id. at 735 (Stevens, J., dissenting).
414. Id. at 722.
415. Id. at 715.
417. Salazar, 559 U.S.700 at 723 (Roberts, C.J., concurring) (citation omitted).
Justice Alito joined Justice Kennedy’s opinion, but, instead of remanding the case, would have ruled that the transfer could be implemented. Alito thought Congress’s action was “true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance.”

Justices Scalia and Thomas ruled that Frank Buono did not have standing to bring the suit. This transfer kept the cross from being on government property as Buono had desired.

Justice Stevens’s dissent was joined by Justice Sotomayor: “I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.” Justice Sotomayor seems to be the only Catholic who picked up Justice Brennan’s concern about government religious monuments.

In another case, Justice Thomas dissented from the denial of certiorari in Utah Highway Patrol Association v. American Atheists, Inc., where he again criticized the “shambles” of the Court’s Establishment Clause jurisprudence. The Tenth Circuit had said that memorializations of police officers with white crosses endorsed Christianity. Because Justice Thomas did not think that action violated the Establishment Clause, he would have granted certiorari.

B. Another Schools Case

The Court was still considering cases about student groups in schools, this time a university. The Hastings College of Law at the University of California had a non-discrimination policy that required school groups to admit members without sexual orientation discrimination. The Christian Legal Society did not want to include LGBTQ members. In a 5–4 decision, Justice Ginsburg, joined by Justices Kennedy and Sotomayor, concluded that the school’s plan did not violate the First Amendment. Justice Kennedy concurred.

418. Id. at 723 (Alito, J., concurring).
419. Id. at 729.
420. Id. at 735.
422. Am, Atheists, Inc. v, Duncan, 616 F.3d 1145, 1164 (10th Cir. 2011).
424. Id. at 672.
425. Id. at 698.
426. Id. at 793 (Kennedy, J., concurring).
majority ruled the plan was reasonable and viewpoint-neutral. Justice Alito wrote a dissent joined by Justices Roberts, Scalia, and Thomas.

Justice Kennedy’s concurrence concluded the Hastings case was not like *Rosenberger* because Hastings’s rule was content neutral, “appl[y]ing equally to all groups and views,” and there was no desire to discriminate. In dissent, Justice Alito complained that the decision rested on a principle of “no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.” The Catholics disagreed about what was discriminatory and what was neutral.

C. More Prayer

Remember that Justice Brennan dissented in 1983 in the *Marsh* case; he ruled that legislative prayer was unconstitutional. Thereafter, the *Marsh* majority was followed as setting a special Establishment Clause rule for legislative prayer. That rule emphasized, not the long list of Establishment Clause tests (*Lemon*, endorsement, coercion, e.g.), but a test that focused on history. *Marsh* said legislative prayer was constitutional because it had happened in early American history.

The Court reconsidered *Marsh* in *Town of Greece, New York v. Galloway*, where the Second Circuit had ruled that Greece’s predominantly Christian prayer practice at its town meetings was unconstitutional, relying on other court tests and thinking legislative prayer had to be non-sectarian. In the Supreme Court, Justice Kennedy wrote the majority opinion upholding Greece’s prayer practice. Chief Justice Roberts and Justice Alito joined his opinion in full, and Justices Scalia and Thomas joined most of it. As usual, they disagreed about coercion. Justice Alito wrote a concurrence, joined by Justice Scalia.

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427. *Id.* at 691–97.
428. *Id.* at 706 (Alito, J., dissenting).
429. *Id.* at 704 (Kennedy, J., concurring).
430. *Id.* at 706 (Alito, J., dissenting).
432. *Id.* at 786–94.
433. *Id.*
435. *Id.* at 569–591.
436. *Id.* at 569.
437. *Id.* at 592–604 (Alito, J., concurring).
Justice Thomas filed a concurrence; Justice Scalia joined part of it.\textsuperscript{438} Justice Sotomayor joined Justice Kagan’s dissenting opinion.\textsuperscript{439} The opinion gave a big boost to governmental prayer.\textsuperscript{440}

Justice Alito argued that “\textit{Marsh} reflected the original understanding of the First Amendment.”\textsuperscript{441} “It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause.”\textsuperscript{442} Justice Thomas wrote separately in order to emphasize his now-common theme that the Establishment Clause is not applied to state governments.\textsuperscript{443} Justice Scalia did not join that part of Justice Thomas’s opinion. He did join Justice Thomas in agreeing that Greece’s prayers were not coercive and therefore were constitutional.\textsuperscript{444}

Justice Sotomayor joined Justice Kagan’s dissent arguing that there should have been a diverse array of speakers to match the diversity of the United States, not just predominantly Christian prayers.\textsuperscript{445} It is interesting, given the long history of the Court, that no Justice wrote a strict separationist argument in this case. Either predominantly Christian prayer (majority) or a range of prayers (dissent). No one really argued Brennan’s position in the \textit{Marsh} dissent that legislative prayer was simply unconstitutional.

Justices Scalia and Thomas dissented from a certiorari denial in \textit{Elmbrook School District v. Doe}.\textsuperscript{446} The Seventh Circuit had ruled a school could not use a church for its graduation under the endorsement test.\textsuperscript{447} Scalia wrote that, post-\textit{Town of Greece}, endorsement is gone, so the test should be reviewed.\textsuperscript{448} The two dissenters wrote there was not any coerced religious activity, again a sign that there was no Establishment violation.\textsuperscript{449}

\textsuperscript{438} \textit{Id.} at 604–610 (Thomas, J., concurring).
\textsuperscript{439} \textit{Id.} at 610 (Kagan, J., dissenting).
\textsuperscript{441} \textit{Id.} at 602 (Alito, J., concurring).
\textsuperscript{442} \textit{Id.} at 602–03.
\textsuperscript{443} \textit{Id.} at 604 (Thomas, J., concurring).
\textsuperscript{444} \textit{Id.} at 604–10.
\textsuperscript{445} \textit{Id.} at 610 (Kagan, J., dissenting).
\textsuperscript{446} \textit{Elmbrook Sch. Dist. V. Doe}, 573 U.S. 922 (2014).
\textsuperscript{447} \textit{Doe v. Elmbrook Sch. Dist.}, 687 F.3d 840 (7th Cir. 2012).
\textsuperscript{449} \textit{Id.}
D. Free Exercise, RFRA, and RLUIPA

The Court continued to debate free exercise and its replacements: RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Chief Justice Roberts wrote a unanimous decision, lacking Alito, who was not involved in the case, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal. In that case, the religious group wanted to use hoasca tea, which contains a drug restricted in the Controlled Substances Act. The government had argued that it had a compelling interest to apply the Act uniformly, but the Court rejected that position, concluding that the government had not established a compelling interest “in barring the UDV’s sacramental use of hoasca.” RFRA provided strict scrutiny when Smith II did not. The Court has been happy to enforce that.

Justice Thomas dissented from the certiorari denial in Swanner v. Anchorage Equal Rights Commission, which involved a successful discrimination suit against a residential property owner who refused to rent to unmarried couples. As Justice Thomas wrote, “I would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently ‘compelling’ that respondent may substantially burden petitioner’s exercise of religion.”

The Court unanimously held RLUIPA constitutional in Cutter v. Wilkinson in an opinion by Justice Ginsburg. Justices Scalia, Kennedy and Thomas joined her. Justice Thomas’s concurrence, for himself only, spoke again about the historical meaning of the Establishment Clause, which, on his non-federalism account, would lead to the same conclusion as the majority but for different reasons.

Justice Alito delivered a unanimous decision for prisoner Gregory Holt in Holt v. Hobbs, ruling that Holt should be allowed to have his one-half inch beard even though prison regulations allowed one-quarter

451. Id. at 423.
452. Id. at 439.
454. Id. at 461 (Thomas, J. dissenting).
456. Id.
457. Id. at 726 (Thomas, J., concurring).
inch beards. This was a RLUIPA victory for the prisoner. The Court doubted whether the prison’s compelling interest against contraband was met and ruled that the prison had not shown its policy was the least restrictive means. Justice Sotomayor joined Justice Ginsburg’s concurrence as well as writing her own. In her own concurrence, she said that the Department “offered little more than unsupported assertions in defense of its refusal of petitioner’s requested religious accommodation. RLUIPA requires more.”

