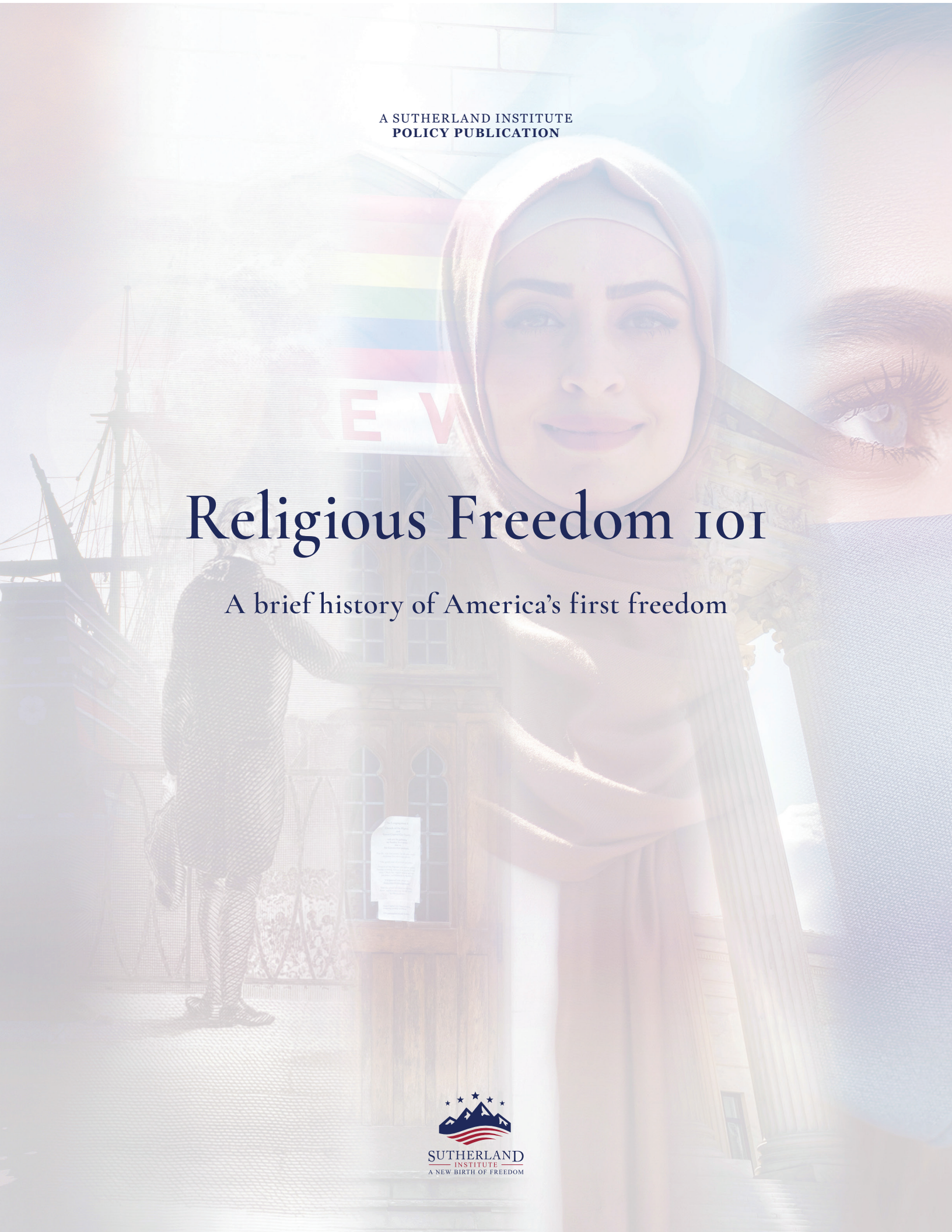

A SUTHERLAND INSTITUTE
POLICY PUBLICATION

Religious Freedom 101

A brief history of America's first freedom

SUTHERLAND
INSTITUTE
A NEW BIRTH OF FREEDOM

For more information, visit SutherlandInstitute.org

A Sutherland Institute Policy Publication

Religious Freedom 101

A brief history of America's first freedom

Written by William C. Duncan

Layout and design by Spencer Williams

Table of Contents

Introduction

Religious freedom has always been an essential part of the American experiment. Original colonists in the 1600s fled religious oppression and founded four of the first American colonies. Later, the new United States enshrined religious freedom in the First Amendment. Americans have had an up-and-down struggle to live up to that amendment – including periods of remarkable acceptance of the faith and practices of religious minorities as well as periods of open hostility toward religion.

> **The story of America is partly a story of an ongoing struggle to achieve the aspiration of religious freedom for Americans.**

Today it feels as if conflicts between government policies and religious practice are becoming more common. In the 2020 U.S. Supreme Court term, for instance, there were three major decisions on religious freedom, and more are anticipated for next term. The ongoing debate over restrictions meant to combat the COVID-19 pandemic has included high-profile clashes over limits on worship, and some of these could lead to further legal developments.

Suffice it to say that modern America's legal and political culture is one of mixed signals and inconsistent legal rules when it comes to religion. But in order to understand why – and therefore know better how to improve that landscape – we must understand the American history that created it.

ARTICLES IN ADDITION TO, AND AMENDMENT[S] ... TUTION OF THE UNITED STATES OF AMERICA, ... CONGRESS, AND RATIFIED BY THE SEVERAL S[TATES] ... SUANT TO THE FIFTH ARTICLE OF THE ORIGINA[L] ... TUTION.

AMENDMENT [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• In Dillon v. Gloss, 256 U. S. 368 [1921], the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State Journals to determine the dates on which each ...f the legislature of certain States ratified the 18th Amendment. ...ate on which the governor approved the ratification, or the date on which ... of a given State certified the ratification, or the date on which ...ted States received a copy of said certificate, ... amendment had been ratified are not controlling. ...ring notes is the date on which the legislature ...ification of the "legislature"). ... It was ... each case such fact has been noted ...

The Aspiration of Religious Freedom

Religious freedom has been a national aspiration from before the country was founded. Yet, just like the nation's aspirations for racial equality and gender equality, our nation's history shows uneven progress. That we have engaged this struggle, with at times miserably poor success, tells us something about the value we have placed on that aspiration.

Establishing the Aspiration – in the Colonies

Colonial history is famously understood, at least in part, as a struggle for religious autonomy. The lives of the colonists themselves illustrate how many of the foundations of religious freedom – freedom of association, religious toleration and the separation of church and state – began centuries before they became part of the American Constitution.

