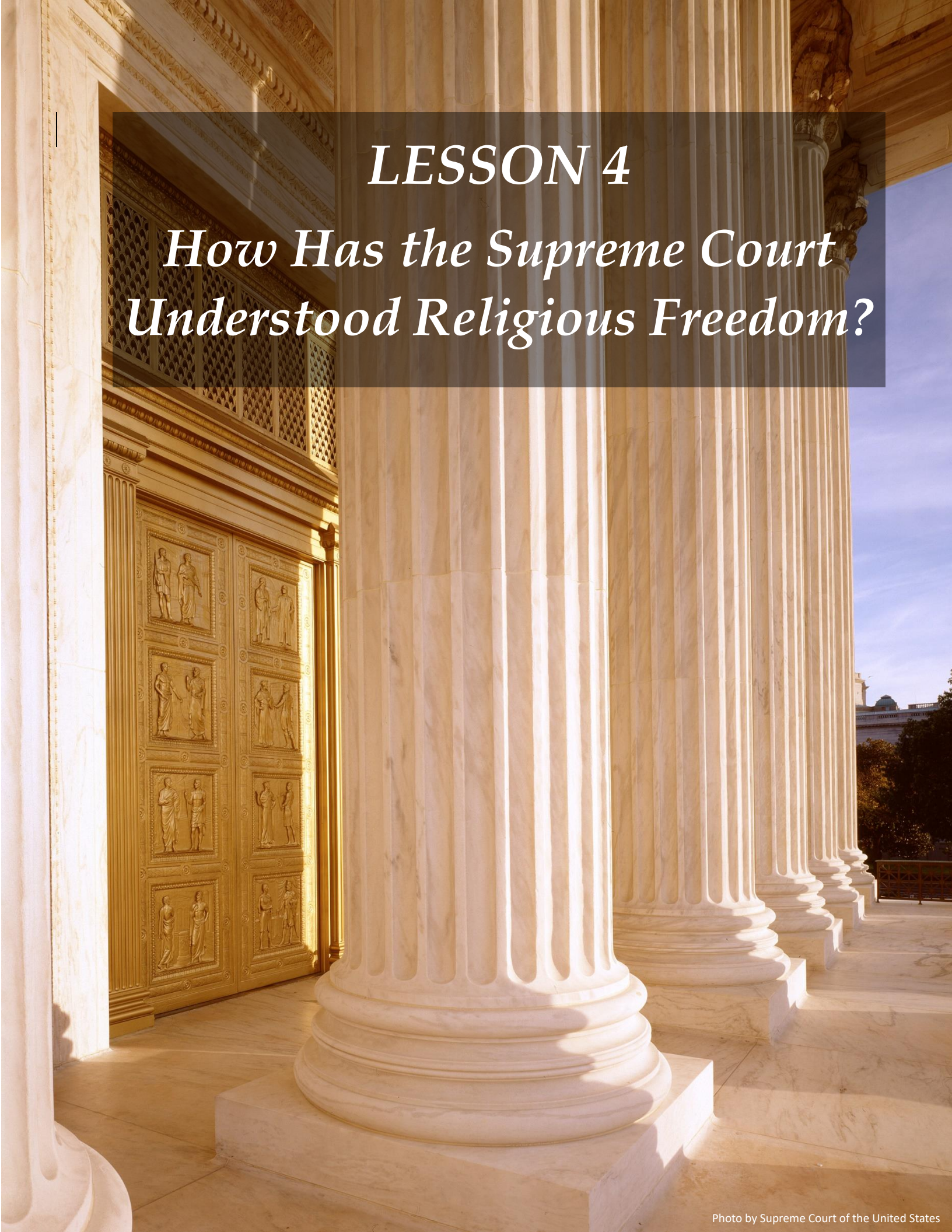

LESSON 4

How Has the Supreme Court Understood Religious Freedom?

Photo by Supreme Court of the United States

LESSON 4

How Has the Supreme Court Understood Religious Freedom?

