Judging Values: Public Confidence in the Federal Courts' Approach to Religion & Morality

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> *"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."*
> – THE FEDERALIST NO. 78 (Alexander Hamilton)

I. INTRODUCTION

Each American has his own story about when he learned of the COVID-19 pandemic. For many, that day was March 11, 2020.[1] The NBA suspended its season.[2] The World Health Organization declared COVID-19 a pandemic.[3] And President Trump announced a ban on travel from European countries.[4]

Few, however, comprehended in March 2020 that over the next few years we would experience perhaps "the greatest intrusions on civil liberties in the peacetime history of this country."[5] "Executive officials across the country issued emergency decrees on a breathtaking scale," "forcing people to remain in their homes" and "shutter[ing] businesses and schools, public and private."[6] These orders tore apart the fabric of communities and directly or indirectly led to the permanent loss of

1. *See* Laurel Wamsley, *March 11, 2020: The Day Everything Changed*, NPR (Mar. 11, 2021, 5:00 AM), https://www.npr.org/2021/03/11/975663437/march-11-2020-the-day-everything-changed ("[T]here was one day that marked the beginning of the new normal.").

2. *Id.*

3. *Id.*

4. *Id.*

5. Arizona v. Mayorkas, 143 S. Ct. 1312, 1314 (2023) (mem.) (statement of Gorsuch, J., concurring).

6. *Id.*

beloved businesses and gathering places.[7] As the Tennessee Attorney General Office's point person for responding to the Biden Administration's vaccine mandates, my desk was piled high with letters from Americans threatened with the loss of employment and begging someone, anyone, to listen to their cries for help.[8]

Still, what surprised me most about our Nation's response to the COVID-19 pandemic was the treatment of churches. For example, the District of Columbia prohibited congregations in our Nation's capital from gathering either indoors or outdoors while simultaneously "welcom[ing] mass protests to the city."[9] Even in the heartland of the country, government officials attempted to close churches. In the Commonwealth of Kentucky, state police officers acting under the direction of Governor Andy Beshear "surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct."[10]

7. *See, e.g.*, Stephanie Langston, *Businesses Face Uncertain Future as Arcade Undergoes Renovations*, WKRN (Aug. 22, 2023, 11:31 PM), https://www.wkrn.com/news/local-news/nashville/businesses-face-uncertain-future-as-arcade-undergoes-renovations (describing the closure of businesses, including Manny's House of Pizza, as the Nashville Arcade had become "a ghost town" during the pandemic); Becky Robertson, *Laser Quest Is Permanently Closing Down All North American Operations*, BLOGTO (Sept. 23, 2020), https://www.blogto.com/sports_play/2020/09/laser-quest-closing-down-north-america ("As much as we wanted to re-open, the COVID-19 pandemic and the resulting uncertain economic climate have made the continued operation of Laser Quest North America next to impossible."); Margaret Renkl, *The Bomb That Struck the Heart of Nashville*, N.Y. TIMES (Dec. 30, 2020), https://www.nytimes.com/2020/12/30/opinion/nashville-bombing-covid.html (describing the "alienation that reached its nadir this year during a pandemic," as Nashville ended the year with an individual blowing up part of downtown, including the by-then shuttered Laser Quest location, while blaring Petula Clark's song "Downtown" on loudspeakers).

8. *See also* Clark L. Hildabrand & Ross C. Hildabrand, *Who Decides? Depends on What the Federal Government Allows*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 2, at *5 (Spring 2022) (explaining further federal restrictions).

9. Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284, 289, 298 (D.D.C. 2020) (granting a church's motion for preliminary injunctive relief against the District of Columbia burdening the exercise of religion in that manner).

10. *Arizona*, 143 S. Ct. at 1314 (statement of Gorsuch, J.) (citing Roberts v. Neace, 958 F.3d 409, 412 (6th Cir. 2020) (per curiam)). Thankfully, Tennessee did not resort to such measures under Governor Lee's leadership.

These should have been "simple case[s]" for the judiciary to resolve, as many governments allowed secular businesses to engage in comparable activities prohibited for the religious.[11] Nevertheless, a disturbing number of federal judges struggled to understand the First Amendment's protection for "the free exercise" of religion—or perhaps could not find the courage to do so.[12]

The United States Supreme Court, for example, allowed the State of Nevada to limit every "church, synagogue, or mosque, regardless of its size," to no "more than 50 persons" while "casinos and certain other favored facilities" were allowed to "admit 50% of their maximum occupancy."[13] "[I]n the case of gigantic Las Vegas casinos, this means that thousands of patrons [we]re allowed" to gamble away their money while all churches remained limited to 50 congregants.[14] The U.S. Constitution does not "permit[] Nevada to favor Caesars Palace over Calvary Chapel," but the Supreme Court declined to protect the evangelical church that had sought to enforce its rights in federal court.[15] And nearly a year into the COVID-19 pandemic, the Supreme Court turned aside a Pentecostal church that challenged California's "categorical ban on singing during services."[16] While actors and actresses could sing "Blinding Lights" on Hollywood sets,[17] singing "I once was lost, but now am found, was blind, but now I see," was illegal for Christians worshipping in their own churches.[18]

In keeping with the theme of this Symposium, this Article explores the ripple effects of the federal courts on society through the lens of the Supreme Court's COVID-19 docket, with an emphasis on its decisions impacting religious liberty. As the cases described above

11. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting).

12. U.S. CONST. amend. I.

13. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

14. *Id.*

15. *Id.* at 2609 (Gorsuch, J., dissenting from denial of application for injunctive relief). After several more months of unconstitutional religious discrimination, the U.S. Court of Appeals for the Ninth Circuit finally granted the church relief; *see* Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020).

16. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (mem.) (statement of Gorsuch, J.)

17. *See id.* at 719–20 & n.2.

18. JOHN NEWTON, *Amazing Grace* (1779).

and below demonstrate, the federal courts have served as the focal point for many recent societal conflicts, with Americans sharply divided over the rectitude of the courts' decisions. The Article concludes that public confidence in the federal courts has been particularly impacted by (1) the decline of a widely shared set of moral and religious values despite heightened issue nationalization and citizen mobility, (2) the slow pace of litigation in a society accustomed to immediate action, and (3) the contraction of the Supreme Court's merits docket.

II. HISTORICAL CONCEPTION OF THE FEDERAL JUDICIARY AND RELIGIOUS LIBERTY

The Federal Judiciary's central role in resolving societal disputes would have come as a surprise to many Founders. The "least dangerous" branch of federal government originally operated within a broader consensus of societal values.[19] To be sure, different Christian denominations predominated in the thirteen original States, but they were generally orthodox and in agreement on most points of doctrine relevant to the organization of society. Thus, the Founders could resolve many disagreements with religious dissenters—including Baptists, Quakers, Roman Catholics, and even Deists—through political compromise. The Federal Constitution itself provided specific textual protections for religious liberty. Most notably for this Article, the quickly ratified Bill of Rights included the First Amendment with its protection against Congress passing laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[20] In the twentieth century, however, increased immigration, consolidation of power in the federal government, and the decline of orthodox Christianity's predominance coincided with the Federal Judiciary playing a larger role in regulating and altering societal values.

A. The Founders' Vision of the Judiciary

The classic story of the Federal Judiciary is the one Alexander Hamilton articulated in The Federalist No. 78, that the Judiciary would "always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure

19. THE FEDERALIST NO. 78 (Alexander Hamilton).

20. U.S. CONST. amend. I.

them."[21] The Judiciary would serve, nevertheless, as "an essential safeguard against the effects of occasional ill humors in the society."[22] For a while, this vision held true. Over time, however, the Anti-Federalists' alternative hypothesis about how the Judiciary would operate as a means of centralizing power and debasing States' authority in service to elite values appeared more prescient.

Start by considering the classic story. The Federalists—the Founding-era politicians who supported ratification of the Constitution—sought to assuage their fellow Americans' concerns about the proposed changes to the federal government. One feature that we take for granted but that gave many Founders pause was the nearly "complete independence of the courts of justice."[23] Federal judges, for example, would enjoy lifetime appointments to "their Offices during good Behaviour,"[24] subject to impeachment in limited circumstances.[25] And these unelected federal officials would exercise the awesome responsibility "to say what the law is."[26]

In contrast to the faith the proposed Constitution placed in such officials, distrust of judges appointed by a distant Executive was part of the national character. The 1689 English Bill of Rights began by complaining that "the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom."[27] The colonists echoed that concern in the Declaration of Independence when they complained about King George III making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," "depriving [the colonists] in many cases, of the benefits of Trial by

21. THE FEDERALIST NO. 78 (Alexander Hamilton).

22. *Id.*

23. *Id.*

24. U.S. CONST. art. III, § 1.

25. U.S. CONST. art. II, § 4.

26. Marbury v. Madison, 5 U.S. 137, 177 (1803); *cf.* Clark L. Hildabrand, *The Curiously Nonrandom Assignment of Sixth Circuit Senior Judges*, 108 KY. L. J. ONLINE 1, 1 (2019) ("On the one hand, these judges have an awesome responsibility to say what the law is. They enjoin presidential acts, strike down state laws, and divine the meaning of constitutional rights. On the other, our Constitution affords these legal elites life tenure, a length of service not granted either to legislators or the executive.").