In September 1620, William Bradford stepped aboard the Mayflower with 36 of his fellow Puritans to seek a better life in the unknown wilderness of North America. As a teenager in 1607, Bradford had been forced to flee England, his native country, for Holland because he had committed treason – along with other Puritans – by separating from the Church of England.[1] When an opportunity to build a Puritan community in North America came – a community governed by a separation of church and state, but not state from God – Bradford accepted it.[2] After helping found Plymouth Colony, he governed it for the next 30 years. Plymouth and other Puritan colonies would eventually form Massachusetts.[3]

More than a decade after Bradford boarded the Mayflower, Lord Baltimore – also known as Cecelius Calvert – sought to free oppressed minority Catholics in England from their plight. English Catholics who survived the anti-Catholic violence of the 1500s lived under laws that banned their religious rites – such as marriage by a Catholic priest – and among a culture that viewed them with suspicion for following the pope.[4] In 1632, Baltimore received a royal charter to form a new colony called Maryland that he hoped could serve as a Catholic refuge in America. In 1649, the colonial legislature of Maryland passed a law of religious toleration spanning Christian faiths.[5]

In 1670, William Penn was arrested in London for speaking publicly in defiance of an English law banning public meetings of more than five people – a law that attempted to suppress worship by any but the Church of England.[6] Penn was not new to religious discrimination, having been imprisoned two years earlier for his religious beliefs as a Quaker.[7] After defending in court his rights as an Englishman – or what we would today call civil rights – Penn was eventually released. In 1682, when Penn received land in America as payment of a debt owed to his father,[8] the colony he established (Pennsylvania) welcomed settlers of any faith and granted them freedom to associate and worship as they chose.[9]

As the lives of founding colonists illustrate, the colonial commitment to religious freedom was real, even as they struggled to extend religious

toleration to others.[10] This struggle even led to new colonies being founded in pursuit of religious freedom, like Rhode Island, where Roger Williams went after being expelled from Massachusetts in 1635 over religious differences.[11]

The aspiration to religious freedom continued as tensions between the colonies and England intensified. As the Revolutionary War got underway in 1775, colonial officials in New York ordered a military draft – which presented a challenge to the Quakers, whose religious beliefs include a commitment to pacifism.[12] New York's political leaders stumbled their way through this challenge; some Quakers were drafted, some refused to serve, and penalties for Quakers not complying with these laws were typically lenient. Ultimately, in New York's first state constitution in 1777, Quakers were exempted from service in the militia – an early indicator of the value placed on religious practice.[13]

Even where colonial policies fell short of toleration, such as the jailing of Baptist preachers in Virginia from the 1760s to the 1770s, the debate over these practices led to important advances.[14] In 1786, Virginia's Assembly enacted an Act for Establishing Religious Freedom, written by Thomas Jefferson and shepherded to passage by James Madison, which ended legal penalties for those who refused to financially support or attend the state church.[15]

Establishing the Aspiration – in the Constitution

The debate over ratification of the proposed United States Constitution in 1787 resulted in calls for a Bill of Rights that would enumerate limitations on the power of the new national government. Religious freedom was prominently featured in the recommended amendments enclosed with the ratifications of Virginia[16] and New York.[17]

Virginia's recommendation read: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others."

When the first Congress drafted the proposals that would make up the Bill of Rights in 1789, those amendments were given a formal place in the nation's governing charter.[18]

Ratified in 1791, the First Amendment to the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[19]

The First Amendment's limitation on the new government's ability to proscribe religious practice (and similar state constitutional provisions) codified an aspiration that governments should not limit the ability of people of faith and their religious organizations to act on their beliefs, just as with the Quakers and Baptists, even if those actions appeared to be at odds with government policies or majority preferences.

From Washington to WWII

On August 17, 1790, President George Washington, accompanied by Secretary of State Thomas Jefferson and others, visited Newport, Rhode Island.[20] At the time of the visit, Rhode Island had ratified the new U.S. Constitution a few months before, and the states were considering ratifying the proposed Bill of Rights. During their visit, local dignitaries read letters of welcome, including one by Moses Seixas, from Yeshuat Israel, a Jewish congregation in the city. Seixas' parents had emigrated from Portugal to Barbados and then to the United States. The congregation's synagogue included a trapdoor representing the "tradition of remembering the perils of Jews living in Spain and Portugal during the Inquisition and having to flee from soldiers of the Holy Office at a moment's notice."[21]

Seixas' letter included an eloquent passage describing in a bold and confident style the aspiration of religious freedom in the new United States:

> *Deprived as we heretofore have been of the invaluable rights of free Citizens, we now with a deep sense of gratitude to the Almighty disposer of all events behold a Government, erected by the Majesty of the People — a Government, which to bigotry gives no sanction, to persecution no assistance — but generously affording to all Liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language equal parts of the great governmental Machine.*[22]

In response, Washington wrote a brief letter, adopting some of Seixas' most powerful ideas:

> *For happily the Government of the United States gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.*[23]

This became one of the earliest formulations of the aspiration codified in the First Amendment, ratified not long afterward – that government should not limit the ability of people of faith and churches to live according to their beliefs.

Living this aspiration was not nearly as simple, as the next century and a half would show.

Majority religions tended to thrive under the new constitutional protections, but the aspiration of religious freedom was applied unequally to minority religions, and sometimes not at all.

While Jewish Americans experienced less persecution than Jews in Europe during the same

time period, they were still subject to mistreatment, including official discrimination.[24] During the Civil War, General Ulysses Grant issued an order expelling all Jews from a district controlled by the military. President Abraham Lincoln quickly revoked the order.[25]

Other religious hostilities did not dissipate so quickly. After a group of members of The Church of Jesus Christ of Latter-day Saints settled in Missouri's Jackson County, local residents, including militia leaders, violently drove them from their homes.[26] They settled in newly created Caldwell County, but even that compromise failed. In 1838, Gov. Lilburn W. Boggs sent militia to drive Latter-day Saints from the state, issuing an order that "the Mormons must be treated as enemies and exterminated or driven from the state."[27]

Persecution of church members continued for decades, even after the Latter-day Saints had left the United States and settled in what is now the state of Utah.

Perhaps the most well-known religious persecution in the United States was directed at Catholics. Though Maryland began as a haven for Catholics, distrust and prejudice were close to the surface from the beginning of the United States. In 1834, a Massachusetts mob – suspicious of Irish Catholic immigrants – burned a convent in Charlestown, forcing out Ursuline nuns who educated Protestant and Catholic children from Boston.[28]

In the 1850s, an anti-immigrant and anti-Catholic political party, the Know Nothing Party, became the first major third party in the U.S. Its platform included barring Catholics from public office.[29]

An online legal encyclopedia explains:

> *The Know-Nothings elected the governor and all but two members of the Massachusetts state legislature as well as 40 members of the New York state legislature. By 1855 Know-Nothing adherents had elected thousands of local government officials as well as eight governors. Forty-three Know-Nothing candidates were elected to the U.S. House of Representatives and there were five Know-Nothing senators.*[30]