In an earlier case, the justices disagreed about state sovereign immunity in RLUIPA cases. Justice Thomas’s opinion for the Court, joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Alito, concluded that RLUIPA did not waive states’ sovereign immunity, and so the lawsuit against Texas was barred. Justice Sotomayor’s dissent thought that “monetary damages are ‘appropriate relief’ is, in my view, self-evident,” and would have allowed the case to proceed.

E. Flast and Standing

Standing decides whose case gets into court. In 1968, in Flast v. Cohen, Justice Brennan joined the Flast majority in allowing a tax challenge to an Establishment Clause violation by the government. Even back in Justice Brennan’s era, Justice Brennan had protested the narrowing of Flast to exclude cases that should have been heard. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., Chief Justice Rehnquist ruled that Americans United did not have standing to bring the case. Justice Brennan dissented that the Court should have been faithful to Flast and talked about the Establishment Clause instead of standing:

459. Id.
460. Id. at 370 (Ginsburg, J., concurring).
461. Id. (Sotomayor, J., concurring).
463. Id. at 293.
464. Id. at 293 (Sotomayor, J., dissenting).
Plainly hostile to the Framers' understanding of the Establishment
Clause, and *Flast*’s enforcement of that understanding, the Court
vents that hostility under the guise of standing, “to slam the court-
house door against plaintiffs who [as the Framers intended] are en-
titled to full consideration of their [Establishment Clause] claims on
the merits.”

The battle against *Flast* continued post-Brennan. In *Hein v. Free-
dom From Religion Foundation, Inc.*, the five Catholics—Chief Justice
Roberts, Justice Scalia, Justice Kennedy, Justice Thomas and Justice
Alito—were the majority five who denied the taxpayers standing to
challenge President George W. Bush’s faith-based offices that gave re-
ligious groups federal support. Justice Alito wrote the opinion, joined
by Chief Justice Roberts and Justice Kennedy. Justice Ken-
nedy concurred. Justice Scalia, joined by Justice Thomas, con-
curred. Justice Alito’s opinion said *Flast* was too broadly construed,
and it has to be looked at narrowly in this challenge to executive ac-
tion. Justices Alito and Kennedy agreed on narrowing *Flast*. Justice
Scalia said *Flast* should be overruled. None of them favored
*Flast*. The dissenting non-Catholic justices—Justices Souter, Stevens,
Ginsburg, and Breyer—would have allowed the case to proceed.

A few years later, another *Flast* case had the same five Catholics
in the majority and Sotomayor in the dissent. In *Arizona Christian
School Tuition Organization v. Winn*, Justice Kennedy wrote an opin-
on, joined by Chief Justice Roberts, Justice Scalia, Justice Thomas,
and Justice Alito, in a case where taxpayers challenged Arizona’s tui-
tion tax credit, which allowed Arizonans who contributed to student
tuition organizations to receive credit for their contributions. Justice
Kennedy concluded the taxpayers lacked standing to challenge the
act. Justice Scalia was joined in a concurrence by Justice Thomas
and argued that *Flast v. Cohen* had created an unnecessary exception

468. *Id.* at 513 (Brennan, J., dissenting).
470. *Id.* at 592.
471. *Id.* at 615 (Kennedy, J., concurring).
472. *Id.* at 618 (Scalia, J., concurring).
473. *Id.* at 592–615.
474. *Id.* at 615–18 (Kennedy, J., concurring).
475. *Id.* at 618–37 (Scalia, J., concurring).
476. *Id.* at 637–43 (Souter, J., dissenting).
478. *Id.* at 146.
that gave taxpayers standing in the Establishment Clause area.\textsuperscript{479} Justice Scalia again thought \textit{Flast} should be abandoned, as he had also argued in his concurrence in \textit{Hein v. Freedom from Religion Foundation, Inc.}\textsuperscript{480}

Justice Sotomayor joined the dissenters and would have allowed the case to proceed. Justice Brennan had joined Chief Justice Warren’s opinion in the 1968 \textit{Flast} case.\textsuperscript{481} The dissenters with Justice Sotomayor defended it: “Today, the Court breaks from this precedent by refusing to hear taxpayers’ claims that the government has unconstitutionally subsidized religion through its tax system.”\textsuperscript{482} The dissent continued:

“The Court’s opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and \textit{Flast} will not stand in the way. No taxpayer will have standing to object.”\textsuperscript{483}

Justice Alito, joined by Justices Roberts and Thomas, dissented from certiorari denial in \textit{Stormans, Inc. v. Wiesman}, which had upheld regulations requiring pharmacists to fulfill prescriptions.\textsuperscript{484} “If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern . . . Violate your sincerely held religious beliefs or get out of the pharmacy business.”\textsuperscript{485} The Justices thought this case was similar to \textit{Lukumi.}\textsuperscript{486} Many of the justices are waiting for the chance to say something negative about \textit{Smith}.

The current Court got the chance to comment on \textit{Smith v. Sherbert} in \textit{Fulton v. Philadelphia.}\textsuperscript{487} \textit{Smith} is still alive, as we will discuss below.\textsuperscript{488} But we have to wonder about \textit{Smith}’s precedential strength.

\textsuperscript{479} Flast v. Cohen, 392 U.S. 83 (1968).
\textsuperscript{480} Hein, 551 U.S. 587 (2007).
\textsuperscript{481} Flast, 392 U.S. 83.
\textsuperscript{483} Id. at 168.
\textsuperscript{484} Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S.Ct. 2433 (2016) (Alito, J., dissenting).
\textsuperscript{486} Id. at 2436–37.
\textsuperscript{488} See infra text accompanying notes 689–711.
F. There is Religious Freedom to Discriminate

In 2012, a unanimous Supreme Court joined most of the lower courts in recognizing the ministerial exception, which is a First Amendment affirmative defense identified by the Court that keeps lawsuits by ministers against their employers out of court.\footnote{Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).} Chief Justice Roberts wrote the opinion for the Court, explaining why Cheryl Perich, a Lutheran school teacher, qualified as a minister, and her disabilities discrimination lawsuit was thus barred by the First Amendment.\footnote{Id. at 196.} Justice Thomas filed a concurring opinion, arguing that the courts should always defer to the employer’s characterization of who is a minister.\footnote{Id. at 196–206 (Thomas, J., concurring).} Justice Alito wrote a concurrence complaining about the confusion brought on by the word “minister” and expanding the exemption to cover anyone who performed religious functions: “[C]ourts should focus on the function performed by persons who work for religious bodies.”\footnote{Id. at 198 (Alito, J., concurring).} This case was one of the biggest recent wins for religious freedom, allowing religious organizations to disobey any of the antidiscrimination laws without the facts ever being litigated.

Eight years later, with a different set of justices, Justice Alito expanded the ministerial exemption to include teachers at Catholic schools.\footnote{Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).} Two of those justices were nominated by President Trump, who wound up adding three Catholic justices to the Court.\footnote{Ronald Brownstein, How Conservative Catholics Became Supreme on GOP’s Court, CNN: FAULT LINES (Sept. 27, 2020, 4:39 PM), https://www.cnn.com/2020/09/27/politics/conservative-catholics-gop-supreme-court/index.html.} Justice Sotomayor dissented in Morrissey-Berru, arguing that the Court had closed the courts to thousands of teachers and other employees of religious organizations.\footnote{Our Lady of Guadalupe Sch., 140 S. Ct. at 2076.}

In Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, a per curiam opinion remanded the case for more proceedings.\footnote{Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano, 140 S. Ct. 696 (2020) (per curiam).} Justice Alito’s concurrence, joined by Justice Thomas, questioned the Puerto Rico court’s conclusion that the Catholic Church
was a single legal entity.\textsuperscript{497} He also identified questions that may merit the Court’s review:

(1) the degree to which the First Amendment permits civil authorities to question a religious body’s own understanding of its structure and the relationship between associated entities and (2) whether, and if so to what degree, the First Amendment places limits on rules on civil liability that seriously threaten the right of Americans to the free exercise of religion as members of a religious body.\textsuperscript{498}

Some justices are eager to protect the religious freedom of organizations to do what they choose.