27. Bill of Rights Act 1689, 1 W. & M., c. 2.

Jury," and "transporting [them] beyond Seas to be tried for pretended offences."[28]

Alexander Hamilton, who envisioned himself a leader of the strong nationalized government, set about to overcome those trepidations. Writing anonymously as one of Publius' authors, Hamilton argued that judicial "firmness and independence" were "peculiarly essential in a limited Constitution" that "contains certain specified exceptions to the legislative authority."[29] The proposed Constitution's skeptics rightly pointed out that "[i]n Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature."[30] Hamilton countered by contrasting Britain's unwritten constitution with the "certain specified exceptions to the legislative authority" included in our Federal Constitution.[31] To avoid members of Congress acting as "the constitutional judges of their own powers" and using that authority to justify straying outside "the limits assigned to their authority[,]" the Judiciary would need to serve as "an intermediate body between the people and the legislature."[32] Hamilton claimed, nevertheless, that the Judiciary would "always be the least dangerous to the political rights of the Constitution" because it would "have neither FORCE nor WILL, but merely judgment."[33]

Nor would States need to fear the loss of sovereignty in the federal suits against them. States enjoyed sovereign immunity.[34] Moreover, such cases were "of a nature rarely to occur" and, when they did occur, States could only be sued in the U.S. Supreme Court,[35] "the

28. THE DECLARATION OF INDEPENDENCE (U.S. 1776); *see also* Thomas Jefferson, Notes on Early Career (The So-called "Autobiography") (1821), https://founders.archives.gov/documents/Jefferson/03-17-02-0324-0002#X717505a9-b224-4681-bb46-514c23937c31 ("A judiciary dependent on the will of the king had proved itself the most oppressive of all tools in the hands of that magistrate.").

29. THE FEDERALIST NO. 78 (Alexander Hamilton).

30. THE FEDERALIST NO. 81 (Alexander Hamilton); *see* BRUTUS NO. 15 (Mar. 20, 1788) (making this criticism).

31. THE FEDERALIST NO. 78 (Alexander Hamilton).

32. *Id.*

33. *Id.*

34. THE FEDERALIST NO. 81 (Alexander Hamilton).

35. *Id.*; *see* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction.").

highest judicatory of the nation."[36] Sovereign States would not suffer the indignity of being "turned over to an inferior tribunal."[37] Such was the story that Hamilton told the Nation.

The Anti-Federalists did not believe Hamilton's rosy vision of the Federal Judiciary's future. Consider the gloomier forecast offered by Brutus, the pseudonymous Anti-Federalist "who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention."[38] Brutus warned that making the Federal Judiciary "totally independent, both of the people and the legislature," was "a situation altogether unprecedented in a free country."[39] Such independence would "operate to effect, in the most certain, but yet silent and imperceptible manner . . . an entire subversion of the legislative, executive and judicial powers of the individual states."[40] The Federal Judiciary would inevitably "favour an extension of its jurisdiction" and thus would "lean strongly in favour of the general government."[41] Individuals desiring to curb the authority of States would quickly realize this and file their suits in federal court, which the Anti-Federalists found "humiliating and degrading to a government."[42]

Brutus was further concerned about the geographic implications of a judiciary with a nationwide scope of powers. The Supreme Court would presumably hold its sessions "at the seat of the general government . . . many hundred miles" away from citizens and States forced to litigate there.[43] This Supreme Court, "exalted above all other power in the government," would favor of "demands of the rich and the lordly" who could afford to litigate nationwide.[44] True, inferior courts spread throughout the country might mitigate some of the harm. But

36. THE FEDERALIST NO. 81 (Alexander Hamilton).

37. *Id.*

38. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 n.6 (1995). If then soon-to-be-Justice Yates was Brutus, that adds a barb to the comment in Brutus No. 11 that understanding the powers of the federal judiciary requires "a degree of law knowledge far beyond what I pretend to." BRUTUS NO. 11 (Jan. 31, 1788).

39. BRUTUS NO. 11 (Jan. 31, 1788).

40. *Id.*

41. *Id.*

42. BRUTUS NO. 13 (Feb. 21, 1788).

43. BRUTUS NO. 14 PT. 2 (Mar. 6, 1788).

44. *Id.*

"there is no security that a trial by jury shall be had in these courts," and "an appeal may be had to the supreme court on the whole merits."[45] Ironically, "the administration of justice under the powers of" such a Federal Judiciary might become even more "dilatory" and cause "such an heavy expence as to amount to little short of a denial of justice to the poor and middling class of people who in every government stand most in need of the protection of the law."[46] Geographically isolated from most of the Nation and virtually immune from reprisals by Congress, the President, or the States, "[m]en placed in th[e] situation" of serving on the Supreme Court would "generally soon feel themselves independent of heaven itself."[47]

The early days of the Republic suggested that the Anti-Federalists' concerns were overblown. Naturally, the Federal Judiciary favored the expansion of its jurisdiction and the powers of the federal government as a whole. In *Chisholm v. Georgia*—the U.S. Supreme Court's first major case—the Court held that the U.S. Constitution grants federal courts jurisdiction when a State is sued by a citizen of a different State.[48] But the people quickly checked the Supreme Court's decision: Congress proposed, and the States ratified the Eleventh Amendment to reassert the States' sovereign immunity from suit.[49] The Supreme Court was not immune to correction.

The lack of policymaking power and "burdensome circuit-riding duties" made service as a Supreme Court Justice an unpleasant role.[50] Shortly after the Eleventh Amendment's ratification in 1795, Chief Justice John Jay, the author of some of *The Federalist Papers* and a member of the *Chisholm* majority,[51] retired from the Supreme Court to become Governor of New York.[52] The second Chief Justice,

45. *Id.*

46. *Id.*

47. BRUTUS NO. 15 (Mar. 20, 1788).

48. 2 U.S. 419, 431 (1793).

49. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

50. Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1392 (2006).

51. *See Chisholm*, 2 U.S. at 469 (Jay, C.J.).

52. *See* Wexler, *supra* note 50, at 1383.

the recess-appointed Chief Justice Rutledge, had earlier resigned from service as an Associate Justice of the U.S. Supreme Court to serve as a state court judge in South Carolina.[53] The Senate then forced Chief Justice Rutledge to resign by rejecting his nomination.[54] The Supreme Court truly seemed the least dangerous branch.

B. Political Resolution of Religious Conflict in the Young Nation

In the early days of the Republic, religious conflicts were resolved by the political branches of the federal government and by the States, not by the Federal Judiciary. While "the past and the present are always more complex than" we are "inclined to claim or believe,"[55] in broad strokes the Founding era was a time of consensus, or at least acceptance, regarding the most important truths for organizing society. John Jay, writing as Publius, described America in terms foreign to modern discourse: "one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs."[56] In his farewell address, President George Washington agreed that, "[w]ith slight shades of difference," Americans "have the same Religion, Manners, Habits, and political Principles."[57] Many prominent Founders viewed those shared religious beliefs as an essential part of the constitutional order. For example, then-President John Adams wrote in 1798 that "Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."[58]

That shared religion was Christianity. While the colonies remained part of the British Empire, "the Church of England was formally established by law in the five southern colonies (Maryland

53. *Id.* at 1384–85.

54. *Id.* at 1385–86.

55. DAVID CANNADINE, THE DECLINE & FALL OF THE BRITISH ARISTOCRACY, *Preface to the Vintage Edition* xx (1999).

56. THE FEDERALIST NO. 2 (John Jay).

57. George Washington, Farewell Address (Sept. 19, 1796), *available at* https://founders.archives.gov/documents/Washington/05-20-02-0440-0002.

58. Letter from John Adams to Massachusetts Militia (Oct. 11, 1798), *available at* https://founders.archives.gov/documents/Adams/99-02-02-3102.

through Georgia)."[59] The colonies of Massachusetts, Connecticut, and New Hampshire mandated Congregationalism, which effectively meant Calvinism was the official religion in most towns.[60] From "the end of the Revolutionary fighting and continuing through the early republic (1780s–1830s)," the Nation experienced "a remarkable Protestant expansion."[61] During this period, the nature of Protestantism shifted from traditional "Congregational and Anglican/Episcopal" dominance toward the evangelical Methodists, Baptists, and Presbyterians.[62] Still, Connecticut did not disestablish its Congregationalist churches until 1818, and Massachusetts took until 1833 to do the same.[63] "New Hampshire enacted a toleration act in 1819, but authorization for towns to support Protestant ministers remained on the books, unenforced, for the rest of the century."[64] In some States, blasphemy against the Christian religion remained a prosecutable offense well into the nineteenth century.[65]

59. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003). Although we often now remember Maryland as a tolerant colony founded by the Roman Catholic Lord Baltimore, Protestants overthrew the Catholic government, and "Maryland became one of the most intolerant and anti-Catholic of the colonies." *Id.* at 2128–29.

60. *Id.* at 2110.

61. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1454 (2004).

62. *Id.* at 1385.

63. McConnell, *supra* note 59, at 2126.

64. *Id.*

65. *See, e.g.*, People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811) (providing case law to support the charge of blasphemy in New York); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838). As should be obvious, the author cites these examples *not* to advocate their emulation in modern times but simply to describe the religious situation as it existed at the time of the Founding. These prosecutions, while unimaginable in modern times, received the imprimatur of state supreme courts and, as shown by the authors of the majority opinions in *Ruggles* and *Kneeland*, some of the most prominent jurists of the era. Many Protestant denominations expressly oppose these Founding era practices. *E.g.*, SOUTHERN BAPTIST CONVENTION THE BAPTIST FAITH & MESSAGE 18 (June 14, 2023), *available at* https://bfm.sbc.net/wp-content/uploads/2024/08/BFM2000.pdf (opposing government favoring particular "ecclesiastical group[s] or denomination[s] . . . more than others," "impos[ing] penalties for religious opinions of any kind," or "impos[ing] taxes for the support of any form of religion").

The predominance of the Protestant faith during the Founding era, however, should not cause us to overlook the contributions of non-Christians or their impact on debates regarding religious liberty. Most prominently, Thomas Jefferson professed to be "of a sect by myself" and enjoyed editing the Bible to fit his unorthodox beliefs, which likely fell somewhere between Deism and Unitarianism.[66] The primary author of *The Declaration of Independence* and our third president was neither a Christian Nationalist, nor an Orthodox Christian.

Nevertheless, Thomas Jefferson himself questioned whether "the liberties of a nation [can] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God."[67] After all, the conviction that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights"[68] is the same conviction that led to the creation of our Nation. The Federal Constitution did not shunt religious beliefs out of the public square; President Thomas Jefferson even attended church services in the U.S. Capitol, as Congress had approved.[69]

The compromise that the Founders settled on was a federalist one: the Establishment Clause prohibited "Congress' imposition of a uniform national church,"[70] while the Constitution and its Bill of Rights

66. Letter from Thomas Jefferson to Ezra Stiles Ely (June 25, 1819), *available at* https://founders.archives.gov/documents/Jefferson/03-14-02-0428 (on file with National Archive).

67. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XVIII(1787 ed., The Avalon Project 2008), https://avalon.law.yale.edu/18th_century/jeffvir.asp (opining on the immoral institution of slavery in Virginia).

68. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

69. *See* Jeffery J. Ventrella, *What's God Got to Do with It??!! The Prima Facie Propriety of Public Religious Expression*, 23 T.M. COOLEY L. REV. 77, 91 n.106 (2006). For the benefit of lay readers, the author does not necessarily agree with all claims in cited works. Indeed, one could easily find points of disagreement between authors and works cited in this Article.

70. David E. Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 290 (2013); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) ("Quite simply, the Establishment Clause is best understood as a federalism provision."). Whether the incorporation of the First Amendment against the States changes this understanding of the Establishment Clause, *see infra* notes 105–08– and accompanying text, is a separate question that this Article does not opine on.

provided express protections for religious liberties and limited the power of Congress to enumerated subjects. This solution gave space for even further political settlements in the different States. Perhaps the most famous example was Thomas Jefferson's Bill for Establishing Religious Freedom, which disestablished the Anglican church in the Commonwealth of Virginia and provided state law protections for religious liberty.[71] As is common in our federalist system of imperfect solutions, not every State approached religious liberty the same way.[72] The Constitution of Tennessee, for example, nominally continues to prohibit any "person who denies the being of God, or a future state of rewards and punishments" from "hold[ing] any office in the civil department of" the State.[73]

Meanwhile, the U.S. Constitution and the soon-enacted Bill of Rights provided baseline protections for nationwide religious minorities. Article VI, clause 3 of the U.S. Constitution requires members of Congress, "the members of the several State Legislatures, and all executive and judicial Officers" to "be bound by Oath or Affirmation, to support" that Constitution.[74] By allowing either an oath *or* an affirmation, the Constitution enabled Quakers, Moravians, Mennonites, various Baptists, and members of other minority religious groups to at least serve in the federal government.[75] For those believers, swearing an oath would have run afoul of the Sermon on the Mount's commandment to "[s]wear not at all."[76] Further, the Constitution commands that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[77]

71. *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 11–13 (1947).

72. McConnell, *supra* note 59, at 2179 ("At the state level, religious tests for office were ubiquitous, outside of Virginia.").

73. TENN. CONST. art. IX, § 2.

74. U.S. CONST. art. VI, cl. 3.

75. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 582–83 (2021) (Alito, J., concurring in the judgment); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 744 (Scalia, J., dissenting).

76. Matthew 5:34 (King James).

77. U.S. CONST. art. VI, cl. 3.

Placating the Anti-Federalists,[78] the First Amendment prohibited Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof."[79] Other constitutional provisions protected the rights of religious minorities. The Second Amendment, for instance, protects "the right of the people to keep and bear Arms."[80] That protection was important for "disfavored religious groups," such as Quakers and Roman Catholics, who faced disarmament in the British colonies during times of war.[81] The text of the Bill of Rights thus provides additional protections against, in Alexander Hamilton's words, the "occasional ill humors in the society" that threaten "the rights of individuals" and "occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."[82]

In the generations after the Founding, the Federal Judiciary took a light touch regarding issues of religion. Consider two episodes from the career of Justice Joseph Story, who served on the Supreme Court from 1812 until 1845 and who authored *Commentaries on the Constitution of the United States* that are frequently cited as "historical evidence from the postratification period."[83] On the one hand, Justice Story respected Christianity's predominant role in society. Presiding over a federal trial as a Circuit Justice, he had no qualms applying the traditional common law rule to exclude the testimony of Universalists who believed neither in God nor in a future state of punishments and rewards, "which rendered them unable to swear an oath."[84] Justice Story did not feel compelled to abandon the common law rule that

78. *Cf.* Steinberg, *supra* note 70, at 290 ("The need to prohibit federal interference in state religious regulation–and particularly the need to prevent federal institution of a national religion–was perhaps the most common theme in anti-federalist opposition to the Constitution.").

79. U.S. CONST. amend. I.

80. U.S. CONST. amend. II.

81. United States v. Rahimi, 602 U.S. 680, 694 (2024) ("By the time of the founding, however, state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic.").

82. THE FEDERALIST NO. 78 (Alexander Hamilton).

83. Bond v. United States, 572 U.S. 844, 891 (2014) (Thomas, J., concurring).

84. Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 ROGER WILLIAMS U. L. REV. 430, 450 (2021) (citing Wakefield v. Ross, 28 F. Cas. 1346, 1347 n.2 (Cir. R.I. 1827)).

allowed Christians, Deists, and almost all religious adherents in the land to serve as jurors. On the other hand, in a case challenging the lawfulness of a bequest to establish a college that excluded from its faculty all "ecclesiastics, missionaries, and ministers of any sect," Justice Story reconciled the request with the fact that the "Christian religion [wa]s a part of the common law of Pennsylvania."[85] Justice Story did so by reading the restriction merely as a "desire[] to exclude sectarians and sectarianism from the college," not Christianity as a whole.[86]

For Justice Story, as he explained at a speech at Harvard, the unifying theme was that Christianity was a necessary precondition for civil society—justifying its preeminence in the common law, as Justice Story understood it—but that the common law went too far in "tolerat[ing] nothing but Christianity, as taught by its own established church."[87] The Constitution provided a degree of toleration while protecting the States' ability to navigate those sectarian conflicts among Christian denominations and, if desired, to expand religious liberties.

C. The Federal Government Imposes New Values

The consensus did not last. Indeed, the concept of America as a principally Protestant nation is now so foreign to us that a supermajority of the U.S. Supreme Court is Roman Catholic. The States' approach to religion in the Founding era would, in many instances, clash with modern jurisprudence. This shift in the law occurred as part of a nationalization of rights via the Fourteenth Amendment and found justification in legal realism. Federal precedent regarding religion is not, however, agnostic regarding values. Starting in the twentieth century, the Federal Judiciary took a leading role in privileging what it viewed as secular values over maintenance of

85. Vidal v. Philadelphia, 43 U.S. 127, 197–98 (1844).

86. *Id.* at 200.

87. Joseph Story, Value and Importance of Legal Study, *in* MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 517 (William W. Story ed., 1852); *see also* Green, *supra* note 84, at 494 (describing these episodes from Justice Story's life and career). To repeat the earlier warning, the author does not necessarily agree with all claims in cited works, and the authors of cited works disagree with each other on various points. *Compare* Green, *supra* note 84, *with* Ventrella, *supra* note 69.

common religious traditions or even, in some instances, over the religious freedom of Christians who represented a declining majority.

Whatever faults may be ascribed to the Founders, their concept of human law was that it "serves the natural law and seeks the common good."[88] As William Blackstone and others have explained, the natural law "signifies those 'certain immutable laws of human nature' laid down by the Creator to regulate and restrain free will."[89] God gave us "the faculty of reason to discover the purport of those laws."[90] Of course, interpreting the positive laws enacted by men required the use of well-accepted tools such as originalism and textualism.[91] Founding-era judges thus sought to identify and "judge by neutral principles."[92] Unless the text of the Constitution clearly recognized rights that could be applied in a neutral manner, the Federal Judiciary stayed out of disputes regarding religion.[93]

The legal realists of the late nineteenth and early twentieth centuries rejected that approach.[94] Starting with Oliver Wendell

88. Paul B. Matey, *"Indispensably Obligatory": Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967, 975 (2023).

89. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES at *40).

90. 1 WILLIAM BLACKSTONE, COMMENTARIES at *40; *cf.* Romans 2:14–15 ("For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the mean while accusing or else excusing one another.") (King James).

91. *See, e.g.*, Matey, *supra* note 88, at 975–80, 976 n.35.

92. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

93. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162–67 (1879) (upholding convictions for bigamy in the federal Territory of Utah).

94. As one example, Justices Oliver Wendell Holmes, Jr., and Louis Brandeis dissented from Supreme Court decisions upholding convictions of communist and anarchist agitators from Russia who threatened "armed rebellion" against the Federal Government. Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). Justice Holmes complained that such criminal laws were a mere power play: "[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Id.* at 630. Instead, Justice Holmes preferred "the competition of the market" of ideas, *id.*, a concept that reflected the Justice's Social Darwinism. *See also* Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.) (infamously using Social Darwinism to justify

Holmes, Jr., legal theorists increasingly began to reject the idea that law "is a deduction from principles of ethics or admitted axioms."[95] These legal realists viewed law as a constantly shifting "means to social ends," as determined by judges.[96] Karl Llewellyn and others set about to deconstruct or delegitimize tools of neutral interpretation, such as canons of statutory interpretation.[97] This new legal project was thus philosophically opposed to "the Anglo-American legal tradition," which had "long interpreted laws based on word meaning, grammatical rules, and interpretive rules."[98]

During the same period legal realism was born in the legal academy, America experienced a surge of immigration from regions other than Protestant Northern Europe. From the 1890s to the 1920s, the foreign-born accounted for about 14% of our Nation's population, a percentage not matched again until the Obama Administration.[99] Meanwhile, new religious groups such as the Jehovah's Witnesses spread throughout the country.[100]

The Supreme Court, meanwhile, began to develop its substantive due process jurisprudence and eventually incorporated the Bill of Rights against the States through the Fourteenth Amendment. Inculcated with the anti-German sentiment of World War I, midwestern

the sterilization of the "feeble-minded" on the grounds that "[t]hree generations of imbeciles are enough").

95. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

96. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

97. *E.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (describing a conventional vocabulary that had been accepted by Courts).

98. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. UNIV. L. REV. 751, 760 (2009).

99. HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF11806, CITIZENSHIP AND IMMIGRATION STATUSES OF THE U.S. FOREIGN-BORN POPULATION (Sept. 17, 2024), https://crsreports.congress.gov/product/pdf/IF/IF11806.

100. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 137, 168 (2018) ("The Witnesses' objection to the flag salute, their zeal in spreading their faith, their willingness to do so in the most hostile environments, and their omnipresent distribution of pamphlets laid the groundwork for much of what we now take for granted as first premises of federal and state free speech and free exercise law.").

States including Nebraska, Iowa, and Ohio attempted to require English as the language of instruction until around the eighth grade.[101] The state legislatures desired "to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters."[102] This requirement, which made no exception for private or parochial schools, fell hardest on Roman Catholic and Lutheran immigrants from Germany.[103] The U.S. Supreme Court intervened in their defense. Adopting the logic of substantive due process, the Supreme Court concluded that the States could not justify "infringement of rights long freely enjoyed," such as the right "of the parent to give his children education suitable to their station in life."[104] Two years later, the Supreme Court similarly declared unconstitutional state laws requiring parents to send their children to public school.[105] These laws had as their primary target private religious schooling, such as parochial schools that might engage in "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church."[106]

The Supreme Court then shifted from substantive due process to full-on incorporation of the First Amendment against the States. In *Cantwell v. Connecticut*, a group of Jehovah's Witnesses were convicted of breaching the peace after they canvassed "a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics" and played a phonograph record that "included

101. *See* Meyer v. Nebraska, 262 U.S. 390, 397–98 (1923); Bartels v. Iowa, 262 U.S. 404, 409–11 (1923).

102. Meyer, 262 U.S. at 402.

103. As early instruction in the classical languages was common even in the Anglo-American tradition of education, the States limited the language proscriptions to modern languages other than English. *Cf. id.* at 400–01; *see also* L.G. KELLY, 25 CENTURIES OF LANGUAGE TEACHING 370 (1976) ("In the Protestant world, Greek and Hebrew were needed for Biblical scholarship and Latin was necessary for the study of basic documents from the Reformation period."); John Adams, Letter to John Quincy Adams (May 18, 1781), https://founders.archives.gov/documents/Adams/04-04-02-0082 ("You go on, I presume, with your latin Exercises . . . . In Company with Sallust, Cicero, Tacitus and Livy, you will learn Wisdom and Virtue.").

104. *Meyer*, 262 U.S. at 400, 403.

105. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925).

106. *Id.* at 532.

an attack on the Catholic religion."[107] The Supreme Court responded by incorporating the First Amendment's Free Exercise Clause against the States: "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[108] After World War II, the Supreme Court incorporated the Establishment Clause as well but ruled that States such as New Jersey could fund transportation to parochial Roman Catholic schools, just as the States could fund transportation to public schools.[109]

During the same decade, the Supreme Court reinterpreted the First Amendment to dramatically expand the rights of individuals and minority belief groups. No pair of cases demonstrates this shift as much as *Minersville School District v. Gobitis*[110] and *West Virginia State Board of Education v. Barnette*.[111] In *Gobitis*, Jehovah's Witnesses sought to protect their children from Pennsylvania public schools requiring them to pledge allegiance to the American flag.[112] The Supreme Court declined to help them. To do so, in the Court's judgment, would have required turning itself into "the school board for the country."[113] According to *Gobitis*, the political branches are the appropriate "arena for debating issues of educational policy" and "choos[ing] among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances."[114] Allowing private or home schools was enough for the Supreme Court in 1940.[115]

Barnette squarely rejected this reasoning just three years later. When a school board in West Virginia "adopted a resolution containing

107. 310 U.S. 296, 300–03 (1940).

108. *Id.* at 303.

109. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947). The Supreme Court has repeatedly confirmed that the Free Exercise Clause prohibits governments from disqualifying "otherwise eligible recipients . . . from a public benefit solely because of their religious character." Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017).

110. 310 U.S. 586 (1940).

111. 319 U.S. 624 (1943).

112. 310 U.S. at 591–92.

113. *Id.* at 598.

114. *Id.*

115. *Id.* at 598–99.

recitals taken largely from the Court's *Gobitis* opinion and ordering" teachers and pupils to salute the American flag, Jehovah's Witnesses sued again.[116] This time, the Jehovah's Witnesses prevailed.[117] In overruling itself, the Supreme Court acknowledged that it was shifting values away from what President Abraham Lincoln and the *Gobitis* Court viewed as the "strength" of unity for the Nation "to maintain itself" via proactive patriotism—which the *Barnette* Court disparaged as "oversimplification"—and toward heterogeneity enforced via "faithful[ness]" in "the ideal of secular instruction and political neutrality."[118] Justice Felix Frankfurter, who ironically noted that he was a member of "the most vilified and persecuted minority in history,"[119] disagreed in dissent: "[o]nly a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit."[120]

The Supreme Court's deconstruction of those habits continued. Mere "invocation of God's blessings" in a classroom became unconstitutional.[121] So did clergy-led "nonsectarian prayer" at high school graduations[122] and "student-led, student-initiated prayer at football games."[123] Reading the Bible in the classroom also became unconstitutional unless somehow "presented objectively as part of a secular program of education."[124]

Such a jurisprudential shift was not neutral: religious instruction was subordinated to non-religious value structures. Religious beliefs could be criticized through a secular lens, but not the other way around. The Supreme Court's decisions thus exuded a cultural message that religion was unimportant or an inferior source of truth and meaning. Students could protest the Vietnam War in the

116. *Barnette*, 319 U.S. at 626–29.

117. *Id.* at 642.

118. *Id.* at 636, 637.

119. *Id.* at 646 (Frankfurter, J., dissenting). Justice Frankfurter was Jewish.

120. *Id.* at 671.

121. Engel v. Vitale, 370 U.S. 421, 424 (1962).

122. Lee v. Weisman, 505 U.S. 577, 589 (1992).

123. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (citation omitted).

124. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

classroom but could not lead prayers to God for the safety of family members or former classmates serving in the military.[125]

Congress—the entity the Founders sought to regulate through the First Amendment—furthered the Supreme Court's doctrinal innovation by using the power of the purse and the heavy-hand of anti-discrimination laws to coerce private and public organizations to compromise their beliefs and longstanding practices. If a Christian liberal arts school in rural Pennsylvania would not assure compliance with Title IX, even when there was no evidence of any sex discrimination, then it would lose federal funding.[126] As Grove City College feared, assuring compliance would eventually come to mean giving newfangled agencies such as the U.S. "Department of Education a regulatory blank check, so to speak,"[127] as the agencies occasionally attempted to reinterpret or, effectively, to rewrite Title IX to suit shifting societal and political demands.[128] In many respects, the U.S. Supreme Court and federal bureaucrats took the place of state legislatures, state educational officials, and local school boards in funding and directing the operations of educational institutions.

III. THE ROBERTS COURT AND COVID-19

Despite concern in some corners that the modern-day Roberts Court would reinvent religious liberty jurisprudence, the Supreme

125. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (highlighting an example of students' limitations at schools).

126. *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984) (holding that Grove City College's acceptance of Basic Educational Opportunity Grants from individual students constituted federal financial assistance, and failure to comply with Title IX regulations warranted the termination of federal assistance to the student financial aid program). Grove City College's decision to decline federal funding required "enormous determination and sacrifice." *Forty years ago, Supreme Court case changed GCC forever*, GROVE CITY COLL. (Feb. 26, 2024), https://www.gcc.edu/Home/News-Archive/News-Article/forty-years-ago-supreme-court-case-changed-gcc-forever (quoting college President Paul J. McNulty).

127. GROVE CITY COLL., *supra* note 126 (quoting college President Paul J. McNulty).

128. *See, e.g.*, Tennessee v. Dep't of Educ., 104 F.4th 577 (6th Cir. 2024) (ruling that the U.S. Department of Education unlawfully attempted to rewrite federal anti-discrimination laws regarding sex discrimination, with billions of dollars in federal funding hanging in the balance).

Court has generally declined to do so. To be sure, the Supreme Court has issued many high-profile decisions regarding religious conflicts. But the Court has resolved those cases more with compromise than with doctrinal innovation or, as many on the left feared because of the appointment of several Roman Catholic Justices, a return to the Founders' belief in Christianity as America's civil religion.[129] The COVID-19 pandemic put the Supreme Court's religious liberty jurisprudence to the test. Amid the direst abridgement of religious liberties "in the peacetime history of this country,"[130] the Court did little more than requiring government officials to treat religious exercise no worse than secular activities. In several cases, the Supreme Court even declined to protect what Founders would have understood as essential to Protestant worship in the Founding era.

A. Before the Pandemic

The Roberts Court's decisions in religious liberty appeals granted before the beginning of the COVID-19 pandemic tended more toward minimalism than toward revival of old doctrines. True, the Roberts Court has not merely deferred to past precedent. In the Establishment Clause context, for example, *Town of Greece v. Galloway*[131] abrogated *County of Allegheny v. American Civil Liberties Union*[132] by allowing town boards to open with "nonsectarian" prayer, at least as long as such prayers emphasized "shared ideals and common ends."[133] But the Court continues to apply school prayer precedents

129. This Article does not opine one way or the other on whether such a change in constitutional interpretation is appropriate. In any case, federal officials and inferior judges in the federal judiciary would be bound to respect the Supreme Court's precedents. *Cf.* Clark L. Hildabrand & Ross C. Hildabrand, *supra* note 8, at *5 ("[N]either we nor the States get to decide; only the U.S. Supreme Court gets a choice.").

130. Arizona v. Mayorkas, 143 S.Ct. 1312, 1314 (2023) (mem.) (statement of Gorsuch, J., concurring).

131. 572 U.S. 565 (2014).

132. 492 U.S. 573 (1989).