The party fell apart when it failed to take a stand on slavery, but anti-Catholic sentiment flared again in the late 19th century. Responding to de facto Protestant domination of schools, Catholic schools were formed but were denied access to public support. In fact, "in the 1880s, over 30 states adopted so-called Blaine Amendments (named after U.S. Senator James G. Blaine) barring any state funds for these separatist schools."[31]

In the 20th century, anti-Catholic activism was promoted by the Ku Klux Klan.[32] The Klan supported a 1922 Oregon law that made attendance at public school mandatory – a clear attempt to criminalize private religious schools.[33]

By the 1920s, though, a Catholic nominee, Al Smith, ran for president. Although prejudice likely contributed to his failure to win the election, he

helped prepare the way for increasing acceptance of Catholics in public life.[34]

Soon, new religious minorities arose to test America's commitment to religious toleration. The Jehovah's Witness movement, arising formally in the 1910s, aroused suspicion because of its members' conscientious objection to military service, refusal to salute national flags, and their proselytism.[35] In the 1930s, they were subjected to mob violence, arrests for proselyting, and widespread condemnation for their criticism of government.[36]

In 1935, the 12- and 10-year-old children of a Jehovah's Witness, Walter Gobitas, were expelled from their Pennsylvania school for refusing to salute the American flag. Gobitas launched a legal challenge that was eventually heard by the U.S. Supreme Court in 1940.[37]

Justice Felix Frankfurter wrote the majority opinion, concluding the legislature could compel children to salute the flag as the symbol of the political order from which freedom sprang. In a strong dissent, Justice Harlan Stone characterized the majority opinion as "no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."[38]

In the aftermath of the decision, persecution and mob violence against Witnesses surged. In 1940 alone, the ACLU estimated there had been 335 attacks on the Jehovah's Witnesses and their facilities.[39]

And yet, while the roughly 140-year period between the enactment of the First Amendment and World War II was often a dark and difficult time for the aspiration of religious freedom, all of this persecution set the stage for a crucial upsurge in legal protections for religious belief and expression. Ultimately, amid these setbacks, the seeds of hope were planted for a critical reaffirmation of the aspiration George Washington had endorsed.

War and Consequences

On the eve of the United States' involvement in World War II, the Supreme Court supported the expulsion of Jehovah's Witness students in Pennsylvania for failing to salute the flag. The decision seemed to solidify a dark trait of American history – official intolerance of minority religious beliefs.

But things were about to change quickly, and for the better.

During the massive conflict with the Nazi government in Germany (which practiced state-enforced oppression and prejudice), the United States began to embrace its own religious traditions of openness, tolerance and freedom.

In a West Virginia town in the early 1940s, elementary school students Marie (age 8) and Gathie Barnett (age 10) attended school like other children. West Virginia had recently enacted a law making participation in the Pledge of Allegiance and saluting the flag mandatory for all students. This created a challenge for these girls, who were members of the Jehovah's Witness faith and had been taught that saluting the flag was a form of idolatry. So, they declined and were expelled from school. Under the law, they could not be readmitted until they complied.[40]

Their father brought suit on their behalf and the federal district court ruled in his favor – the flag salute law was unconstitutional. The U.S. Supreme Court heard the appeal and issued its decision in 1943. The majority opinion treated the religious beliefs of the family with respect, explaining their rationale for declining to salute the flag and noting in a footnote to the history of such dissent: "Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority."[41]

The opinion also adopted the imagery of religious freedom as an aspiration:

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*[42]

So the West Virginia law was found unconstitutional and the girls were finally able to return to school, although they did have to repeat a grade because they had missed so much during the litigation.

Two decades later, the court adopted a test for applying the free exercise clause that may have brought the government's actual practice of

religious liberty as close to the aspiration as it had ever been.

The case was brought by Adeil Sherbert, a textile mill worker in South Carolina. The mill instituted a new six-day workweek and required her to work on Saturdays. A recent convert to the Seventh-day Adventist faith, Sherbert declined and was fired. She was also denied unemployment insurance by the state because her firing had been for cause.[43]

The South Carolina Supreme Court affirmed that decision, and Sherbert appealed to the U.S. Supreme Court.

In *Sherbert v. Verner*, the court said the free exercise clause required the government to demonstrate a compelling government interest before it could burden a religious practice.

Even where the government had such a strong interest, it had to make sure that its actions were "narrowly tailored" to advance that interest. In other words, if a law or government practice put a burden on religious exercise, the government would first have to show that the burden was justified by an overwhelming interest (like protection of public safety) and that the burden had been imposed in such a way that it interfered only as much as absolutely necessary to advance that interest without creating any residual impact on religious freedom.

Put more simply, the court had now endorsed a practical approach to making effective the aspiration of religious freedom officially stated in the First Amendment.

Under this rule, when a government action created a burden on a religious practice, the courts would ask a series of questions:

- Does the action or rule create a burden on religious exercise? If no, there is no violation of the First Amendment. If yes, then the court goes to the next question.
- Does the state have a compelling purpose for its action? If it does not, then the action violates the First Amendment. If it does, then the court goes to the next question.
- Is the challenged action and the government's interest closely enough related that we could say that it does no more harm to religious liberty than is absolutely necessary? If no, the First Amendment is violated. If yes, it is not.

The protective power of this rule was exemplified in a 1972 case that has been described as the "high water mark of religious liberty."[44] It involved a Wisconsin law that required children to attend public school until they were 16 years old.[45] Amish parents in Green County, Wisconsin, withdrew their children from school after eighth grade because their religion required separation from the world and was totally pervasive in the lives of members, directing the education they would receive and their vocations in life.[46]

The Amish had determined that education past the eighth grade, when only vocational training was consistent with their faith, was a violation of

their beliefs, so three Amish fathers refused to send their children to school and were fined $5 under the Wisconsin law. For religious reasons, the Amish parents would not defend themselves, so their legal fees were paid by others.[47] They were represented by William B. Ball, an extremely effective Catholic lawyer from Pennsylvania.[48]

The Supreme Court held that Wisconsin could not prosecute the Amish parents for declining to send their children to school after eighth grade. The court recognized that the state's promotion of education was among its most important functions but still needed to yield to the religious freedom of the Amish.[49]

Perhaps the soul-searching brought on by the shock of a massive war with a truly intolerant nation helped the United States begin to officially disavow the intolerance of minority religious groups that had characterized much of its history. In the wake of World War II, the United States Supreme Court began to treat religious freedom with the kind of respect, and tangible protection, that had always been the implicit promise of the First Amendment.

Unfortunately, religious freedom's journey does not end on that triumphal note. In the past four decades, many events have called into question the viability of the nation's religious freedom aspiration.

From Aspiration to 'Nonessential'

During the early responses to the COVID-19 pandemic, many states divided businesses and activities into the categories of essential and nonessential. Essential activities were allowed to proceed while nonessential activities were precluded or strictly limited.