President Trump named three Catholics to the Supreme Court of the United States. Justice Neil Gorsuch, Justice Brett Kavanaugh, and Justice Amy Coney Barrett were all nominated by President Trump.\textsuperscript{499} Justice Gorsuch replaced the deceased Justice Scalia in 2017 and Justice Kavanaugh replaced the retired Justice Kennedy in 2018.\textsuperscript{500} Justice Amy Coney Barrett joined the Court in November 2020 after the death of Justice Ruth Bader Ginsburg.\textsuperscript{501} Justice Gorsuch is currently an Episcopalian but is included in this essay because he was raised Catholic.\textsuperscript{502}

A. Even More Funding

As noted earlier in this paper, Justice Thomas long supported funding to religious organizations, as in his dissent from denying certiorari in \textit{Columbia Union College v. Clarke}.\textsuperscript{503} “We should take this opportunity to scrap the ‘pervasively sectarian’ test and reaffirm that the Constitution requires, at a minimum, neutrality not hostility toward

\begin{itemize}
\item \textsuperscript{497} Id. at 701–02 (Alito, J., concurring).
\item \textsuperscript{498} Id. at 702.
\item \textsuperscript{499} See Justices 1789 to Present, supra note 60.
\item \textsuperscript{500} See Justices 1789 to Present, supra note 60.
\item \textsuperscript{501} See Justices 1789 to Present, supra note 60.
\item \textsuperscript{503} Columbia Union Coll. v. Clarke, 159 F.3d 151 (4th Cir. 1998), \textit{cert. denied}, 527 U.S. 1013 (1999) (Thomas, J., dissenting); \textit{supra} Section III.C.
\end{itemize}
religion.\textsuperscript{504} Although many of the colleges participating in the program in \textit{Clarke} were affiliated with religious institutions, Maryland deemed Columbia Union College, a private liberal arts college affiliated with the Seventh-day Adventist Church, "‘too religious’ to participate."\textsuperscript{505} According to Justice Thomas:

We invented the “pervasively sectarian” test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities. In my view, the “pervasively sectarian” test rests upon two assumptions that cannot be squared with our more recent jurisprudence. The first of these assumptions is that the Establishment Clause prohibits government funds from ever benefiting, either directly or indirectly, “religious” activities. The other is that any institution that takes religion seriously cannot be trusted to observe this prohibition.\textsuperscript{506}

A year later, Justice Thomas wrote the plurality opinion, joined by Justice Scalia and Justice Kennedy, in \textit{Mitchell v. Helms}, upholding federal governmental aid to private schools.\textsuperscript{507} He concluded that neutral aid that passes through parents’ hands does not violate the Establishment Clause.\textsuperscript{508} Justice O’Connor concurred because she thought the plurality’s rule allowing funding was too broad.\textsuperscript{509}

As noted at the beginning of this essay, the current Court, with Justice Gorsuch first and later Justices Kavanaugh and Barrett, added to the funding available to religious schools in three opinions: \textit{Trinity Lutheran, Espinoza, and Carson}.\textsuperscript{510} The first two cases involved state Blaine amendments.\textsuperscript{511} The original Blaine amendment was proposed as an amendment to the federal Constitution that would have banned

\begin{itemize}
  \item \textsuperscript{504} Columbia Union Coll., 527 U.S. at 1014 (emphasis in original).
  \item \textsuperscript{505} Id. at 1013.
  \item \textsuperscript{506} Id.
  \item \textsuperscript{507} Mitchell v. Helms, 530 U.S. 793 (2000).
  \item \textsuperscript{508} Id. at 816.
  \item \textsuperscript{509} Id. at 837 (O’Connor, J., concurring).
  \item \textsuperscript{510} Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246 (2020); Carson as next friend of O. C. v. Makin, 142 S. Ct. 1987 (2022).
  \item \textsuperscript{511} Espinoza, 140 S. Ct. at 2258–59; Trinity Lutheran Church of Columbia, 137 S. Ct. at 2018.
\end{itemize}
aid to religious organizations, including religious schools. The federal amendment did not pass. Many states, however, passed their own constitutional amendments that banned such aid. Currently 37 states have Blaine amendments.

Missouri had such an amendment, and because of that amendment the state refused to allow a church school participation in a project that allowed recipients to replace their pea gravel with rubber through Missouri's Scrap Tire program. The Missouri amendment banned such aid. The 7–2 opinion was written by Chief Justice Roberts, who was joined in full by Justices Kennedy, Alito, and Kagan, and, for all except footnote three, by Justices Thomas and Gorsuch. Justice Breyer concurred in the judgment. The majority ruled that the Free Exercise Clause was violated by the amendment’s refusal to give aid to religions. Justices Thomas and Gorsuch made a point of joining Chief Justice Roberts’ opinion, except for footnote three, which stated, “this case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” Justice Thomas filed a concurrence joined by Justice Gorsuch, and Justice Gorsuch filed a concurrence joined by Justice Thomas. Justice Sotomayor wrote the dissent, joined by Justice Ginsburg.

Chief Justice Roberts’s opinion concluded the amendment violated free exercise, because it “discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” Chief Justice Roberts concluded the program required Trinity Lutheran to “renounce its religious character in order to participate in an otherwise generally available public benefit

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512. Espinoza, 140 S. Ct. at 2268 (Alito, J. concurring).
513. Id.
516. Id. at 2016, 2025.
517. Id. at 2026 (Breyer, J., concurring).
518. Id. at 2024.
519. Id. at 2024 n. 3.
520. Id. at 2025–27 (Thomas, J., concurring in part).
521. Id. at 2027 (Sotomayor, J., dissenting).
522. Id. at 2021.
Applying strict scrutiny, Chief Justice Roberts decided the State’s action was unconstitutional. Presumably anticipating future cases, Justices Thomas and Gorsuch refused to join footnote three. Justice Thomas also noted his continued disagreement with Locke v. Davey, which in his view had allowed states to discriminate against religion by refusing funding to Joshua Davey, a pastoral theology student. But because the majority had interpreted Locke narrowly, and the parties had not asked for Locke to be reconsidered, he joined the opinion, except for footnote three.

Justice Gorsuch questioned a distinction that continued to interest him, although not the majority, namely the difference between religious status and religious use. Justice Gorsuch thought status and use were very similar: “I don’t see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.” Justice Gorsuch also explained that he refused to join footnote three because some might think it means that the case was limited to playground resurfacing only, and “the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.”

Justice Sotomayor dissented, stating that “the stakes are higher” in the case than the majority believed. She thought the decision “jeopardize[d] the government’s ability to remain secular[.]”

This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slight both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.

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523. Id. at 2024.
524. Id. at 2024.
525. Id. at 2025–26 (Thomas, J., concurring in part).
526. Id.
527. Id. at 2026 (Gorsuch, J., concurring).
528. Id.
529. Id. at 2041 (Sotomayor, J., dissenting).
530. Id.
531. Id. at 2027.
Justice Sotomayor thought “[i]f this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship.” Justice Sotomayor agreed with Justice Brennan’s spirit of the government not funding religion in this dissent.

The next case arrived in Espinoza v. Montana Dept. of Revenue, where five Catholic Supreme Court Justices—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and now Justice Brett Kavanaugh—modified the Court’s jurisprudence of the First Amendment’s Religion Clauses over four dissents from Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court ruled that, if a private school gets state aid, religious schools must also receive it. The religious schools have a free-exercise right to such aid. The five justices agreed that the Establishment Clause does not block aid to religious schools.