133. *Galloway*, 572 U.S. at 582–83.

such as in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*.[134]

Meanwhile, the Affordable Care Act provided the Roberts Court with one of its first major religious liberty cases. In *Burwell v. Hobby Lobby Stores, Inc.*, Mennonite and evangelical Christian-owned closely held companies challenged the Affordable Care Act's requirement to provide health insurance coverage for contraceptives "that they consider to be abortifacients."[135] The Supreme Court narrowly ruled that the "contraceptive mandate, as applied to closely held corporations, violates" the Religious Freedom Restoration Act because it was not the least restrictive means of furthering the federal government's interests.[136] Ruling only on that statutory religious liberty basis, the Court avoided "reach[ing] the First Amendment claim" under the Free Exercise Clause.[137] Justice Anthony Kennedy, who provided a fifth vote for the Court's opinion, hedged in his concurrence.[138] He agreed with Justice Kagan's *Galloway* dissent that the "American community is today, as it long has been, a rich mosaic of religious faiths,"[139] and pondered whether "the instant cases" might be distinguished were it "more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise."[140]

Burwell is not the only case in which the Supreme Court has been reluctant to tread new Free Exercise ground.[141] For over a decade, the Colorado Civil Rights Commission attempted to punish Jack Phillips, a baker who refused to create custom cakes for weddings when "participating in [such] a celebration" would be "contrary to his own

134. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 541–42 (2022) (positively citing Lee v. Weisman, 505 U.S. 577 (1992) and Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) as relevant precedents).

135. 573 U.S. 682, 701 (2014).

136. *Id.* at 728, 736.

137. *Id.* at 736.

138. *See id.* at 736–39 (Kennedy, J., concurring).

139. *Id.* at 739 (quoting Town of Greece v. Galloway, 572 U.S. 565, 628 (2014) (Kagan, J., dissenting)).

140. *Id.*

141. *Id.*

most deeply held beliefs."[142] When one of the baker's cases eventually arrived at the Supreme Court, the Court resolved it on narrow grounds. Emphasizing over the top rhetoric by the Colorado commissioners, one of whom "even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust,"[143] the Supreme Court dodged the fundamental question of whether the baker's "free exercise of his religion must yield to" an antidiscrimination law.[144] After years of additional litigation, the Colorado Civil Rights Commission eventually settled with the baker, who continues to defend himself against individuals who want to punish him for living according to his religious beliefs.[145] The Supreme Court, exercising its power to pick the cases it hears and choose the issues it considers, has instead preferred to resolve related cases under the First Amendment's Free Speech Clause with fact patterns somewhat less applicable to everyday businesses.[146]

In choosing its cases, however, the Supreme Court has selected several that have allowed it to extend *Everson*'s principle that governments cannot exclude the religious, "*because of their faith* . . . from receiving the benefits of public welfare legislation."[147] In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court ruled that Missouri could not exclude a Lutheran preschool and daycare center from a grant system for resurfacing playgrounds.[148] Later, in *Espinoza v. Montana Department of Revenue*, the Supreme Court held that the Montana Supreme Court erred in invalidating a scholarship program that funded both religious and nonreligious schools.[149] The Supreme Court noted that state laws "prohibiting States from aiding 'sectarian'

142. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 625–26 (2018).

143. *Id.* at 635. *But see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (comparing West Virginia public schools requiring students to pledge allegiance to the American flag to "the fast failing efforts of our present totalitarian enemies" in World War II).

144. *Masterpiece Cakeshop*, 584 U.S. at 625.

145. *See* Masterpiece Cakeshop, Inc. v. Scardina, 556 P.3d 1238 (Colo. 2024).

146. *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding that a Colorado statute violated the First Amendment because it required a wedding website designer to endorse homosexual marriage).

147. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947).

148. 582 U.S. 449, 453, 466 (2017).

149. 591 U.S. 464 (2020).

schools" generally had their origin in the failed Blaine Amendment of the 1870s and in the accompanying anti-Roman Catholic bigotry.[150]

While religious tension in the nineteenth century focused more on conflict between Protestants and Roman Catholics, religious tension today is more between those who make faith a central focus of their life and those who do not. Justice Barrett's biography is illustrative. During Barrett's confirmation hearing for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, Senator Dianne Feinstein remarked to the Notre Dame law professor that "[t]he dogma lives loudly within you, and that's of concern when you come to big issues that people have fought for for years in this country."[151] Rather than sinking Barrett's nomination to the lower court, however, it propelled her onto shortlists for the highest court.[152] In addition to the Roman Catholic Justice Sonia Sotomayor, every Republican Supreme Court appointee is either a practicing Roman Catholic or grew up in that faith.[153]

Several of the cases the Supreme Court granted for review in the years preceding the COVID-19 pandemic protected the religious liberties of Roman Catholics and other religious groups. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court extended the First Amendment's "ministerial exception" to teachers at Roman Catholic schools who, unlike earlier cases, "were not given the title of 'minister' and have less religious training."[154] "The religious education and

150. *Id.* at 482; *see also id.* at 497–507 (Alito, J., concurring) (explaining history of the Blaine Amendment and similar legislation).

151. Eliana Johnson, *How Amy Coney Barrett vaulted onto Trump's Supreme Court shortlist*, POLITICO (July 3, 2018, 12:53 AM), https://www.politico.com/story/2018/07/02/justice-barrett-amy-coney-feinstein-692199.

152. *See, e.g.*, *id.*; Clark L. Hildabrand, *Here's Which People On Trump's List Are Most Likely To Replace Anthony Kennedy*, THE FEDERALIST (June 29, 2018), https://thefederalist.com/2018/06/29/heres-people-trumps-list-likely-replace-kennedy (speculating who Trump would nominate to replace Justice Anthony Kennedy on the Supreme Court).

153. Justice Gorsuch was raised Roman Catholic and graduated from the same Jesuit college-preparatory school as Justice Kavanaugh. However, Justice Gorsuch nowadays attends services with his Anglican wife, so his religious allegiances are less clear. *Cf.* Daniel Burke, *What Is Neil Gorsuch's Religion? It's Complicated*, CNN (updated Mar. 22, 2017), https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html.

154. 591 U.S. 732, 737, 738 (2020).

formation of students is the very reason for the existence of most private religious schools," so the Court refused to split hairs or interfere with "the selection and supervision of the teachers upon whom the schools rely to do this work."[155] In *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, the Supreme Court granted certiorari to weigh in on a jurisdictional removal dispute that normally would not merit the Court's attention.[156] And in *American Legion v. American Humanist Ass'n*, the Supreme Court protected "a 32-foot tall Latin cross that sits on a large pedestal" in a Maryland suburb where many Roman Catholics live and commute to Washington, D.C.[157] At this war memorial's dedication ceremony in 1925, "a local Catholic priest offered an invocation," a Congressman "delivered the keynote address," and a Baptist pastor provided a benediction.[158] The Supreme Court turned aside the Establishment Clause challenge to the cross "even though the cross has religious significance as a central symbol of Christianity."[159]

When the Supreme Court granted certiorari for *Fulton v. City of Philadelphia* in February 2020,[160] expectations were high that the Supreme Court might finally reevaluate its decision in *Employment Division v. Smith*, which allows governments to infringe on claimed religious liberties with "neutral, generally applicable regulatory law."[161] But the Supreme Court once again chose to "sidestep" the issue it had "granted certiorari to decide."[162] Applying *Smith*, rather than revisiting the Court's precedent, the majority ruled that the City of Philadelphia's non-discrimination requirement for foster care service providers—here, a Roman Catholic agency—was not "neutral and

155. *Id.* at 738.

156. 589 U.S. 57 (2020). Some Justices might have hoped to explain the Court's century-old decision in *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 210 U.S. 296 (1908), or to weigh in on more broadly applicable Free Exercise issues when the Court initially granted certiorari. *See Acevedo Feliciano*, 589 U.S. at 66–67 (Alito, J., concurring).

157. 588 U.S. 29, 43 (2019).

158. *Id.* at 44.

159. *Id.* at 76 (Thomas, J., concurring).

160. 140 S. Ct. 1104 (2020) (mem.).

161. 494 U.S. 872, 880 (1990).

162. Fulton v. City of Philadelphia, 593 U.S. 522, 618 (2021) (Gorsuch, J., concurring).

generally applicable," thus triggering strict scrutiny.[163] As even the Justices who were skeptical of *Smith*'s protection of religious liberty pointed out, the majority struggled to explain why the non-discrimination requirement in the city's code was not neutral and generally applicable to all public accommodations and why the similar provision in the city's contracts with foster service providers also failed *Smith*.[164] Rather than engaging in the difficult (and controversial) process of deciding whether governments can force religious foster care agencies to violate their belief in the one-man-one-woman definition of marriage,[165] Justice Barrett threw her hands up in the air at the prospect of having to decide "what should replace *Smith*."[166]

B. The Supreme Court Muddles Through COVID-19

Perhaps part of the reason for the Supreme Court's indecision in *Fulton* was that the COVID-19 pandemic became widespread in America just one month after the Court granted certiorari. By the time the Supreme Court decided *Fulton*, "judges across the country" were "struggl[ing] to understand and apply *Smith*'s test" to a broad range of government regulations.[167] The Supreme Court's handling of cases challenging those regulations on religious liberty grounds is difficult to square with the special protection the First Amendment and federal statutes afford the free exercise of religion.

In the early days of the pandemic, Chief Justice Roberts authored an influential concurrence that justified denying injunctive relief to a Pentecostal church discriminatorily targeted by the State of California's COVID-19 restrictions. Relief was denied because the

163. *Id.* at 533 (majority opinion).

164. *Id.* at 618–24 (Gorsuch, J., concurring) (noting, for example, that "[t]he majority ignores the [ordinance's] expansive definition of 'public accommodations,'" "ignores the reason the district court offered for why [Catholic Social Services] falls within that definition," and "changes the terms of the parties' contract").

165. *See id.* at 545–618 (Alito, J., concurring) ("I would overrule *Smith* and reverse the decision below. Philadelphia's exclusion of CSS from foster care work violates the Free Exercise Clause . . . ."). This Article takes no position on whether the Supreme Court should overrule its decision in *Smith*.

166. *Id.* at 543 (Barrett, J., concurring).

167. *Id.* at 626 (Gorsuch, J., concurring); *see also id.* at 610–11 (Alito, J., concurring in the judgment) (arguing that COVID-19 rules had highlighted shortcomings in the *Smith* test).

"precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."[168] As long as "[s]imilar or more severe restrictions" applied to *some* "secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances," the Chief Justice did not believe the case merited immediate intervention.[169] As Justice Kavanaugh pointed out, however, California did not apply the 25% occupancy cap to "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[170] For Chief Justice Roberts, worship was comparable only to nonessential activities. For the dissenting Justices Thomas, Alito, Gorsuch, and Kavanaugh, religion was a more fundamental fact of life.

A couple months later in the summer of 2020, the divide remained. Nevada prohibited every church, "regardless of its size," from "admit[ting] more than 50 persons" even though "casinos and certain other favored facilities" could "admit 50% of their maximum occupancy."[171] As mentioned in the Introduction, that subordination of religion meant "thousands of patrons" were allowed to gamble away their money in "gigantic Las Vegas casinos" that operated without the fifty-person limit.[172] The Supreme Court thus allowed Nevada to prioritize even gambling over worship.

Evident from the identity of the plaintiffs in *South Bay United Pentecostal Church* and *Calvary Chapel Dayton Valley*, congregational attendance limits fell particularly hard on Protestant churches with a conviction that their "congregation[s] must meet in person each Sunday to worship together."[173] Generally, Protestant worship requires at least singing, scripture reading, and exposition of

168. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (agreeing with the denial of injunctive relief).

169. *Id.*

170. *Id.* at 1614 (Kavanaugh, J., dissenting) (disagreeing with the denial of injunctive relief).

171. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, dissenting) (disagreeing with the denial of injunctive relief).

172. *Id.*

173. Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284, 294 (D.D.C. 2020).

the biblical text. Since Martin Luther penned "A Mighty Fortress is Our God" for German Christians to sing together in their native tongue, congregational singing has played a key role in Protestant worship.[174] Colonial Puritans, for example, sang biblical Psalms a capella.[175] While song selection and worship styles vary historically and by denomination, singing has "an important part in public worship" across Protestant Christian denominations.[176] Congregational singing is not, however, merely a preference or an accident of historical custom. For Protestants, the Bible commands them to sing.[177] In the words of one pastor, singing brings glory to God and edifies members of the congregation through "hearing the truth about God melodiously and emotionally in varied tones, sometimes intensely, sometimes loudly, sometimes sweetly, sometimes joyfully."[178]

174. *See, e.g.*, Mark Dever, *In Praise of Low-Budget, Non-Professional Music Ministries*, 9MARKS (Aug. 23, 2016), https://www.9marks.org/article/in-praise-of-low-budget-non-professionalized-music-ministries/ (discussing the broad range of music played throughout the congregation); Jonathan Leeman, *Why We Sing*, 9MARKS (Apr. 23, 2014), https://www.9marks.org/article/why-we-sing/ ("Singing is how the congregation particularly engages its emotions and affections with God's Word.").

175. *See* Justin Taylor, *What Did It Look and Sound Like in Jonathan Edwards' New England?*, THE GOSPEL COALITION (June 14, 2013), https://www.thegospelcoalition.org/blogs/justin-taylor/what-did-it-look-and-sound-like-in-jonathan-edwards-new-england (citing DOUGLAS SWEENEY, JONATHAN EDWARDS AND THE MINISTRY OF THE WORD: A MODEL OF FAITH AND THOUGHT 24–26 (2009)) ("They sang the Psalms a cappella, banning the use of musical instruments and resisting the use of hymnody in worship."); Justin Taylor, *What Would It Have Been Like to Attend a Puritan Worship Service?*, THE GOSPEL COALITION (Sept. 1, 2014), https://www.thegospelcoalition.org/blogs/justin-taylor/what-would-it-have-been-like-to-attend-a-puritan-worship-service/ (citing HORTON DAVIES, THE WORSHIP OF THE ENGLISH PURITANS 246–47 (Soli Deo Gloria Publications 1997 ed.)) (1948) (describing what it would have been like to attend Puritan church service: "[h]e would then join in a metrical psalm of praise.").

176. PRESBYTERIAN CHURCH IN AMERICA, THE BOOK OF CHURCH ORDER OF THE PRESBYTERIAN CHURCH IN AMERICA 51–1 (June 2024 ed.), https://www.pcaac.org/wp-content/uploads/2024/10/BCO-2024-Jump-Links.pdf.

177. *E.g.*, John Piper, *The Glory of God and Why We Sing*, DESIRINGGOD (June 15, 2019), https://www.desiringgod.org/messages/the-glory-of-god-and-why-we-sing (citing Ephesians 5:18–20 and Colossians 3:16) (highlighting how scripture compels them to sing).

178. Jonathan Leeman, *On Congregational Singing (Pastors Talk, Ep. 257)*, 9MARKS (Feb. 13, 2024), https://www.9marks.org/episode/on-congregational-singing-pastors-talk-ep-257/ (quoting Mark Dever).

Typically, after singing comes a sermon regarding a passage of the Bible. The most famous sermon from colonial America—Jonathan Edwards's 1741 "Sinners in the Hands of an Angry God," which explains Deuteronomy 32:35—would take roughly 50 minutes to read aloud.[179] Even today, evangelical Protestant sermons last about 39 minutes.[180] On top of all those elements of worship, Protestants "frequently" observe the Lord's Supper, also known as Communion, during their worship services to remember Christ sacrificing his body and blood on the cross for the forgiveness of sins.[181] Consistent with Jesus and his followers singing a hymn after the first Lord's Supper,[182] Protestant denominations often sing "a psalm or hymn" after observance of this ordinance.[183] So, even setting aside convictions regarding the importance of corporate worship, the logistics of conducting in-person Sunday worship services with a 50-person maximum would be daunting for many congregations.[184] Nevertheless, a majority of the Supreme Court allowed 50-person maximums to remain in effect.

Eventually, however, the capacity restrictions became so extreme that the Supreme Court decided to intervene. New York

179. *E.g.*, *Sinners in the Hands of an Angry God: A Sermon by Jonathan Edwards*, REASONABLE TECHNOLOGY, YOUTUBE (Jan. 3, 2024), https://www.youtube.com/watch?v=HoDfZR6nWUA (taking roughly 50-minutes to complete on YouTube).

180. *See* David Crary, *How Long Is the Sermon? Study Ranks Christian Churches*, THE ASSOCIATED PRESS (Dec. 16, 2019), https://apnews.com/article/us-news-ap-top-news-religion-christianity-d5c3a0bd7726f18d5cff44efa1bd4cfd ("[T]he median length of the sermons was 37 minutes. Catholic sermons were the shortest, at a median of just 14 minutes, compared with 25 minutes for sermons in mainline Protestant congregations and 39 minutes in evangelical Protestant congregations.").

181. PRESBYTERIAN CHURCH IN AMERICA, *supra* note 176, at 58-1; *see also* SOUTHERN BAPTIST CONVENTION, *supra* note 65, at 8 ("The Lord's Supper is a symbolic act of obedience whereby members of the church, through partaking of the bread and the fruit of the vine, memorialize the death of the Redeemer and anticipate His second coming."), *available at* https://bfm.sbc.net/wp-content/uploads/2024/08/BFM2000.pdf.

182. *See* Mark 14:26 (noting immediately after the observance of the first Lord's Supper that "they had sung an hymn") (King James).

183. PRESBYTERIAN CHURCH IN AMERICA, *supra* note 176, at 58-7.

184. *See* Dever, *supra* note 174 ("As a congregation, we sing probably around 15 hymns on the average Lord's day (about 9 in our morning service and 6 in our evening prayer service).").

Governor Andrew Cuomo had issued an executive order "that impose[d] very severe restrictions on attendance at religious services classified as 'red' or 'orange' zones."[185] Red zones had attendance limits of 10 people while orange zones had attendance limits of 25 people.[186] Casting worship as "non-essential," the State of New York treated religion worse than supposedly "essential" businesses such as acupuncture facilities and camp grounds in red zones and did not even apply the 25-person capacity limit to "non-essential businesses" in orange zones.[187] Roman Catholic and Orthodox Jewish communities in New York challenged those limits under the Free Exercise Clause of the First Amendment.[188]

While the Supreme Court had not credited concerns about in-person attendance in *South Bay United Pentecostal Church* and *Calvary Chapel Dayton Valley*, the Court worried that New York's restrictions were so strict that "the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred."[189] "Catholics who watch a Mass at home cannot receive communion," which is the focus of a Roman Catholic worship service.[190] And the Supreme Court noted "there are important religious traditions in the Orthodox Jewish faith that require personal attendance."[191] Justice Kavanaugh repeatedly described the ten and twenty-five-person caps on attendance at religious services as "much more severe than" the 50-person and 100-person limits in the two cases brought by Protestant churches.[192] To be sure, a 25-person capacity limit is even stricter than a 50-person capacity limit. But from the perspective of the harm to Protestant churches' ability to worship as corporate bodies, a 50-person limit forecloses the ability of, say, a 500-person congregation to worship together just as much as a 25-person

185. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15–16 (2020) (per curiam).

186. *Id.* at 16.

187. *Id.* at 16–17.

188. *Id.*

189. *Id.* at 19.

190. *Id.*

191. *Id.*

192. *Id.* at 28, 30 (Kavanaugh, J., concurring).

limit would. Those churches did not believe their exercise of religion was "free."[193]

The Supreme Court's subsequent treatment of *South Bay United Pentecostal Church* would further reveal what litigants viewed as shortcomings of *Smith*'s blinkered focus on how governments treat supposedly comparable activities. Eleven months into the COVID-19 pandemic, the Pentecostal church again sought relief from the Supreme Court. The Court enjoined enforcement of California's complete prohibition on indoor worship but allowed the State to impose 25% capacity limitations and to prohibit singing and chanting during indoor services.[194] Chief Justice Roberts again concurred, emphasizing the need for "significant deference to politically accountable officials with the 'background, competence, and expertise to assess public health.'"[195] Without bothering to request further briefing or to conduct oral argument on the application for injunctive relief, Justice Barrett complained that "the record is uncertain" about the singing and chanting prohibition.[196] The result of the *Smith* test here was that the Court would essentially engage in rational-basis review for a prohibition of hymn singing despite *Smith* elsewhere requiring strict scrutiny for even for regulations of ritual animal sacrifice.[197]

Justice Gorsuch, writing on behalf of himself and Justices Thomas and Alito, did not accept what he viewed as excuses to avoid application of the Constitution's text and the Court's precedents. As the pandemic "enter[ed] its second year—and hover[ed] over a second Lent, a second Passover, and a second Ramadan—it [wa]s too late for the State to defend extreme measures with claims of temporary exigency, if it ever could."[198] Justice Gorsuch identified record evidence, including a declaration from the Screen Actors Guild's

193. U.S. CONST. amend. I.

194. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (mem.).