It was (and is) galling to people of faith that religious services were often lumped into the nonessential category. The situation was made worse by questionable classification decisions. Judge Gregory Van Tatenhove, a federal judge in Kentucky, highlighted this discrepancy, noting that religious services – even those carefully employing social distancing measures – were banned while "hardware stores, laundromats and dry cleaners, law offices, and liquor stores" were allowed to continue to operate.[50]

As described earlier, we see that by the 1970s, legal respect for religious freedom in the U.S. was probably at its highest point since the framing of the Constitution. It took more than 200 years: from the first faltering steps toward religious tolerance in the colonial period, through the establishment of an ideal in the First Amendment to the U.S. Constitution, through repeated failures to extend that ideal to minority religious groups, to increasing acceptance and tolerance in the legal rules applied in cases where religious practices were burdened by government actions.

Now, four decades later, religious freedom is a contested value, and the Supreme Court, rather than the legislature, typically decides a religious freedom dispute each term (three in the 2020 term). What happened?

> **There appear to be three factors at work: a decline in formal legal protection of religious freedom; an increase in general regulations that impact religious practice; and a decline in religiosity among Americans generally.**

Decline in Legal Protections

As explained earlier, in 1972, the Supreme Court decided that Wisconsin's interest in public education had to yield to the religious objections of Amish parents who wanted their children to be excused from school after the eighth grade.[51]

The court followed a decision from a decade earlier in which a South Carolina court said an employer could not deny unemployment benefits to a woman fired from her job for declining to work on her Sabbath.[52]

The major change in legal protection of religious freedom came just 18 years later in another unemployment case, known as *Employment Division v. Smith*.[53] The case involved Al Smith, a member of the Klamath Tribe in Oregon. After successfully overcoming an alcohol addiction, he spent his life helping Native Americans with alcohol

and drug addiction. In the early 1980s, he took a job with a private addiction treatment program. He was invited to a Native American church which took part in the ceremonial use of peyote, which was illegal in Oregon. His employer threatened to fire him if he attended the ceremony. As a profile in *The Atlantic* explained: "He had been warned, but the tone of disrespect to an Ancient Native faith rankled. He later recalled his immediate response: 'You can't tell me that I can't go to church!'"[54]

Smith was fired and denied unemployment benefits, and he took his case to the Supreme Court.

The court made a dramatic reversal in its approach to religious liberty, abandoning the principle that the government would need to show a compelling reason for burdening religious practice and adopting instead a rule from the 1870s – a high point not of religious toleration, but of religious persecution – from a case that had justified jailing members of The Church of Jesus Christ of Latter-day Saints for practicing polygamy.

The new (old) rule was that the government could impose a burden on religious practice as long as it also burdened the same conduct by others.

This provides some protection for people of faith. When a Florida city banned possession of animals for the purpose of killing them and drafted the law so that it would only apply to a particular religious ceremonial practice, the court said this was unconstitutional. But if all private chicken killing were banned, the religious practice could be as well, so the religious protection was not robust.[55]

Interestingly, Congress passed a law just three years after the Smith ruling, the Religious Freedom Restoration Act, or RFRA, to restore the old constitutional analysis (burdening religious practice requires a compelling government purpose) as a statute governing the actions of the federal and state governments.[56] The Supreme Court, however, ruled in 1997 that this federal law could not be applied to the states.[57]

So, to the degree Congress or state legislatures are willing to protect religious practices, there can be legal protection, but this protection (including RFRA) will always be dependent on political majorities. By contrast, when the protection is understood to come directly from the First Amendment, it is not subject to popular disapproval of a particular minority religion. This is especially important for those whose beliefs and practices are in the minority and not well understood, such as the Amish, Native American churches, Muslims, and Sikhs.

Government Regulations

This decrease in legal protection (since it is now always up for revision) for religious freedom is magnified by the drastically increased opportunities for conflict between government regulations and religious practice.

Take the example of the Little Sisters of the Poor, currently embroiled in years of litigation over whether they will pay for contraceptive coverage for employees.[58] When the Little Sisters first came to the United States in 1868, the idea that the national government would ask anything of them, much less require that they act in opposition to their religious beliefs, would have been ludicrous.[59]

The examples could be multiplied: zoning laws, employment regulations, unemployment benefits. Federal, state and local governments are involved in an ever-greater swath of daily life, and this means that the practices of people of faith and religious organizations – most of which would not have been affected by any government policy in the past – have more occasions to run up against state policies on land use, health care, discrimination, etc.

Religiosity

As Lyman Stone, an adjunct fellow at the American Enterprise Institute, has convincingly demonstrated, "religiosity in America is declining." Since 1960, attendance at religious services "has fallen from 50 percent to about 35 percent, while the share claimed as members by any religious body has fallen from over 75 percent to about 62 percent. Finally, the share of Americans who self-identify or report being affiliated with any religion has fallen from over 95 percent to about 75 percent."[60]

As the share of adherents has fallen, the support for religious freedom claims can be expected to decline as well. In the past a citizen might feel empathy toward a persecuted member of another faith, thinking, "That could be me." Many still would, of course, but an increasing number would view the faith claims of that other person with suspicion and sometimes with contempt.

> **Influential elites are likely to hear claims for religious tolerance as special pleading – a right to discriminate or to put others at risk.**

This was the way a Protestant majority once viewed the establishment of parochial schools and how most Americans saw the refusal to salute the flag.

These three converging developments have created an unprecedented climate for churches, religious organizations and individual believers. As opportunities for conflict increase, the ability to rely on legal rules for protection has decreased, and increased skepticism of the value of religious faith means that vulnerable faiths are ever less likely to get a sympathetic hearing from their fellow citizens.

Conclusion

This is the history that has created the terrain on which current conflicts with religious freedom are being worked out. It is challenging, but it also creates an opportunity for a renewed commitment to the aspiration of religious freedom embodied in the founding of the United States of America, if we are willing to work toward it.

This commitment means greater cultural tolerance for people of faith and religions. It also means a return to a robust understanding of what the First Amendment requires. The aspiration of the Framers of that amendment was religious toleration – a religious toleration that was not dependent on the popularity of a religious practice. They wanted to ensure that the ability of individuals and churches to act on their beliefs would not be subject to majority approval, and thus would be free from majority oppression.

Developing that commitment will require a high degree of appreciation for the role religion plays – both in historically establishing the freedoms that all Americans cherish and in contributing to the solutions of major problems in society.

We need an appreciation of what we all gain when others are free to act on their sincerely held beliefs.

> *"We have abundant reason to rejoice, that in this land the light of truth and reason have triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart. In this enlightened age and in this land of equal liberty, it is our boast, that a man's religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attaining and holding the highest offices that are known in the United States."*
>
> *– George Washington, January 17, 1793* [61]

Appendix: 2020 U.S. Supreme Court Year in Review

During 2020, the Supreme Court decided five major religious freedom cases.