The concurrences added additional arguments. Justice Thomas, now joined by Justice Gorsuch, said the Establishment Clause does not apply to the states, who should in fact be free to choose whatever religion they want. Justice Thomas repeated his criticism of the Lemon test and Justice O’Connor’s endorsement test. Justice Thomas, citing his joining of Justice Alito’s concurrence on denying certiorari in Kennedy v. Bremerton School Dist. (which Justices Gorsuch and Kavanaugh also joined), thought that the Court’s misguided tests had led the courts to the “‘remarkable’ suggestion ‘that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith.’” And Justice Thomas complained that the Free Exercise Clause remained on the “lowest rung of the Court’s ladder of rights.” Justice Gorsuch repeated his argument that both status and use are protected by the Free Exercise Clause. Justice Alito emphasized that the

532. Id. at 2041.
534. Id. at 2262–63.
535. Id.
536. Id. at 2063.
537. Id. at 2063–65 (Thomas, J., concurring).
538. Id. at 2265 (Thomas, J., concurring) (quoting Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring)). The Court later granted cert. in the Kennedy case, and ruled in favor of the coach’s prayer. See supra notes 574–82.
539. Id. at 2267.
540. Id. at 2075 (Gorsuch, J., concurring).
Montana Constitution’s no-aid section, like other Blaine amendments, was based on anti-Catholic bias and accordingly could not be upheld as constitutional.  

Many commentators immediately noted that the ideal of separation of church and state was gone. The sixth Catholic on the Court, Justice Sonia Sotomayor, was the lone Catholic dissenter, as she was in the Court’s previous pro-religious aid case, *Trinity Lutheran Church of Columbia v. Comer.* In *Espinoza,* Justice Sotomayor reiterated her *Trinity Lutheran* point, that the decision “weakens this country’s longstanding commitment to a separation of church and state beneficial to both.” “We once recognized that ‘[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.” As before, Justice Sotomayor was with Justice Brennan in spirit.

Religious school funding was also required in the third case, *Carson v. Makin.* Maine has many school districts that do not have a public secondary school, but is required to provide public education to all students. In order to provide that education, Maine’s law allows funding for private school education, as long as the education is nonsectarian. The parents’ lawsuit takes aim at the program’s “requirement that any school receiving tuition assistance payments must be ‘a nonsectarian school in accordance with the First Amendment of the United States Constitution.’”

The parents won 6-3 in the Supreme Court, with Chief Justice Roberts, joined by Thomas, Alito, Gorsuch, Kavanaugh and Barrett. Sotomayor again was the lone Catholic dissenter, joining Justice

541. Id. at 2274.
543. Espinoza, 140 S. Ct. at 2292 (Sotomayor, J., dissenting); *Trinity Lutheran Church of Columbia,* 137 S. Ct. at 2027 (2017) (Sotomayor, J., dissenting).
544. Espinoza, 140 S. Ct. at 2292 (Sotomayor, J., dissenting).
545. Id. at 2297.
548. Id. at 1993–94.
549. Id. at 1994 (quoting ME. REV. STAT. ANN., tit. 20, § 2951(2) (West 2022)).
550. Id. at 1992.
Breyer’s dissent in part and writing for herself.\textsuperscript{551} Roberts wrote that the Free Exercise Clause was violated because the state had discriminated against the religious schools because they were religious.\textsuperscript{552}

In \textit{Carson}, Roberts adopted the use argument that Gorsuch had made in the earlier cases. He concluded that religious discrimination is present when the government makes decisions based on religious status \textit{or} use.\textsuperscript{553} "The Court of Appeals also attempted to distinguish this case from \textit{Trinity Lutheran} and \textit{Espinoza} on the ground that the funding restrictions in those cases were ‘solely status-based religious discrimination,’ while the challenged provision here ‘imposes a use-based restriction.’ Justice BREYER makes the same argument [in dissent]."\textsuperscript{554} Roberts disagreed with them. He wrote that the religious aspects of education made a distinction between status and use irrelevant to the constitutional discussion; “any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."\textsuperscript{555} This time, there were no concurrences by Gorsuch or Thomas. They won the use-based argument.

The opinion suggests that the religious schools can receive the aid, even though they discriminate on the basis of “gender, gender-identity, sexual orientation, and religion, and . . . require [that] their teachers be Born Again Christians.”\textsuperscript{556} Justice Breyer was troubled by this.\textsuperscript{557} Breyer’s dissent also stated that \textit{Locke}, the case that refused state funding for the study of ministry, required a ruling in Maine’s favor.\textsuperscript{558} However, Roberts stated there was no historical refusal to fund religious schooling while there had been a long tradition of not funding the training of clergy allowed in \textit{Locke}.\textsuperscript{559}

Sotomayor did not join the section of Breyer’s opinion defending \textit{Trinity Lutheran}.\textsuperscript{560} She is now the only \textit{Trinity} dissenter left on the

\begin{itemize}
\item \textsuperscript{551} \textit{Id.} at 2003, 2012 (Breyer, J., dissenting; Sotomayor, J., dissenting).
\item \textsuperscript{552} \textit{Id.} at 1997–98, 2001–02.
\item \textsuperscript{553} \textit{Id.} at 2000–02.
\item \textsuperscript{554} \textit{Id.} at 2000.
\item \textsuperscript{555} \textit{Id.} at 2001
\item \textsuperscript{556} \textit{Id.} at 2010–11. (Breyer, J., dissenting).
\item \textsuperscript{557} \textit{Id.} at 2011.
\item \textsuperscript{558} \textit{Id.} at 2011–12.
\item \textsuperscript{559} \textit{Id.} at 2001–02.
\item \textsuperscript{560} \textit{Id.} at 2002, 2004–05.
\end{itemize}
Court.\textsuperscript{561} She repeated the argument that she made in the earlier two cases, arguing that Carson had gone to the conclusion she feared in Trinity.\textsuperscript{562} The “Court continues to dismantle the wall of separation between church and state that the Framers fought to build,”\textsuperscript{563} she wrote.

What a difference five years makes. In 2017, I feared that the Court was “lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.” Trinity Lutheran (dissenting opinion). Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next, I respectfully dissent.\textsuperscript{564}

Is separation of church and state now a constitutional violation? How much is left of the Establishment Clause? These three cases suggest that the Catholics have won their goal of requiring the state to fund religion whenever it funds other private entities.

In a funding case that the Court did not hear, Justice Kavanaugh, joined by Justices Alito and Gorsuch, wrote a statement about the denial of certiorari in Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation.\textsuperscript{565} Morris County had historic preservation funds that went to all kinds of buildings, including religious ones.\textsuperscript{566} New Jersey law, however, did not allow funding for religious buildings.\textsuperscript{567} Justice Kavanaugh cited Justice Brennan’s cases, McDaniel and Larson, to state that the “principle of religious equality eloquently articulated by Justice Brennan . . . is []firmly rooted in this Court’s jurisprudence.”\textsuperscript{568} Justice Kavanaugh cited Justice Kennedy’s

\textsuperscript{562} Carson, 142 S. Ct. at 2012–15.
\textsuperscript{563} Id. at 2012.
\textsuperscript{564} Id. at 2014–15.
\textsuperscript{566} Id. at 909.
\textsuperscript{567} Id.
\textsuperscript{568} Id. at 909.
opinion in *Lukumi* and the *Smith* case.\(^{569}\) He also cited the numerous cases about equal treatment for religious organizations, including *Trinity Lutheran, Good News Club, Rosenberger, and Lamb’s Chapel.*\(^{570}\) “Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion.”\(^{571}\) The justices concluded denial of certiorari was appropriate because of the facts of the case and the new legacy of *Trinity Lutheran.* We now know from *Carson v. Makin* what the legacy of *Trinity Lutheran* entails.