195. *See id.* (Roberts, C.J., concurring) (granting partial injunctive relief) (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (mem.) (Roberts, C.J., concurring) (denying injunctive relief)).

196. *S. Bay United*, 141 S. Ct. at 717 (Barrett, J., concurring) (granting partial injunctive relief).

197. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

198. *S. Bay United*, 141 S. Ct. at 717–20 (statement of Gorsuch, J.).

General Counsel, and California's regulations supporting the church's claim that "California's powerful entertainment industry has won an exemption" from the categorical singing ban.[199] To the extent there was "some confusion over what rules actually apply to Hollywood," Justice Gorsuch "would not allow the government officials who created California's complex regime to benefit from its confusing nature."[200] For the majority, however, a speedy decision on the merits was unnecessary.

The Supreme Court never resolved on the merits whether the First Amendment allows States to prohibit worship services from including singing, instead granting the subsequent petition for writ of certiorari, vacating the judgment, and remanding in light of another emergency docket case that did not present that question.[201] The district court ultimately allowed such restrictions as long as they were "included in the guidance for live events and performances."[202]

Although the Supreme Court's primary interaction with the Free Exercise Clause during the COVID-19 pandemic came in challenges to limits on the ability of Americans to worship, this Article would be remiss if it did not briefly mention the vaccine mandate cases. The Supreme Court stayed the Occupational Safety and Health Administration's vaccine mandate[203] but allowed the Centers for Medicare and Medicare and Medicaid Services[204] and, to some extent, the military[205] to impose COVID-19 vaccine mandates. Vaccination has been highly successful in eradicating certain diseases, such as polio.[206] But many Americans expressed opposition, including for

199. *Id.* at 719 & n.2.

200. *Id.* At the time, Justice Gorsuch was the only Justice who attended Protestant services. His wife "has an affinity for the liturgy and music" of such churches. Burke, *supra* note 153.

201. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 2563 (2021) (mem.) (citing *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam)).

202. S. Bay United Pentecostal Church v. Newsom, No. 3:20-cv-865, 2021 WL 2250818, at *1 (S.D. Cal. June 1, 2021).

203. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109 (2022) (per curiam).

204. Biden v. Missouri, 595 U.S. 87 (2022) (per curiam).

205. Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022) (mem.).

206. *Cf. Ending Polio*, ROTARY INT', https://www.rotary.org/en/our-causes/ending-polio ("Today, polio remains endemic only in Afghanistan and Pakistan.") (last visited Jan. 2025).

various moral and religious reasons, to compulsory COVID-19 vaccination.

Despite upholding those vaccine mandates, the Supreme Court's decisions were just the beginning of litigation on the subject. In case[207] after case[208] after case[209] after case,[210] religious employees plausibly alleged that healthcare providers failed to accommodate employees' beliefs about COVID-19 vaccination. And litigation over the impacts of the military vaccination mandates has continued[211] even after Congress forced the military to end them.[212] The Nation may have moved on from COVID-19 vaccination mandates, but the consequences remain.

IV. THE RIPPLE EFFECTS OF THE SUPREME COURT'S RELIGIOUS LIBERTY DOCKET

The Supreme Court's resolution of disputes over religious liberty has created ripple effects for American society. The author does not pretend to know where all those ripples will go or precisely how they will impact public confidence in the federal courts. The COVID-19 pandemic itself warns against such hubris. Nevertheless, a few impacts stand out. First, COVID-19 contributed to and revealed religious and political polarization despite the Nation's emphasis on nationwide issue resolution and citizen mobility. Second, the frequently slow pace of litigation left some Americans feeling their rights were unprotected and unvalued. And third, the contraction of the Supreme Court's merits docket and use of the Court's emergency docket created opportunities for the Court's critics to dismiss or denigrate its approach to divisive issues.

First, the Supreme Court's religious liberty docket frequently exposed deep-seated disagreement about the importance of religion. Many States, such as Tennessee, did no more than aggregate non-binding "suggested protocols" for worship services, concerned that

207. Lucky v. Landmark Med., 103 F.4th 1241 (6th Cir. 2024).

208. Bube v. Aspirus Hosp., Inc., 108 F.4th 1017 (7th Cir. 2024).

209. Ringhofer v. Mayo Clinic, Ambulance, 102 F.4th 894 (8th Cir. 2024).

210. Bazinet v. Beth Israel Lahey Health, Inc., 113 F.4th 9 (1st Cir. 2024).

211. Crocker v. Austin, 115 F.4th 660 (5th Cir. 2024).

212. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-236, 136 Stat. 2395 (2022).

"[n]ot all suggestions will be appropriate for each faith community."[213] In contrast, California, Nevada, and New York generated extensive litigation as they attempted to justify tightly regulating religion while applying a lighter touch to more profitable and politically powerful entities. Nevada, for instance, prioritized "the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance" over the free exercise of religion.[214] California, predictably, favored Hollywood.[215] Application of the *Smith* test often turned on determining what secular activities were truly comparable to the regulated religious ones.[216] The Supreme Court has shown that it will not intervene to protect singing during church services, and is occasionally willing to allow draconian restrictions on worship activities central to the Protestant religion—both historically and in modern times—as long as "[s]imilar or more severe restrictions" applied to some "secular gatherings."[217]

The Supreme Court's decisions perhaps impacted the Nation's religious priorities. Without confusing correlation with causation, the COVID-19 years resulted in an 8% increase in the proportion of the population that never attends religious services, from 25% pre-pandemic to 33% post-pandemic.[218] This shift "may portend

213. *Guidance for Gathering Together in Houses of Worship*, TENN. GOVERNOR'S OFF. OF FAITH-BASED & CMTY. INITIATIVES (Oct. 2020), https://www.tn.gov/content/dam/tn/governorsoffice-documents/House%20of%20Worship%20Guidance%20FBCI.pdf.

214. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603–04 (2020) (mem.) (Alito, J., dissenting) (writing for the denial of injunctive relief).

215. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. at 719 n.2 (statement of Gorsuch, J.).

216. *See* Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (eventually clarifying strict scrutiny applies "whenever [a government] treat[s] *any* comparable secular activity more favorably than religious exercise" and that "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather").

217. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring).

218. Daniel A. Cox et al., *Faith After the Pandemic: How COVID-19 Changed American Religion* 4, AEI (Jan. 5, 2023), https://www.aei.org/research-products/report/faith-after-the-pandemic-how-covid-19-changed-american-religion; *see also* Jeffrey M. Jones, *U.S. Church Attendance Still Lower Than Pre-Pandemic*, GALLUP (June 26, 2023), https://news.gallup.com/poll/507692/church-attendance-lower-pre-pandemic.aspx (discussing the shift in religious attendance during the COVID-19 pandemic).

increasing religious polarization, with more Americans either very religiously active or completely inactive."[219] Religious polarization has coincided with political polarization. Before the pandemic, less than a third of liberals reported never attending religious services.[220] By the spring of 2022, nearly half of liberals reported never attending religious services while four-fifths of conservatives attend services.[221]

With political preferences aligning more with religious preferences, the temptation grows for each party to attempt to resort to nationwide solutions rather than the federalism envisioned by the First Amendment. Thanks to air travel and our interstate system, our national population is highly mobile. If a Californian disagreed with the State's COVID-19 restrictions, he could pack up a U-Haul truck and move. Hundreds of thousands of Californians did just that during and immediately after the pandemic, fleeing to States such as Florida, North Carolina, South Carolina, Tennessee, and Texas.[222] But the growth of federal bureaucracies and wide-reaching federal statutes risks replacing local solutions, however imperfect, with uniformly harmful policies. From rent moratoria[223] to vaccine mandates, federal officials repeatedly attempted to "assume[] authority to regulate an area—public health and safety—traditionally regulated by the States."[224]

As with the lawsuits involving believers in California, Nevada, and New York, the demand for federal interference often came from local political minorities whose values were more aligned with national

219. Cox, *supra* note 218, at 7.

220. *Id.* at 4.

221. *Id.* Conservatives experienced a 6% increase in the proportion that did not attend church services while liberals experienced a 15% increase in the proportion that did not attend church services. *Id.*

222. *U-Haul Growth States of 2024: South Carolina Tops List for First Time*, U-HAUL (Jan. 2, 2025), https://www.uhaul.com/Articles/About/U-Haul-Growth-States-Of-2024-South-Carolina-Tops-List-for-First-Time-33083 ("California experienced the greatest net loss of do-it-yourself movers in U-Haul equipment and ranks 50th for the fifth consecutive year.").

223. *See* Alaska Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 768 (2021) (per curiam) (Breyer J., dissenting) (discussing that some public health laws were passed to serve the purpose of stopping the spread of diseases such as COVID-19).

224. MCO No. 165 v. United States DOL (In re MCP No. 165), 20 F.4th 264, 264, 285 (6th Cir. 2021) (Sutton, C.J., dissenting).

allies. For example, mask mandates were more popular among Democrats than among Republicans. Conservative opponents of mask mandates in Tennessee succeeded in obtaining an executive order from the Governor[225] and then in enacting a statute[226] protecting their children from school board mask mandates. Unable to succeed in the political process, proponents of mask mandates brought suit in federal court, and federal district court judges creatively interpreted federal disability law to substitute mask mandate proponents' policy preferences for those of the General Assembly.[227] Chaos ensued, with mass religious exemptions offering the only route for thousands of students to avoid in-school suspension.[228] Defying one federal judge, whose reasoning hinged on the idea that the plaintiffs "cannot attend school without their school's ability to require masking,"[229] mask-mandate opponents convinced the school board in a suburban Nashville county to end the mandate early.[230] The entire incident highlighted the political polarization and issue nationalization that are unfortunate hallmarks of our culturally divided Nation.