Espinoza v. Montana Department of Revenue

Description: The court decided a challenge to an amendment to the Montana Constitution (a Blaine Amendment) meant to prevent any state support going to religious schools.[62] In 2015, Montana created a $150 tax credit for individuals who donated to a scholarship fund that could be used by parents who wanted to send their children to private schools. In administering the program, the Montana Department of Revenue said that none of the scholarship money could be used by parents who chose to send their children to religious schools. So, mothers of children who wanted to use scholarship money at a private Christian school sued. The Montana Supreme Court decided to invalidate the entire scholarship program since some of the scholarship money could go to religious schools, which that court felt was inconsistent with the state's Blaine Amendment.

A 5-4 majority of the U.S. Supreme Court ruled that the Department of Revenue rule was unconstitutional because it singled out religious schools and religious parents for treatment that is not given to others who might participate in the scholarship program. After noting a previous ruling saying that merely allowing parents to use money from the state for religious education does not violate the First Amendment's Establishment Clause, the court said the situation in Espinoza was like a recent case decided by the court where Missouri was not allowed to exclude only religious schools from a playground safety grant.[63]

The majority opinion held that "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school." For the court, "[w]hen otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny" — which means that unless Montana could demonstrate that it had a compelling reason to single out religious parents or religious schools for differential treatment, the law would be held unconstitutional. The state's only argument – that it needed to separate church and state more "fiercely" than the federal government – was not, the majority concluded, a compelling reason to violate a clear constitutional prohibition on discrimination against faith.

The Supreme Court concluded the Montana Supreme Court should have followed the federal Constitution to conclude that the exclusion of religious choices from scholarship recipients was invalid, rather than just doing away with the entire program to avoid allowing religious schools to use an indirect benefit.


Credit Becket

Analysis: Of the 2020 religious freedom cases, this one was more predictable than the others because the Supreme Court had been moving in this direction in previous decisions, particularly the 2017 Missouri case. These cases have two important implications for other government programs.

First, it is clear that the court looks askance at government actions that result in unequal treatment of religious and secular people and groups. In fact, this is perhaps the most marked theme of the court's recent religious freedom cases, as will be seen in the decisions described below. Some academics and other commentators have questioned in recent decades whether the First Amendment's singling out of religious exercise for protection is a good idea. This line of argument suggests that other constitutional principles are adequate to provide any necessary protections for people of faith.

So, in some ways, the principle of nondiscrimination is relatively uncontroversial. Even those who do not believe that specific protection for religious exercise is justified could endorse the idea that religious exercise should not be the grounds for discriminatory treatment.

Second, this case is arguably a course correction from more complicated past approaches to the question of separating church and state. One prominent reading of the Establishment Clause of the First Amendment is that the state can do nothing that might have the incidental effect of benefiting religious groups. This can become an absolutist position, as the Missouri and Montana cases show. Almost everyone would agree that the state should not pay salaries of clergy or promote one set of religious beliefs over another. That is not, however, what is usually at stake. The typical case is one where religious people or organizations experience a benefit on a par with all other parts of society.

This could have the effect of discouraging litigation over these types of programs. By extension, it could also cool contention over questions of separation and state where these are unnecessary.

Little Sisters of the Poor v. Pennsylvania

Description: This case involved a Department of Health and Human Services rule that required employers to provide contraceptive coverage to employees at no cost.[64] In 2018, the Trump administration created a new rule that broadened the previous religious exemption to include employers with sincere religious or moral objections to providing contraceptives. The state of Pennsylvania (and later New Jersey as well) stepped in and sued, arguing HHS did not have the authority to create this religious accommodation.

The Supreme Court rejected the argument of Pennsylvania and New Jersey that the federal government lacked the authority to create a rule that accommodated the objections by some religious organizations to providing contraception to their employees. The majority opinion, written by Justice Clarence Thomas, relied on the language of the Affordable Care Act, which allowed HHS to "provide for" coverage, which is a broad grant of authority to the agency and allows it to establish both mandates and exemptions. Since Congress

did not add specific qualifications to this authority, the agency was free to choose those it did.

The majority also decided that the agency was free to consider the Religious Freedom Restoration Act (which prevents the federal government from enacting laws that burden religious practice unless absolutely necessary) in making its rule.

The majority rejected two other arguments from the states challenging the exemption: First, that HHS enacted the 2018 rule without following required procedures. Second, that the agency did not keep an "open mind" when creating the rule. On this point, the court understandably concluded it did not have the authority to create a new open-mindedness requirement to the law governing how executive agencies can set policies.

The conclusion neatly sums up the ruling:

> *For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. "[T]hey commit to constantly living out a witness that proclaims the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless." … But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate.*
>
> *We hold today that the Departments had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption. We further hold that the rules promulgating these exemptions are free from procedural defects.*

Analysis: This is an important case but actually limited in practical effect because of its unique posture. If stated in the simplest way, the court merely held that if the federal government would like to extend protection to religious groups, it may do so.

It did not, however, require such protection, and so the Little Sisters of the Poor must await the next administration's determination of whether it wants to restore the original mandate, presumably leading to more litigation over whether the group must act in ways that conflict with its religious mission.

This observation points to a deeper phenomenon—that the other branches of government seem to have fallen into a pattern of allowing the courts to take on the responsibility of protecting religious freedom. In this particular case, Congress could have acted when initially enacting the Affordable Care Act to limit any conflicts between mandates that would result and the operations of religious nonprofits. Having failed to do so, the administrative agencies refused to do so until political change shifted the calculus.

Administrative agencies can be a tool for the president to enact ideological goals that would be difficult to achieve in the atmosphere of consensus-building that characterizes congressional action on difficult topics. Thus, those whose interests or ideological goals are different increasingly look to the courts to vindicate their interests, as the Little Sisters did under the Obama administration and the progressive states did under Trump.

Ironically, although the courts must settle the disputes, doing so may signal to Congress that it need not act, especially where it may avoid complaints that will now be directed to court majorities.

Our Lady of Guadalupe Schools v. Morrissey-Berru

Description: This case actually involved two separate disputes with very similar facts.[65] In both, parochial schools had let go elementary school teachers who taught secular and religious subjects. The majority focused on all the religious functions the teachers performed. It noted one was considered "a teacher of religion" by the school, prepared students for Mass and took them once a week, prayed with them, and performed a number of other religious responsibilities. The other teacher "instructed her students in the tenets of Catholicism" and "was required to teach religion for 200 minutes each week." She "worshipped with her students," prepared them to participate in Mass, and prayed with them.

When the teachers were fired, they sued their respective schools, alleging age and disability discrimination, respectively. Before the lawsuits could proceed, the courts had to decide if the schools' decisions were protected. The trial courts determined the ministerial exception but the U.S. Court of Appeals for the Ninth Circuit reversed, so the Supreme Court took the case.

Justice Samuel Alito framed the key question the court had to decide: "These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith."