**B. More Government Prayer**

The Establishment Clause was discarded in a case about a public-school football coach’s prayer with students, *Kennedy v. Bremerton School District.* Remember the *Lemon* test, discussed at length earlier?\(^{572}\) The Court finally dismissed it in its new case about prayer.\(^{573}\) *Kennedy* allows a public school’s football coach to lead his players in public Christian prayer. Justice Gorsuch was joined by the other Catholic Justices on the Court, except for Justice Sotomayor, who once again was the lone Catholic in dissent.\(^{574}\) According to Gorsuch, “[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘‘reference to historical practices and understandings.”’\(^{575}\) Moreover, Gorsuch wrote there was no evidence of coercion of the students to pray in the facts of the case.\(^{576}\)

*Lemon,* endorsement, and coercion. For a long time, those were the Justices’ tests about Establishment. Open for debate now is what will be protected—or not—by “historical practices and understandings.”\(^{577}\) The Court dismissed the two tests that gave Bremerton a win. It also made it hard to find coercion, as past cases were worried about the power of teachers to coerce their students into prayer. Gorsuch emphasized the free exercise and free speech rights of Kennedy, and was

\(^{569}\) *Id.* at 909–10  
\(^{570}\) *Id.* at 910.  
\(^{571}\) *Id.* at 911.  
\(^{572}\) *See supra* notes 170–74, 189–92 and accompanying text.  
\(^{574}\) *Id.* at *3.  
\(^{575}\) *Id.* at *14.  
\(^{576}\) *Id.*  
\(^{577}\) *Id.* at *3.
barely concerned about establishment. In his words: "Nor does a proper understanding of the Amendment’s Establishment Clause require the government to single out private religious speech for special disfavor."  

Sotomayor complained again in her pro-establishment dissent. She argues that "Members of the current majority [] effect fundamental changes in this Court’s Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all." Commentators worry that more coercion of religion is allowed under the Court’s new test. Future cases will tell us what the new interpretations of the Religion Clauses hold.

C. The End of Korematsu and the Beginning of Something Else?

Remember that Justice Murphy dissented in the Japanese internment case, Korematsu. Korematsu returned to the Court with President Trump’s Muslim ban. Chief Justice Roberts, joined by Justices Kennedy, Thomas, Alito, and Gorsuch, upheld President Trump’s ban on Muslim immigration to the United States. Justice Kennedy and Justice Thomas wrote concurrences while Justice Sotomayor dissented. The case was remarkable for two reasons. First, the Court finally questioned the truth of Korematsu, the Japanese internment case. Second, it upheld a program against Muslim immigration that the dissenters thought was similar to Korematsu. The majority thought the president had met his constitutional obligations, while the dissenters believed he had discriminated against Muslims.

Chief Justice Roberts concluded the President’s program was neutral toward religion and based on legitimate national security

578. Id.
584. Id.
585. Id. at 2423–34 (Kennedy, J., concurring, Thomas, J., concurring, and Sotomayor, J., dissenting).
586. Id. at 2423.
587. Id.
588. Id. at 2420–22.
concerns. Justice Kennedy’s concurrence encouraged government officials to demonstrate their commitment to the Constitution, even in foreign affairs. Justice Thomas noticed “the President has inherent authority to exclude aliens from the country.”

Dissenting Justice Sotomayor argued that the majority had failed to protect religious neutrality by allowing an openly anti-Muslim policy that was “first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerades behind a facade of national-security concerns.” Justice Sotomayor believed the full facts demonstrated that President Trump had acted out of “hostility and animus toward the Muslim faith,” consistent with how the Japanese were treated in Korematsu. Maybe Justice Sotomayor was picking up Murphy’s theme of understanding and opposing discrimination.

Chief Justice Roberts’ opinion replied specifically to Justice Sotomayor’s dissent about Korematsu:

Finally, the dissent invokes Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to Korematsu, however, affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution."

589. Id. at 2423.
590. Id. at 2423–29 (Kennedy, J., concurring).
591. Id. at 2424 (Thomas, J., concurring).
592. Id. at 2433 (Sotomayor, J., dissenting).
593. Id. at 2435.
594. Id. at 2423 (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).
So, the Court agrees with Justice Murphy’s early dissent that *Korematsu* was “gravely wrong the day it was decided” and now has been overruled. But *Trump v. Hawaii* raises new questions about the president’s freedom to discriminate against a religious group, in this case Muslims.

D. Another Public Monument is a “Secular Cross”

In another public monument case, the Court upheld a cross on public land in an opinion by Justice Alito, joined in different parts by Chief Justice Roberts and Justice Kavanaugh. Justices Thomas and Gorsuch concurred in the judgment only. Justices Thomas, Gorsuch, and Kavanaugh all filed concurrences. Justice Sotomayor joined Justice Ginsburg’s dissent.

The Humanists had challenged a Maryland cross that sat on public land. Justice Alito’s decision concluded that over time the cross, a symbol of Christianity, has taken on a “secular meaning. Indeed, there are instances in which its message is now almost entirely secular.” Justice Thomas repeated his point against the incorporation of the Establishment Clause and argued that the cross did not coerce. He called for *Lemon* to be overruled and did not join the Court’s opinion because it did not “adequately clarify the appropriate standard for Establishment Clause cases.” Justice Gorsuch, joined by Justice Thomas, thought the case should be dismissed for lack of standing and should be rejected for that reason. Justice Kavanaugh explained that the *Lemon* test was not good law in five categories: “(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5)

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595. Id.
597. *Id.* at 2094–2103 (Thomas, J., concurring and Gorsuch, J., concurring).
598. *Id.* at 2103–13 (Ginsburg, J., dissenting).
599. *Id.* at 2074.
600. *Id.* at 2090.
601. *Id.* at 2074.
602. *Id.* at 2094–95 (Thomas, J., concurring).
603. *Id.* at 2097.
604. *Id.* at 2098–2103 (Gorsuch, J., concurring).
regulation of private religious speech in public forums." He also suggested that, whatever the Court said about it, the state legislature or governor could require the cross to be removed.

Justice Ginsburg's dissent argued the Court "elevates Christianity over other faiths, and religion over nonreligion," a result the First Amendment is supposed to prevent. Religious freedom has reached the point, however, where the Christian cross is ruled to be secular.

E. Prisoners' Religion

In *Murphy v. Collier*, the Court granted a stay of execution for Patrick Henry Murphy, a Texas prisoner who argued that his Buddhist spiritual advisor was not allowed to be present during his execution, even though Christian and Muslim advisors were. Justices Thomas and Gorsuch would not have allowed the stay. Justice Kavanaugh argued that the choice was now up to Texas. "What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room." Justice Alito dissented, joined by Justices Thomas and Gorsuch, arguing that Murphy's claim should have been brought much earlier, and not at the time that the execution was about to take place. Because Murphy's claim was "egregiously delayed," his request for a stay should not have been granted.

The Court had denied a similar request from a Muslim prisoner who did not have a Muslim advocate, over dissent by four, including Justice Sotomayor. In both cases, several justices were angered by the long delay of the prisoners in raising their claims.

The Supreme Court then granted a stay of execution to an Alabama prisoner until his Christian pastor was allowed to attend the

605. *Id.* at 2092 (Kavanaugh, J., concurring).
606. *Id.* at 2092–94.
607. *Id.* at 2104 (Ginsberg, J., dissenting).
609. *Id.* at 1475.
610. *Id.* at 1476 (Kavanaugh, J., concurring).
611. *Id.*
612. *Id.* at 1485 (Alito, J., dissenting).
613. *Id.*
615. *Murphy*, 139 S. Ct. at 1477–78 (Kavanaugh, J., concurring and Alito, J., dissenting); *Dunn*, 139 S.Ct. at 662 (Kagan, J., dissenting) ("I also see no reason to reject the Eleventh Circuit's finding that Ray brought his claim in a timely manner.").
Justice Kagan, joined by Justices Breyer, Sotomayor, and Barrett, ruled that the state had not given a convincing reason as to why the pastor was absent. Security did not satisfy strict scrutiny because it was possible to find clergy who would agree to act safely. Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh would have allowed the execution to continue. Either Justice Alito, Justice Gorsuch, or both, must have joined the four to create a majority to stop the execution, but the opinion did not make clear how they had voted. Post-Murphy, Alabama had barred all spiritual advisors from the execution. Post-Supreme Court decision, Alabama said Smith would not be given the death penalty.

John Ramirez was a Texas prisoner sentenced to death. He originally complained when the state refused to allow his pastor to be present during his execution. Texas reversed the no-pastor policy. Ramirez then asked that his pastor be allowed to touch his body and to pray audibly at the execution. Texas denied both requests.