Second, the pace of litigation—sometimes fast but often slow—led to frustration as many Americans felt their rights did not receive timely analysis and protection. To a society accustomed to instant gratification, our legal system can feel like *Bleak House*'s Court of Chancery. Indeed, part of the frustration of the Tennessee mask mandate cases for members of the public was that substantive appellate review often appeared unobtainable.[231]

225. *See* R.K. v. Lee, 568 F. Supp. 3d 895, 899 (M.D. Tenn. 2021).

226. *See* R.K. v. Lee, 575 F. Supp. 3d 957, 964 (M.D. Tenn. 2021), *vacated by* R.K. v. Lee, 53 F.4th 995 (6th Cir. 2022).

227. *E.g.*, *id.*

228. Anika Exum, *Williamson County students who don't mask or file exemption moved to separate rooms*, THE TENNESSEAN (Oct. 20, 2021, 12:31 PM), https://www.tennessean.com/story/news/local/williamson/2021/10/20/williamson-county-students-moved-separate-rooms-not-wearing-mask-without-exemption/8527726002.

229. *R.K.*, 575 F. Supp. 3d at 991.

230. *See* Caroline Sutton, *Williamson County School Board votes to end mask mandate*, NEWSCHANNEL5 NASHVILLE (Nov. 15, 2021, 10:37 PM), https://www.newschannel5.com/news/williamson-county-school-board-votes-to-end-mask-mandate.

231. *See, e.g.*, G.S. v. Lee, No. 21-5915, 2021 WL 5411218, at *3 (6th Cir. Nov. 19, 2021) (per curiam) (denying stay pending appeal); M.B. v. Lee, No. 21-6007, 2021

The same concern repeatedly arose in the COVID-19 religious liberty cases. Almost all churches and religious institutions that filed lawsuits never received a merits decision from the Supreme Court. As cases wound their way through the appeal processes, "[g]overnment actors" would "mov[e] the goalposts" and insist on mootness.[232] Brutus had anticipated such complaints about the federal courts: "the administration of justice under the powers of the judicial will be dilatory" and "will be attended with such an heavy expence as to amount to little short of a denial of justice to the poor and middling class of people who in every government stand most in need of the protection of the law."[233]

The tardiness of litigation frequently contrasted, nevertheless, with occasional haste. At least since the first Trump Administration, a pattern has developed of plaintiffs seeking universal injunctions "based on expedited briefing and little opportunity for the adversarial testing of evidence."[234] With "more than 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 regional courts of appeal," both federal and state attorneys were "forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide" or statewide stakes.[235] Even where Congress instituted a system to channel lawsuits into a randomly selected circuit, appellate judges of one circuit would overrule previous decisions of other circuits.[236]

Third, the contraction of the Supreme Court's merits docket coupled with the Court's reliance on the emergency docket led to some commenters criticizing the use of the "so-called 'shadow docket.'"[237]

WL 6101486 (6th Cir. Dec. 20, 2021) (order) (denying stay pending appeal); R.K. v. Lee, No. 22-5004, 2022 WL 1467651 (6th Cir. May 10, 2022) (order) (denying stay pending appeal).

232. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (mem.) (statement of Gorsuch, J.).

233. BRUTUS, NO. 14 PT. 2 (Mar. 6, 1788).

234. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring).

235. *Id.* at 600–01.

236. *E.g.*, MCO No. 165 v. United States DOL (In re MCP No. 165), 21 F.4th 357 (6th Cir. 2021) (dissolving Fifth Circuit's stay of OSHA vaccine mandate).

237. Dr. A. v. Hochul, 142 S. Ct. 2569, 2571 (2022) (mem.) (Thomas, J., dissenting) (writing for the denial of certiorari) (citing Merrill v. Milligan, 142 S. Ct.

Oddly, however, most commenters used the insinuations of impropriety[238] that come with the term "shadow docket" not to encourage the Supreme Court to quickly and efficiently address cases on their merits but to discourage review altogether.[239] For example, when healthcare workers in Maine asked the Supreme Court to intervene to protect their First Amendment rights, the Court declined to grant such "extraordinary relief" to discourage litigants using "the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument."[240] Despite three Justices wanting to take the case even in the emergency posture,[241] the Supreme Court then denied the petition for writ of certiorari when the case returned to it.[242]

Even more strangely, the same commenters who lambast the Supreme Court for resolving cases on its emergency docket and discourage the Court from hearing more cases also criticize the supposed "judge shopping" of single federal district court judges resolving those cases.[243] Bending to those concerns, the Judicial Conference considered imposing top-down judge-assignment rules[244] that potentially conflicted with federal law.[245] Litigants in rural venues

879, 889 (2022) (Kagan, J., dissenting) (writing to deny the grant of application for stay)); *see, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

238. *See, e.g.*, Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 4–6 (2019) (mem.) (Sotomayor, J., dissenting).

239. *See, e.g.*, Stephen I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 533, 541 (2024) (expressing concern "that the [Supreme] Court is increasingly (if inconsistently) a court of *first* view").

240. Doe v. Mills, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring).

241. *See id.* at 18 (Gorsuch, J., dissenting).

242. Doe v. Mills, 142 S. Ct. 1112 (2022) (mem.).

243. *See, e.g.*, Steve Vladeck, *The Growing Abuse of Single-Judge Divisions*, ONE FIRST (Mar. 13, 2023), https://www.stevevladeck.com/p/18-shopping-for-judges.

244. *Conference Acts to Promote Random Case Assignment*, U.S. COURTS (Mar. 12, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/03/12/conference-acts-promote-random-case-assignment.

245. *Cf.* Letter from Sen. Mitch McConnell, Sen. John Cornyn, and Sen. Tom Tillis to David C. Godbey, Chief Judge of U.S. District Court for the Northern District of Texas (Mar. 14, 2024), https://reason.com/wp-content/uploads/2024/03/CJ-David-C.-Godbey.pdf (citing apparent conflict with 28 U.S.C. § 137(a)).

would have neither the convenience of litigating close to home nor the finality of litigating before the U.S. Supreme Court "at the seat of the general government."[246]

The finality of litigating before the Supreme Court would respect the interests both of private litigants asserting federal constitutional claims and of the States subjected to what the Founders viewed as the "humiliating and degrading" experience of litigating in another sovereign's courts.[247] Instead, the Supreme Court—"the highest judicatory of the nation"—prefers to exercise its jurisdiction sparingly.[248] Even when COVID-19 created conflicts between the States themselves, such as about the taxation of teleworkers, the Supreme Court refused to exercise its original jurisdiction to resolve the sovereigns' disagreement.[249] If the Supreme Court will not resolve constitutional disputes, then sovereign States will suffer the indignity, as the Founders feared, of being "turned over to an inferior tribunal."[250]

V. CONCLUSION

The COVID-19 pandemic placed enormous stress on civil society and tested the ability of the federal courts to mediate disagreement about the constitutionality of various policies. The courts' opinions will have ripple effects on our Nation for decades to come, even as memories fade about the various fights regarding stay-at-home orders, travel bans, worship-capacity limits, mask mandates, and vaccine requirements. Gradually, and in their own ways and times, Americans came to a consensus that the various government policies were no longer necessary to protect the Nation from COVID-19. This Article does not chronicle every time Dr. Fauci contradicted himself or the Centers for Disease Control reversed position,[251] but COVID-19

246. BRUTUS NO. 14 PT. 2 (Mar. 6, 1788).

247. BRUTUS NO. 13 (Feb. 21, 1788).

248. THE FEDERALIST NO. 81 (Alexander Hamilton).

249. New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (denying motion for leave to file a bill of complaint).

250. THE FEDERALIST NO. 81 (Alexander Hamilton).

251. But here are a few. *See, e.g.*, The Editorial Board, *Anthony Fauci Fesses Up*, WALL ST. J. (Jan. 11, 2024, 6:34 PM), https://www.wsj.com/articles/anthony-fauci-covid-social-distancing-six-feet-rule-house-subcommittee-hearing-44289850 (Dr. Fauci eventually testified that "the six-feet rule for social distancing 'sort of just

served as a reminder to many Americans of how little we know about what we imagine we can control.[252] The country's shift in policy preferences has now resulted in some of the deepest critics of those COVID-19 policies rising to positions of influence in the federal government.[253]

COVID-19 also served to vindicate the Founders' decision to enshrine express protections for religion in the U.S. Constitution. During times of crisis, such as the pandemic, judges are often reluctant to assume their role as "an essential safeguard against the effects of occasional ill humors in the society."[254] That hesitancy in understandable and, in many circumstances, admirable. But when it comes to religion, the Founders wanted to protect the exercise of religion from the demands of those who boast in "human wisdom's fleeting light."[255]

appeared' without a solid scientific basis"); Natalie O'Neill, *CDC walks back claim that vaccinated people can't carry COVID-19*, N.Y. POST (Apr. 2, 2021, 1:25 PM), https://nypost.com/2021/04/02/cdc-walks-back-claim-that-vaccinated-people-cant-carry-covid/ (CDC Director mistakenly asserting that "vaccinated people do not carry the virus").

252. *Cf.* Proverbs 27:1 (King James) ("Boast not thyself of to morrow; for thou knowest not what a day may bring forth.").

253. *See, e.g.*, Murthy v. Missouri, 603 U.S. 43, 91 (2024) (Alito, J., dissenting) (noting concerns of incoming Secretary of the U.S. Department of Health & Human Services Robert F. Kennedy, Jr., regarding COVID-19 vaccines); R.K. v. Lee, 568 F. Supp. 3d 895, 906 (M.D. Tenn. 2021) (stating that "the Court is simply unwilling to trust Dr. Bhattacharya," the incoming Director of the National Institutes of Health).

254. THE FEDERALIST NO. 78 (Alexander Hamilton).

255. KEITH GETTY ET AL., *My Worth Is Not in What I Own* (Getty Music Publ'g & Makeaway Music 2014).