The majority explained that religious institutions generally have to follow secular laws but the Constitution "protect[s] their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles." The opinion notes that the "ministerial exception" was adopted because "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." Absent this power, "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."

The opinion notes "the close connection that religious institutions draw between their central purpose and educating the young in the faith" by reviewing educational practices of a wide variety of religious denominations. In this case, the teachers "performed vital religious duties … not only were they obligated to provide instruction about the

Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."

This was true even though they did not have the title "minister" (which is not used in many religions), "had less formal religious training" than the teacher in the 2012 case, and it was not relevant whether the person was a member of the same faith as that of the school. Alito concluded: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

Analysis: While the court's previous 2020 religious cases were either unsurprising or limited, this case is far more consequential. There was precedent for the court's decision in the commonsense policy that the state should not interfere with decisions of religious groups about who will convey their teachings. In the context of religious schools, though, the principle can look less simple in application, since religious schools may see all teachers (and often staff) as having a religious role even when they are teaching "secular" subjects. When the value the state is trying to vindicate is the principle of nondiscrimination, the issues are even more complicated.

In this instance, it is not only the specific facts that made the court's decision so significant and contentious. Waiting in the wings are similar cases that involve what is the most contentious area of religious freedom law currently — the potential conflict between religious organizations that promote orthodox teachings about marriage and sexuality, and LGBT groups and individuals who are concerned that allowing these religious groups to make employment decisions based on a religious mission could lead to a loss of job opportunities or even loss of jobs.

So, the court's decision was being watched for portents of how the Supreme Court would deal with these thorny conflicts. The court certainly showed deference to religious schools wanting to operate consistent with their missions, but the underlying concern is unlikely to recede since the facts of these cases allowed the court to base its decision on the specific function of a particular teacher in representing and teaching the organization's faith. This allows for future litigants to make the case that certain teachers are not actually representing a faith, so litigants could bring discrimination lawsuits even against religiously motivated employers.

Again, Congress or state legislatures could circumvent at least some of these conflicts by enacting laws that clarify the circumstances under which nondiscrimination laws can be applied to religious groups when that group's mission implicates a religious teaching, as on sexual morality. In the absence of such direction, the court will likely stay on the front lines.

Agudath Israel of America v. Cuomo

Description: The suit consolidated two cases. The first was brought by Agudath Israel, an Orthodox Jewish organization. New York Gov.

Andrew Cuomo had singled out Jewish synagogues in public statements such as: "We're now having issues in the Orthodox Jewish community in New York, where because of their religious practices, etc., we're seeing a spread" of COVID-19. As a result, Agudath Israel claimed "the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included" in extremely restrictive regulations (limits on religious services of 10 worshippers in red zones and 25 in orange). As the Becket Fund for Religious Freedom noted, "These zones heavily restricted worship, closed schools, and prevented Jewish families from celebrating holidays while mere blocks away, schools were open and restaurants were serving customers."

The second suit was brought by the Catholic Diocese of Brooklyn. It also objected to the severe limitations on churches, noting that in red zones "all 'essential' businesses—a broad category that includes everything from grocery stores to pet shops to accounting and payroll offices" have no capacity limitations, while in orange zones "almost all commercial enterprises" can stay open "without capacity limitations."

The U.S. Court of Appeals for the Second Circuit declined to put a hold on the restrictions while these suits were pending, so the religious groups asked the Supreme Court to intervene on an emergency basis. The court agreed and issued its decision at the very end of the day on Nov. 25.

The court agreed with the religious groups in an unsigned opinion representing the consensus of five justices. The decision includes some striking illustrations of the findings from the Religious Freedom Index, a survey of public opinion conducted by the Becket Fund.

For example, "a majority of respondents said that houses of worship should be treated with at least the same priority as reopening businesses." This theme of equal treatment of religious exercise was a major consideration in the court's opinion.

The majority relied on the fact that Agudath Israel and the Diocese of Brooklyn "have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak." The majority found that the disparate treatment of religious groups violated the Constitution. It held: "Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services."

Justice Neil Gorsuch wrote separately in support of the majority's ruling. His strongly worded opinion began: "Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available."

In an amusing passage, Gorsuch referenced the governor's order:

> *the Governor has chosen to impose no capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor*

> *considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?*

He concludes that designating some businesses as essential while saying "traditional religious exercises are not ... is exactly the kind of discrimination the First Amendment forbids."

Analysis: The three previous cases all arose before the COVID-19 pandemic, but this one arises directly from the regulations responding to that challenge. In the early stages of the pandemic, religious groups tended to be deferential to state guidelines (and most still are), but as the restrictions dragged on, the reality that religious worship is essential for many people led to litigation between the most restrictive rules and the desire of churches to provide that essential service to congregants.

The court stayed out of these disputes for some time but eventually weighed in here in a very significant case that has implications for the pandemic guidelines adopted by many states. Why would the court now get involved? It seems clear that the equal treatment theme noted above is a key part of the explanation. Religious groups, and the court majority, saw legal problems with allowing businesses of all kinds to do things that churches could not. It is contrary to the views of most Americans for the state to be in the business of determining that some things (retail shopping, gambling) are essential while others of great value to citizens (like religious services) are not.

As a result of this decision, the court has struck down similar restrictions in Colorado[66] and lower courts are invalidating others.[67] The thrust of the court's position is clear – religious activities will need to be treated the same as other enterprises if the state is to enforce public health restrictions.

Tanvir v. Tanzin

Description: This case involved men who said they had been placed on the federal no-fly list because they would not agree to inform on fellow Muslims after being approached by the FBI. Doing so, they argued, would violate their religious beliefs by requiring them to spy on their religious community. They explained that being prevented from flying by the designation caused serious personal and professional repercussions.

The Department of Homeland Security eventually allowed the plaintiffs to fly, so they did not need to challenge their inclusion on the list. But they still wanted to recoup the damages incurred while they had been banned from flying (e.g., they were unable to travel to job interviews).

The precise question the court had to address was whether the relevant federal religious freedom law, the Religious Freedom Restoration Act (RFRA), allowed the men to seek monetary damage from the federal government officials who they said had infringed on their religious freedom.

The court unanimously decided that RFRA did allow lawsuits for financial damages.

Justice Clarence Thomas wrote the opinion, which was joined by all the justices except Justice Amy Coney Barrett, who did not join the court until after the arguments in the case had already been made.

The court noted that RFRA says a person whose religious practice is interfered with by the federal government can sue to "obtain appropriate relief against a government." The court pointed to the statute's definition of government, which included an "official (or other person acting under color of law) of the United States." This, the court explained, means that those harmed by a religious freedom violation can sue the individual government official (a "person" for purposes of RFRA).

The court also noted that the phrase in RFRA defining government is drawn from another civil rights statute which has been understood to allow suits against government employees. It is reasonable, the court found, to conclude that Congress borrowed this language for RFRA knowing that the interpretation in the religious freedom context would be consistent with the use of the term in the other statute's use of the term.