Eight Justices ruled for Ramirez, concluding that he had stated a probably successful RLUIPA claim that must be resolved before the state began his execution. His religion was substantially burdened by the state’s refusal. The Court, in an opinion by Chief Justice Roberts, concluded that the state’s denial was not the “least restrictive means” of achieving its goals. Roberts was joined by Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett.

617. Id. at 725 (Kagan, J., concurring).
618. Id.
619. Id. at 726.
620. Justices Alito and Gorsuch did not sign onto any opinion in the case. See Id. at 725–27.
624. Id. at 1273.
625. Id.
626. Id. at 1274.
627. Id. at 1284.
628. Id. at 1278.
629. Id. at 1279.
630. Id. at 1271.
Sotomayor and Justice Kavanaugh each wrote a concurrence, focusing on how the states could handle such prisoner requests in the future.631

Justice Thomas was the sole dissenter, complaining, in particular, that Ramirez had long delayed his execution and was using this lawsuit to delay even more.632

F. COVID and Justice Barrett Arrive at the Court

In 2020, COVID hit the courts as many governments limited the size of religious gatherings, or their ability to meet in person, in order to limit COVID’s transmission rate.

In *South Bay United Pentecostal Church v. Newsom*, Chief Justice Roberts joined Justices Ginsburg, Breyer, Sotomayor, and Kagan in allowing California’s restrictions to stay in place.633 Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented.634 Chief Justice Roberts emphasized the need for the Court to defer to the government’s difficult decisions about the public’s health.635 As Chief Justice Roberts explained it:

> Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.636

In contrast, the dissenters would have granted the application believing that the regulations discriminated against places of worship and in favor of secular workplaces.637

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631. *Id.* at 1271, 1284–89 (Sotomayor, J., concurring; Kavanaugh, J., concurring).
632. *Id.* at 1290–91 (Thomas, J., dissenting).
634. *Id.* at 1614.
635. *Id.* at 1613.
636. *Id.* at 1613 (Roberts, C.J., concurring).
637. *Id.* at 1614 (Kavanaugh, J., dissenting).
A similar request for relief was denied in *Calvary Chapel Dayton Valley v. Sisolak*. Justice Alito, Thomas, and Kavanaugh dissented, criticizing the Nevada governor’s decision to exempt casinos but not churches from its limitations. Justice Alito emphasized that public health emergencies did not allow the government to ignore the Constitution. Justice Gorsuch added a comparison between the churches and synagogues vs. theaters and casinos; in “Nevada, it seems, it is better to be in entertainment than religion. . . . But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.” Justice Kavanaugh explained at length why the state’s policy discriminated against religion in violation of the Free Exercise Clause.

Then the votes changed with the addition of Justice Barrett to the Court. By a 5–4 vote, the Court ruled that New York had violated the First Amendment by placing the churches and synagogues into red zones that limited the number of participants. A per curiam decision granted the religious organizations’ requests. Justices Gorsuch and Kavanaugh concurred, and Chief Justice Roberts dissented. Then, in a 6–3 decision in February 2021, the Court ruled that California must open the churches that had been closed for indoor worship due to COVID-19. The Court allowed the State’s bans on singing and chanting to continue, although those bans could be challenged if the churches presented more facts in future litigation. The State can still hold the churches to 25% capacity.

Justices Gorsuch and Thomas would have given the churches freedom in all these areas. Justice Alito joined those two, but would have given the State thirty days before the injunction against it could take

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639. *Id.* at 2603–04 (Alito, J., dissenting).
640. *Id.* at 2604.
641. *Id.* at 2609 (Gorsuch, J., dissenting).
642. *Id.* at 2609–15 (Kavanaugh, J., dissenting).
644. *Id.* at 68.
645. *Id.* at 69–76 (Gorsuch, J., concurring, Kavanaugh, J., concurring, and Roberts, C.J., dissenting).
647. *Id.* at 716.
648. *Id.*
649. *Id.* at 716.
In her first opinion, Justice Barrett, joined by Justice Kavanaugh, argued that the churches had not yet shown that the singing and chanting bans were too strong, but that they could litigate that in the future. Chief Justice Roberts deferred to the State’s wishes on singing, chanting, and size of attendance, but ruled that there should not be deference to the closing of the churches. Justice Kagan dissented, joined by Justices Breyer and Sotomayor, and concluded that science had been abandoned in favor of judicial edict.

In another 2021 case, in a per curiam opinion, Justices Thomas, Alito, Kavanaugh, Gorsuch, and Barrett voted for religion. Chief Justice Roberts voted to deny the application. Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. The majority first cited Roman Catholic for the rule that, “whenever they treat any comparable secular activity more favorably than religious exercise,” the government’s action is subject to strict scrutiny. Its second point was that comparability depends on the risks faced by participants and not on the reasons they gather. Third, strict scrutiny means that when the government allows other activities to proceed, “it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.” And fourth, cases are not mooted when the government changes the regulations.

In applying strict scrutiny, the Court noted that California treated “hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants” more favorably than religions. Moreover, the Ninth Circuit had not required the state “to explain why it could not safely permit at-home

650. Id.
651. Id. at 717.
652. Id. at 716–17 (Roberts, C.J., concurring).
653. See Id. at 723 (Kagan, J., dissenting) (noting that “the Court forges ahead . . . insisting that science-based policy yield to judicial edict.”).
655. Id. at 1298.
656. Id. (Kagan, J., with Breyer, J., and Sotomayor, J., dissenting).
658. Id. at 1296–98.
659. Id. at 1297.
660. Id.
661. Id.
worshipers to gather in larger numbers while using precautions used in secular activities.\textsuperscript{662}

In contrast, Justice Kagan’s dissent argued that the state must treat comparable secular and religious conduct alike. She argued that if the state treats secular gatherings in homes like religious gatherings in homes, it has complied with the First Amendment.\textsuperscript{663} Secular at-home meetings were the “obvious comparator” in this case, not hardware stores and hair salons: “[T]he law does not require that the State equally treat apples and watermelons.”\textsuperscript{664} Justice Kagan wrote that the per curiam opinion was wrong in concluding the Ninth Circuit had not concluded that the secular activities posed a lesser risk because the court had in fact done that.\textsuperscript{665} Repeating her text from \textit{South Bay}, Justice Kagan argued the majority was “treating unlike cases, not like ones, equivalently,” as well as ignoring the state’s scientific and health care findings.\textsuperscript{666} It “disregard[ed] law and facts alike.”\textsuperscript{667}

\textit{Tandon}, a pre-\textit{Fulton} decision, led some commentators to conclude that the Court had overruled \textit{Smith} in its shadow docket:

In \textit{Tandon}, however, the majority effectively overturned \textit{Smith} by establishing a new rule, often called the “most favored nation” theory. Under this doctrine, any secular exemption to a law automatically creates a claim for a religious exemption, vastly expanding the government’s obligation to provide religious accommodations to countless regulations. In \textit{Tandon}, for instance, the Supreme Court held that California had to let people gather indoors for Bible study because it allowed them to gather indoors to get a haircut, eat, or take a bus; if Californians can get pedicures, they must also be permitted to spend hours in close quarters discussing the Bible. And the Supreme Court created this sweeping new rule through its shadow docket—those cases decided with minimal briefing and no oral argument outside the court’s normal procedure.\textsuperscript{668}

\textsuperscript{662} \textit{Id.}
\textsuperscript{663} \textit{Id.} at 1298 (Kagan, J., dissenting).
\textsuperscript{664} \textit{Id.} at 1298.
\textsuperscript{665} \textit{Id.}
\textsuperscript{666} \textit{Id.} at 1299 (quoting \textit{South Bay United Pentacostal Church v. Newsom}, 141 S. Ct. 716, 722 (mem.) (2021) (Kagan, J., dissenting)).
\textsuperscript{667} \textit{Tandon}, 141 S. Ct. at 1299.
Fulton, however, shows that Smith has survived, for now.

The Court also refused to grant an injunction pausing Maine’s regulation requiring healthcare workers to be vaccinated against COVID-19. No religious exemptions were allowed by the state. If the workers are not vaccinated, they lose their jobs. Justices Gorsuch, Thomas, and Alito dissented. They would have granted the exemption, arguing that the law did not satisfy strict scrutiny under the Court’s jurisprudence under Lukumi, Fulton, and Tandon. The Justices repeatedly debate just how and why religion should be protected.