INTRODUCTION

In previous lessons, we learned about the Founders' commitment to protect the "free exercise" rights of every American and every religious community. The first 16 words of the First Amendment formed the Founders' indelible guarantee that the inalienable right of free exercise would be protected in American law for everyone. This lesson will focus on the various, and often contradictory, interpretations of America's First Freedom provided by the United States Supreme Court. In the process, we will see that America's highest court has at times wrestled with keeping religious liberty at the center of our democracy in the face of challenges that have sought to marginalize or deny its role in American public life. Yet, today, the first sixteen words of the First Amendment are no less important for the future of this democracy than they were when the Bill of Rights was ratified in 1791.

LEARNING OBJECTIVES

4.1 Describe the colonial background that shaped the Founders' attitudes toward Establishment and Free Exercise
4.2 Describe the Founders' solution to prevent religious tyranny while promoting religious activity
4.3 Provide examples to illustrate the Founders' willingness to involve religion in government
4.4 Provide historical context to Jefferson's "Wall of Separation" comment
4.5 Discuss the Court's mixed messaging on the Establishment and Free Exercise Clauses
4.6 Apply common judicial standards to determine the constitutionality of various social questions
4.7 Identify the significant Court cases that established a framework for religious freedom in America
4.8 Discuss the personalities, circumstances, and intentions of the Religious Freedom Restoration Act

KEY TERMS AND CONCEPTS

As you read through the lesson, give particular attention to making sure you understand the following key terms and concepts.

Compelling Interest	*Excessive Entanglement*	*Secular*
Constitutional	*Free Exercise*	*Strict Scrutiny*
Dissenters	*Inalienable Right*	*Virtue*
Establishment	*Lemon Test*	*Wall of Separation*

Lesson 4: How has the Supreme Court understood Religious Freedom?

ENGAGE

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus begins Article III of the US Constitution where the Judicial branch of the national government is described. The Judicial branch is actually the last of the three branches detailed in the US Constitution. Article I describes the Legislative branch in 2268 words, Article II describes the Executive branch in 1025 words, but Article III describes the Judicial Branch in a mere 375 words. Why do you think the word count describing the judicial branch is so brief? Does this imply something about the intended role of the courts? Is the Judicial branch less important than the other two?

The First Amendment's "Religion Clauses"

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

--from the First Amendment of the United States Constitution

The first sixteen words of the First Amendment to the US Constitution prioritize the fundamental right of free exercise of religion in America and provide a strong layer of protection against those who would seek to deny this right to all Americans. While the signing of the Constitution created the American Republic in 1787, the ratification of the Bill of Rights would have to wait until December 15, 1791. It was then that certain human rights that were previously understood to be foundational to the new democracy were formally acknowledged in writing. Contained within these first sixteen words are two "religion clauses" commonly known as the "establishment clause" and the "free exercise" clause. Both serve as pillars of the country's commitment to protecting the right of every individual and community to practice religion freely without interference from the state. For the Founders, the two clauses worked in tandem. The ban on a federal religious establishment was designed to protect the natural right of free exercise from government control or manipulation. In the pages that follow, you will explore how Americans, and in particular the U.S. Supreme Court, have interpreted and applied these two clauses since their establishment nearly two and a half centuries ago.

1 The Establishment Clause

"Congress shall make no law respecting an establishment of religion"

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion." Let's briefly explore the history of the Establishment Clause and how the Supreme Court has interpreted it.

Establishment in the Colonies

Nine of the thirteen colonies had an established church (Pennsylvania, Delaware, New Jersey, and Rhode Island did not). By the time of the American Revolution, all nine were either Anglican or Congregationalist. By the time the First Congress of the United States met opposition to religious establishments had been rising for decades. As discussed in Lesson 2, the founders feared that an established religion, such as the Church of England, would give the national government too much power to control people's lives and take away their freedoms. But they were also concerned that a democratic government like the new American Republic would fail without religion's ability to promote virtue in the people. Their solution was to encourage people to be religious while banning the establishment of a national religion.