The court next concluded that the "appropriate relief" that a person harmed by the government could receive under RFRA included financial damages. The court reasoned that this type of remedy has been allowed since the early Republic and has been implicitly recognized in other federal laws governing damage claims against the government, and that the civil rights law that RFRA referenced also allows for monetary damages from government employees.

Here, the court said, financial damages are "the only form of relief that can remedy some RFRA violations," like the "wasted plane tickets."

Analysis: One hundred fifty years ago, Congress recognized the need for real enforcement of 14th Amendment rights by passing the Ku Klux Klan Act, which specified ways a person deprived of their constitutional rights could get relief from the government.[68] In 1993, when Congress wanted to ensure protection of the right of religious exercise, it included some of the language from the earlier law in the Religious Freedom Restoration Act.

In this case, the court ensured that the men harmed by the FBI could be recompensed for any deprivations of their rights – and *Tanvir* will also be important to others whose ability to live consistent with their religious beliefs is harmed by government officials. It creates an important incentive to government officials to carefully consider decisions that could interfere with religious practice. They cannot, after this decision, just assume the deep pockets of the government will cover the costs of any wrongdoing.

William C. Duncan, J.D., is a religious freedom policy fellow at Sutherland Institute. He has taught family law as an adjunct professor and has published widely on constitutional topics in legal journals.

Endnotes

[1] History.com editors, "William Bradford," *HISTORY*, last modified August 1, 2018, accessed November 13, 2020, https://www.history.com/topics/colonial-america/william-bradford.

[2] "Puritan Massachusetts: Theocracy or Democracy?" *Bill of Rights in Action* 29(1):1-5 (Constitutional Rights Foundation, Fall 2013), https://www.crf-usa.org/images/pdf/gates/puritans-of-mass.pdf.

[3] Rebecca Beatrice Brooks, "Religion in Plymouth Colony," *History of Massachusetts Blog*, September 28, 2016, accessed November 13, 2020, https://historyofmassachusetts.org/plymouth-colony-religion/.

[4] USHistory.org, "Maryland—The Catholic Experiment," *U.S. History Online Textbook*, accessed November 13, 2020, https://www.ushistory.org/us/5a.asp.

[5] "Cecil Calvert, 2nd Lord Baltimore," *Wikipedia*, accessed November 13, 2020, https://en.wikipedia.org/wiki/Cecil_Calvert,_2nd_Baron_Baltimore#Settlement_of_the_Maryland_colony.

[6] "William Penn," *Quakers in the World*, accessed November 13, 2020, http://www.quakersintheworld.org/quakers-in-action/3.

[7] "William Penn, Criminal Justice, and the Penn-Mead Trial," *Quakers in the World*, accessed November 13, 2020, http://www.quakersintheworld.org/quakers-in-action/96.

[8] "Quakers in Colonial Pennsylvania," *Quakers in the World*, accessed November 13, 2020, http://www.quakersintheworld.org/quakers-in-action/282/Quakers-in-colonial-Pennsylvania.

[9] "The Holy Experiment, in Pennsylvania," *Quakers in the World*, accessed November 13, 2020, http://www.quakersintheworld.org/quakers-in-action/8.

[10] Daniel Baracskay, "Puritans," *The First Amendment Encyclopedia*, 2009, accessed November 13, 2020, https://www.mtsu.edu/first-amendment/article/1372/puritans.

[11] "Roger Williams, Rhode Island, and Birthplace of Religious Freedom," *George Washington Institute for Religious Freedom*, accessed November 13, 2020, https://www.gwirf.org/roger-williams-rhode-island-birthplace-of-religious-freedom/.

[12] Hugh Barbour et al., "Wars, Revolutions, and the Peace Testimony," *Quaker Crosscurrents: Three Hundred Years of Friends in the New York Yearly Meetings* (Syracuse, NY: Syracuse University Press, 1995).

[13] "The Constitution of New York: April 20, 1777," *The Avalon Project*, accessed November 13, 2020, https://avalon.law.yale.edu/18th_century/ny01.asp.

[14] Jerry L. Tarver, "Baptist preaching from Virginia jails, 1768–1778," *Southern Speech Journal* 30(2):139-148 (1964), accessed November 13, 2020, https://www.tandfonline.com/doi/abs/10.1080/10417946409371770?journalCode=rsjc18.

[15] Committee of the Virginia Assembly, "A Bill for Establishing Religious Freedom, 18 June 1779," *Founders Online*, accessed November 13, 2020, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082.

[16] "Virginia Ratifying Convention, Proposed Amendments to the Constitution," *The Founders' Constitution* 1 (chapter 14, document 43), June 27, 1788, accessed November 13, 2020, http://press-pubs.uchicago.edu/founders/documents/v1ch14s43.html.

[17] "Ratification of the Constitution by the State of New York; July 26, 1788," *The Avalon Project*, accessed November 13, 2020, https://avalon.law.yale.edu/18th_century/ratny.asp.

[18] "The Creation of the First Amendment," *Religion and the Founding of the United States*, accessed November 13, 2020, https://people.smu.edu/religionandfoundingusa/us-constitution-and-first-amendment/the-history-of-the-first-amendment/; "Resolution of the First Congress Submitting Twelve Amendments to the Constitution, March 4, 1789," Exploring Constitutional Law, accessed November 13, 2020, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/resolutions.htm.

[19] "United States Constitution 1789," *Constitute*, accessed November 13, 2020, https://www.constituteproject.org/constitution/United_States_of_America_1992#139.

[20] "George Washington and his Letter to the Jews of Newport," *Touro Synagogue National Historic Site*, accessed November 13, 2020, https://www.tourosynagogue.org/history-learning/gw-letter.

[21] "Virtual Jewish World: Rhode Island, United States," *Jewish Virtual Library*, accessed November 13, 2020, https://www.jewishvirtuallibrary.org/rhode-island-jewish-history.

[22] "Moses Seixas' Letter from Congregation Yeshuat Israel," *Touro Synagogue National Historic Site*, accessed November 13, 2020, https://www.tourosynagogue.org/history-learning/tsf-intro-menu/slom-scholarship/85-seixas-letter.

[23] "George Washington and his Letter," *Touro Synagogue National Historic Site.*

[24] Kenneth C. Davis, "America's True History of Religious Tolerance," *Smithsonian Magazine* (October 2010), accessed November 13, 2020, https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/.

[25] "Father Abraham [Lincoln] & the Children of Israel: Order No. 11," *Jewish Virtual Library*, accessed November 13, 2020, https://www.jewishvirtuallibrary.org/order-no-11-judaic-treasures.

[26] "Missouri State Archives: The Missouri Mormon War," *Missouri Digital Heritage*, accessed November 13, 2020, https://www.sos.mo.gov/archives/resources/mormon.asp.