VI. HOW CATHOLICS VOTED ON THE LIFE ISSUES

Catholic Justices have also voted about life-related issues, including abortion, contraception, medical treatment, and marriage. Recently, Justices Alito, Thomas, Gorsuch, Kavanaugh and Barrett overruled the abortion cases, Roe and Casey.

Justice Brennan voted for the constitutional right to contraception and for the right to abortion. He dissented in the abortion funding cases, voting in favor of funding in Maher v. Roe and Harris v. McRae. In those early cases, he was the only Catholic on the Court. Justice Brennan was pro-abortion and contraception rights throughout his career on the Court.

670. Id.
671. Id.
672. Id. at 18 (Gorsuch, J., dissenting).
673. Id. at 22 (“There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention. I would grant relief.”).
679. See Justices 1789 to Present, supra note 60.
Justices Scalia and Thomas always voted anti-abortion. Justice Kennedy was on both sides, upholding some abortion legislation and striking down other bills. He was part of the plurality that kept Roe from being overturned in Casey, while Justice Scalia and Justice Thomas dissented.

Justice Sotomayor has always voted pro-choice. Justices Kennedy and Sotomayor voted together to invalidate some Texas laws restricting abortion in Whole Woman's Health v. Hellerstedt. Chief Justice Roberts, Justice Thomas, and Justice Alito dissented, voting to uphold the regulations.

Nonetheless, Chief Justice Roberts joined Justice Sotomayor in the majority of June Medical Services L.L.C. v. Russo, a case that on the facts was very similar to Whole Woman's Health. Many commentators think Chief Justice Roberts's opinion limited the right to abortion over previous opinions, including Whole Woman's Health. Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented, showing the two new Catholics on the Court were anti-choice.

Trump's third nominee, Justice Amy Coney Barrett, provided the fifth vote to overrule Roe and Casey, ruling definitively that the


686. Id. at 2330 (Alito, J., dissenting).


688. Id.

689. Id. at 2142.
Constitution does not protect a right to abortion. Barrett voted as Ginsburg had not. With Barrett as the ninth Justice, the Court first allowed a ban on abortion after six weeks to take effect in Texas. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissented. Unnamed in the opinion were the five who agreed to the abortion ban, namely Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. The Court’s action has allowed abortions to virtually end in Texas.

Then the Court took the biggest step of all. It overruled Roe and Casey in Dobbs v. Jackson Women’s Health Organization, which involved a Mississippi law that bans abortion after fifteen weeks. Chief Justice Roberts’s concurrence argued that the Court should exercise more judicial restraint, upholding Mississippi’s law without overruling the precedents.

But five Justices concluded abortion enjoys no protection in the Constitution, so states may regulate it as they wish. States are now allowed to limit abortion from the moment of conception, which is completely consistent with the Vatican’s teachings against abortion. About half the states are expected to limit or ban abortion. Justice Sotomayor defended the Court’s abortion precedents.

In other life cases, Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas joined Justice Alito’s opinion in Burwell v. Hobby Lobby, ruling that RFRA gives employers a right to refuse contraceptive insurance coverage to their employees. Justice Sotomayor joined the dissenters, and she repeated the same opposition to

691. Id.
694. Id. at *67–71.
695. Id. at *43.
the contraceptive exception in *Wheaton College v. Burwell*. In a recent case, where President Trump had expanded the number of employers who could be exempt from the contraceptive mandate, all five Catholic male justices—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh—voted to allow the mandate. Justice Sotomayor was one of only two dissenters against the policy.

A unanimous Court—eight Justices, without Justice Barrett yet on the Court—ruled in an opinion by Justice Thomas that RFRA allows individuals to claim money damages against government officials in their individual capacities. Tanvir and others were Muslims who argued the government had put them on the No Fly List because they refused to inform about their religious communities. The government’s action cost them damages from items including wasted plane tickets and lost salary. The Court studied RFRA’s language carefully and concluded that the statute’s language allows damages against government officials in their individual capacities as part of the statute’s “appropriate relief.” RFRA, which was passed in opposition to Smith, always wins at the Court.

While Justices Scalia and Kennedy voted against a right to refuse medical treatment in *Cruzan v. Director, Missouri Department of Health*, Justice Brennan dissented in favor of it, arguing Nancy Cruzan was “entitled to choose to die with dignity.” Justices Scalia, Kennedy, and Thomas later joined a unanimous Court, refusing to recognize a constitutional right to physician-assisted suicide. Almost ten years later, Justice Kennedy wrote the majority opinion concluding that

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702. *Id.*
704. *Id.* at 489.
705. *Id.*
706. *Id.* at 489.
709. *Id.* at 302 (Brennan, J., dissenting).
Oregon had a state right to allow physician-assisted suicide, while Justices Scalia and Thomas dissented in that case, favoring the federal government's powers to limit what the states could do.

Justice Kennedy wrote four pro-gay rights decisions. In *Romer v. Evans*, he wrote the majority opinion concluding that an anti-gay-rights amendment to Colorado's Constitution was unconstitutional. Justices Scalia and Thomas dissented:

> The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

Justice Kennedy wrote *Lawrence v. Texas*, which recognized that a Texas law banning same-sex relations was unconstitutional. Justices Scalia and Thomas also dissented in that case.

Justice Kennedy wrote the opinion concluding the Defense of Marriage Act, which had lowered tax and other benefits to LGBTQs, was unconstitutional. He was joined in the majority by Justice Sotomayor. The dissenters were Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. In a subsequent case, Justice Kennedy wrote the opinion, and Justice Sotomayor joined him, upholding the constitutionality of same-sex marriage.

712. Id at 275 (Scalia, J., dissenting).
714. Id. at 636 (Scalia, J., dissenting) (citations omitted).
716. Id. at 586 (Scalia, J., dissenting).
718. Id. at 747.
719. Id. at 775 (Roberts, C.J., dissenting); see also Id. at 778 (Scalia, J., dissenting); see also Id. at 802 (Alito, J., dissenting).
Justice Scalia, Justice Thomas, and Justice Alito dissented. The Court then reviewed an Arkansas case in which state law did not allow both members of a same-sex marriage to be listed as parents of their children. The State listed only the birth mother’s name. Chief Justice Roberts and Justices Kennedy and Sotomayor joined a per curiam decision ruling that the state law violated Obergefell. Justice Gorsuch, joined by Justices Thomas and Alito, dissented, arguing that Obergefell did not cover this situation.

Justice Kennedy, however, wrote a 7–2 decision upholding the right of a baker to deny a wedding cake to a gay couple even though state law prohibited discrimination against LGBTQs. Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Gorsuch agreed with him that the Civil Rights Commission had spoken negatively about religion when discussing the case and therefore violated the Free Exercise Clause.