[27] See image at https://www.sos.mo.gov/cmsimages/archives/resources/findingaids/miscMormRecs/eo/18381027_ExtermOrder.pdf.

[28] "August 12, 1834: Charlestown Convent Lies in Ruins," *Mass Moments*, accessed November 13, 2020, https://www.massmoments.org/moment-details/charlestown-convent-lies-in-ruins.html.

[29] Lorraine Boissoneault, "How the 19th-Century Know Nothing Party Reshaped American Politics," *Smithsonian Magazine* (January 26, 2017), accessed November 13, 2020, https://www.smithsonianmag.com/history/immigrants-conspiracies-and-secret-society-launched-american-nativism-180961915/.

[30] "Know Nothing Party," *Law Library - American Law and Legal Information*, accessed November 13, 2020, https://law.jrank.org/pages/8005/Know-Nothing-Party.html.

[31] Josh Zeitz, "When America Hated Catholics," *Politico Magazine* (September 23, 2015), accessed November 13, 2020, https://www.politico.com/magazine/story/2015/09/when-america-hated-catholics-213177.

[32] Ibid.

[33] Robert Bunting, "Pierce vs. Society of Sisters (1925)," *The Oregon Encyclopedia*, accessed November 13, 2020, https://www.oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925_/#.X49NV9BKjD6.

[34] Terry Golway, "To all Catholic candidates for president: Thank Al Smith," *America Magazine* (October 17, 2019), accessed November 13, 2020, https://www.americamagazine.org/politics-society/2019/10/17/all-catholic-candidates-president-thank-al-smith.

[35] "Jehovah's Witnesses," Wikipedia, accessed November 13, 2020, https://en.wikipedia.org/wiki/Jehovah%27s_Witnesses.

[36] Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*, (Lawrence, KS: University Press of Kansas, April 2000), https://kansaspress.ku.edu/978-0-7006-1182-9.html.

[37] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[38] Ibid., 606.

[39] Sarah Barringer Gordon, "What We Owe the Jehovah's Witnesses," *HistoryNet*, accessed November 13, 2020, https://www.historynet.com/what-we-owe-jehovahs-witnesses.htm.

[40] David L. Hudson, Jr., "Woman in Barnette Reflects on Flag Salute Case" Freedom Forum Institute (April 29, 2009), accessed Feb. 1, 2021, https://www.freedomforuminstitute.org/2009/04/29/woman-in-barnette-reflects-on-flag-salute-case/#:~:text=Posted%20on%20April%20 29%2C%202009%20by%20David%20L.&text=Barnette%20(1943)%2C%20in%20which,recite%20the%20Pledge%20of%20Allegiance.

[41] West Virginia State Board of Education v. Barnette, 319 US 624 (1943).

[42] Ibid., 642.

[43] Sherbert v. Verner, 374 US 398 (1963).

[44] James D. Gordon III, "Wisconsin v. Yoder and Religious Liberty," *Texas Law Review* 74:1237 (1996).

[45] James C. Foster, "Wisconsin v. Yoder (1972)," *The First Amendment Encyclopedia*, accessed November 13, 2020, https://www.mtsu.edu/first-amendment/article/676/wisconsin-v-yoder.

[46] Marc H. Pullman, "Wisconsin v Wisconsin v. Yoder: The Right to Be Different - First Amendment Exemption for Amish under the Free Exercise Clause," *DePaul Law Review* 22:539 (1973).

[47] Rev. William C. Lindholm, "U.S. Supreme Court Case: Is There Religious Freedom in America — for the Amish?," National Committee For Amish Religious Freedom, accessed November 13, 2020, https://www.amishreligiousfreedom.com/case.htm.

[48] Wolfgang Saxon, "William Ball Is Dead at 82; Defended Religious Rights" *New York Times*, January 18, 1999, accessed November 13, 2020, https://www.nytimes.com/1999/01/18/us/william-ball-is-dead-at-82-defended-religious-rights.html.

[49] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[50] Jordan Whitaker, "'Despite an honest motive,' Federal Judge reverses restrictions on Kentucky churches," *WYMT*, May 8, 2020, accessed November 13, 2020, https://www.wymt.com/content/news/Despite-an-honest-motive-Federal-Judge-reverses-restrictions-on-Kentucky-churches-570332821.html.

[51] *Wisconsin*, 406 US 205.

[52] *Sherbert*, 374 US 398.

[53] Employment Div. v. Smith, 494 US 872 (1990).

[54] Garrett Epps, "Elegy for a Hero of Religious Freedom," *The Atlantic* (December 9, 2014), accessed November 13, 2020, https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/.

[55] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[56] Public Law No: 103-141.

[57] City of Boerne v. Flores, 521 US 507 (1997).

[58] William C. Duncan, "Meet the nuns behind the Supreme Court case," *Sutherland Institute*, May 7, 2020, accessed November 13, 2020, https://sutherlandinstitute.org/meet-the-nuns-behind-the-supreme-court-case/.

[59] "American Foundations," *Little Sisters of the Poor*, accessed November 13, 2020, http://littlesistersofthepoor.org/american-foundations/.

[60] Lyman Stone, *Promise and Peril: The History of American Religiosity and Its Recent Decline* (Washington, DC: American Enterprise Institute, April 2020), https://www.aei.org/wp-content/uploads/2020/04/Promise-and-Peril.pdf.

[61] George Washington, "From George Washington to the Members of the New Jerusalem Church of Baltimore, 27 January 1793," *Founders Online*, accessed November 13, 2020, https://founders.archives.gov/documents/Washington/05-12-02-0027.

[62] Espinoza v. Department of Revenue, 140 S. Ct. 2246 (2020).

[63] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017).

[64] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

[65] Our Lady of Guadalupe School v. Agnes Morrissey-Berru, 140 S. Ct. 2049 (2020).

[66] High Plains Harvest Church v. Polis, No. 20A105 (2020).

[67] Calvary Chapel Dayton Hill v. Sisolak, No. 20-16169 (9th Cir. 2020).

[68] "Liability Under Section 1983," Orange County Department of Education (2003), https://ocde.us/LegalServices/Documents/LIABILITY_UNDER_SECTION_1983_wcopyright.pdf.

Founded in 1995, Sutherland Institute is a nonpartisan policy and educational institution – a think tank. Our mission is to advance principled public policy that promotes the values of faith, family and free markets. Our research informs the public and policymakers alike – true to the belief that this and every generation must recommit to the principles that make us free. Sutherland Institute does not seek or accept government funding.

When it comes to religion, modern America's legal and political culture is one of mixed signals and inconsistency. But in order to understand why – and therefore know better how to improve it – we must understand the American history that created it.

Sutherland Institute
15 West South Temple Street
Suite 200
Salt Lake City, UT 84101

Office – 801.355.1272
si@sifreedom.org
sutherlandinstitute.org