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

All very truthful, but Justice Kennedy found a free exercise violation there. Justice Gorsuch concurred, joined by Justice Alito, arguing that the Commission had not treated Phillips neutrally. Justice Thomas concurred in part, joined by Justice Gorsuch, concluding that Colorado had failed to honor Phillips’ free speech. Only Justice Sotomayor

721. Id. at 686–742.
723. Id. at 2077.
724. Id. at 2075
725. Id. at 2079 (Gorsuch, J., dissenting).
727. Id.
728. Id. at 1729.
729. Id. at 1734–40 (Gorsuch, J., concurring).
730. Id. at 1740–48 (Thomas, J., concurring).
viewed what happened as appropriate government activity, rather than discrimination.\textsuperscript{731}

Then the Court issued a pro-gay rights decision. By a 6–3 vote, Justice Gorsuch, joined by Chief Justice Roberts, Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan, ruled that Title VIII prohibits gay and transgender discrimination.\textsuperscript{732} Justices Alito, Thomas, and Kavanaugh dissented, accusing the majority of misreading the statute and legislating.\textsuperscript{733}

Although \textit{Bostock} looked like a big victory for LGBTQ rights, Justice Gorsuch’s opinion noted the cases where religion might lead to a different result. He mentioned the details of Title VII, RFRA, and the ministerial exception as issues that raised questions about religious freedom and gay rights.\textsuperscript{734}

\textit{Fulton} then showed that LGBTQ persons lose to religious freedom.\textsuperscript{735} \textit{Fulton} was a case argued before the Court, not a shadow docket case. At issue was the question that has arisen throughout this paper: is free exercise best protected by \textit{Smith}, \textit{Sherbert}, or something else? For now, \textit{Smith} is still the law. \textit{Fulton} says that, but also raises questions of other non-\textit{Smith} options for the future.\textsuperscript{736}

Recall the issue in \textit{Fulton}. Philadelphia law says no discrimination against LGBTQs is allowed, and for that reason ended its program with Catholic Social Services, which refuses to give foster children to LGBTQ parents.\textsuperscript{737} On a straightforward reading of \textit{Smith}, which the Third Circuit followed, the antidiscrimination law is a neutral law of general applicability, and therefore the Catholics were not allowed an exemption from it and lost.\textsuperscript{738}

Catholic Social Services challenged that conclusion. Its certiorari petition asked “[w]hether Employment Division v. \textit{Smith} should be revisited?”\textsuperscript{739} The petition advocated that the Court should “revisit \textit{Smith} and return to a standard that can better balance governmental interests

\textsuperscript{731} Id. at 1748–52 (Ginsburg, J., dissenting).
\textsuperscript{732} Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744–54 (2020).
\textsuperscript{733} See Id. at 1754 (Alito, J., dissenting); see also Id. at 1822 (Kavanaugh, J., dissenting).
\textsuperscript{734} Id.
\textsuperscript{736} Id. at 1876–77, 1881.
\textsuperscript{737} Id. at 1874.
\textsuperscript{738} Fulton v. Philadelphia, 922 F.3d 140 (3d Cir. 2019).
\textsuperscript{739} Petition for Certiorari at 1, Fulton v. Philadelphia 141 S. Ct. 1868 (2021) (No. 19-123), 2019 WL 3380520, at *i.
and fundamental rights." They sought a "more administrable rule that adequately protects a fundamental first amendment right." Would that mean that the Court would return to Sherbert, with its compelling interest standard, as a rule for future free exercise cases and reject the Smith rule followed by the Third Circuit? Not yet.

Chief Justice Roberts wrote the opinion for the Court, joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett. Following Smith, Chief Justice Roberts concluded the Philadelphia law was not generally applicable because it allowed the City to make exceptions. The cited law said:

"Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." Because the law was not generally applicable, strict scrutiny, not Smith applied. Then the majority concluded that the "City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." The majority concluded that granting an exception to CSS would not undermine the City’s goals of maximizing the number of foster families and minimizing liability.

Not one separate word of protest arose from Justices Breyer, Sotomayor, or Kagan. Justice Sotomayor in particular could have been expected to vote with the gay individuals and not with the religion. Their silence was likely due to their view that maintaining Smith was important, and so they were quiet and silently joined the other three to defeat LGBTQs but win for Smith.

740. Id. at 31.
741. Id. at 34.
742. Fulton, 141 S. Ct. 1868.
743. Id. at 1878.
744. Id. (alteration in original) (second emphasis added).
745. Id. at 1879.
746. Id. at 1882.
747. Id. at 1881–82.
Justice Barrett, a former law clerk to Justice Scalia,\textsuperscript{748} wrote a con-
currence joined by Justice Kavanaugh and, in all except the first para-
graph, by Justice Breyer.\textsuperscript{749} The first paragraph was critical of \textit{Smith}. Justice Barrett asked, “Yet what should replace \textit{Smith}?”\textsuperscript{750} She con-
ccluded:

As the Court’s opinion today explains, the government contract at
issue provides for individualized exemptions from its nondiscrimi-
nation rule, thus triggering strict scrutiny. And all nine Justices
agree that the City cannot satisfy strict scrutiny. I therefore see no
reason to decide in this case whether \textit{Smith} should be overruled,
much less what should replace it. I join the Court’s opinion in
full.\textsuperscript{751}

Justice Alito wrote a long concurrence with Justices Thomas and
Gorsuch.\textsuperscript{752} Justice Alito said the Court should have addressed \textit{Smith},
which was the whole purpose of granting certiorari.\textsuperscript{753} Justice Alito’s
decision could be the opinion of the future Court, but it has not yet
received five votes. Justice Alito concluded:

If \textit{Smith} is overruled, what legal standard should be applied in this
case? The answer that comes most readily to mind is the standard
that \textit{Smith} replaced: A law that imposes a substantial burden on re-
ligious exercise can be sustained only if it is narrowly tailored to
serve a compelling government interest.\textsuperscript{754}

Strict scrutiny all the time, instead of occasionally. Justice Alito
defended the religious right to discriminate against LGBTQ individu-
als, as he had in dissent in \textit{Obergefell}. Justice Alito concluded with
these sad words:

After receiving more than 2,500 pages of briefing and after more
than a half-year of post-argument cogitation, the Court has emitted

\textsuperscript{748} \textit{Current Members}, \textit{Supreme Court of the United States}, https://www.su-
premecourt.gov/about/members_text.aspx (last visited Jun. 16, 2022).
\textsuperscript{749} \textit{Fulton}, 141 S. Ct. at 1882 (Barrett, J., concurring).
\textsuperscript{750} \textit{Id.}
\textsuperscript{751} \textit{Id.} at 1883.
\textsuperscript{752} \textit{Id.} at 1883 (Alito, J., concurring).
\textsuperscript{753} \textit{Id.} at 1887.
\textsuperscript{754} \textit{Id.} at 1924 (Alito, J., concurring).
a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.\textsuperscript{755}

Justice Gorsuch’s concurrence was very critical of Chief Justice Roberts’s reasoning in the majority, especially his reading of Philadelphia law.\textsuperscript{756} He said no amici or parties asked for the outcome Chief Justice Roberts gave them:

Given all the maneuvering, it’s hard not to wonder if the majority is so anxious to say nothing about Smith’s fate that it is willing to say pretty much anything about municipal law and the parties’ briefs. One way or another, the majority seems determined to declare there is no “need” or “reason” to revisit Smith today.\textsuperscript{757}

Like Justice Alito, Justice Gorsuch predicted that these cases would keep returning to the Court, costing the religions a lot of money, until the Court had the courage to protect religion even more than it is already protected. “So what are we waiting for?” he asked.\textsuperscript{758} “Rather than adhere to Smith ..., the Court should overrule it now, set us back on the correct course, and address each case as it comes.”\textsuperscript{759}

So, can we count to five? Could Justices Thomas, Alito, Gorsuch, join with, perhaps, Justices Barrett and Kavanaugh to change the rule of law from Smith? Would Justice Breyer have joined them? What about Justice Breyer’s replacement, Justice Ketanji Brown Jackson, who is Protestant?\textsuperscript{760} For now, we wait to see if the seven-Catholic Court will give more protection to religious freedom, neglecting civil rights in the name of the First Amendment.

VII. CONCLUSION

The Catholic justices have had an interesting history. We already know that, as a matter of free exercise and non-establishment, the Court has expanded the funding available to religious organizations. While

\textsuperscript{755} Id. at 1926.
\textsuperscript{756} Id. at 1929 (Gorsuch, J., concurring).
\textsuperscript{757} Id. at 1929.
\textsuperscript{758} Id. at 1931.
\textsuperscript{759} Id.
allowing the institutions to receive more funding, it has also given them ever-increasing freedom to violate all the antidiscrimination laws of the state and federal governments for anyone they call a minister. The Court also continues to approve government-sponsored religious monuments as well as government prayer. Public school employees now enjoy more rights to pray publicly with students. The *Fulton* concurrences told us another challenge to *Smith* would come back through the courts, forcing the Court to decide how much free exercise protection religions enjoy. We question how strong the Establishment Clause remains. Five Justices have left abortion to the states. The Catholic Court has been religion-friendly.

It will be interesting to see if future Catholics and non-Catholics on the Court continue or end these positions toward religion.