Some now falsely claim that the First Amendment's religion clauses were intended to eliminate all religion from public life in America. There are many reasons that illustrate that this was not the Founders' intent including Congress' 1789 election of the Reverend Samuel Provost as its first chaplain who opened Congress in daily prayer (a tradition continued to this day), George Washington taking the oath of office with his hand on a Bible, and the numerous public declarations by early government officials that were clearly religious in nature. Perhaps the clearest evidence is the fact that even after the First Amendment became national law, several states still had established churches with the Founders' full knowledge. The last three states to have established state churches—New Hampshire, Connecticut, and Massachusetts—did not eliminate them until 1817, 1818, and 1833, respectively.

Thus, it seems clear that the ban on establishment was not meant to keep religious influence out of public life. In fact, it was the opposite. The Founders wanted lots of religious influence in public life. They just wanted to avoid the tyranny of an established national church.

The Wall of Separation

It is an unfortunate fact of American history that a common understanding of the First Amendment's establishment clause has become defined in the modern world by a private letter from an individual who was not even present when the Constitution was written. You might remember the details from Lesson Two where you read about a half-ton block of cheese delivered by the Reverend John Leland, on behalf of the Baptist farmers of Cheshire, Massachusetts, to President Thomas Jefferson. That same day, Jefferson wrote a letter to another group of Baptists, the Danbury Baptist Association of Connecticut in which he described the First Amendment's ban on an established church as "building a wall of separation between Church and State." Perhaps the best way to understand what Jefferson meant by the "wall of separation" is by considering the original letter from the Danbury Baptists to which his letter was a response. The Danbury Baptists had written President Jefferson to offer congratulations at his election to office and to inform him of the heavy burden placed upon their religious privileges. According to the Baptist leaders

who signed the Danbury letter, their religious liberty was shackled by the charter of the state

Jefferson was writing to address this oppressive context. His concern was with liberating the colonies and their people from a tyranny that failed to recognize religious liberty as an inalienable right. When Jefferson responded to the Danbury Baptists (see letter at right) by using the "wall of separation" metaphor, his primary concern was limiting the power of government over religious individuals and communities. Thus, Jefferson's choice of words was clearly meant to assure of Connecticut and they feared a national government that would do the same.

this group of religious citizens that the First Amendment would provide them with strong protections against an overbearing national government that would try and destroy their most basic right—the right to freely exercise their faith. This was, of course, consistent with the Founding principle that all American religious communities were to have the right of free exercise– not just Baptists, and not just Christians, but everyone.

When Jefferson responded to the Danbury Baptists by using the "wall of separation" metaphor, his primary concern was limiting the power of government over religious individuals and communities.

It is important to note that when Congress drafted the First Amendment (principally the work of James Madison), Thomas Jefferson was in Paris serving as the minister to France and not directly involved in the writing of the Constitution. Whatever President Jefferson intended by using those words as a substitute for the constitution's ban on a national establishment of religion, it was not generally accepted at the time as an authoritative statement on the meaning of the Constitution.

Nevertheless, by the 19th century the separation concept became a useful way to discriminate against various religious traditions—particularly the large numbers of Catholics who were arriving on the east coast from Europe. In response, anti-Catholic movements developed, such as nativist political parties, Protestant groups who opposed Catholic religious ideas, and secular liberals who opposed any form of orthodox religion in public life. These groups combined to label Catholic institutions (such as parochial schools and orphanages) as violations of the "separation of church and state."

Anti-Catholic sentiment was so strong that many states adopted legislation to block state support for Catholic institutions. Known as the "Blaine amendments," these laws revealed a growing but inaccurate belief that the First Amendment ban on an established church was the same thing as "separation of church and state."

By the mid 20th century, many Americans assumed that the separation phrase was actually in the First Amendment and Blaine amendments were increasingly used against state support for any orthodox religious institution. "Separation" had become a political and constitutional strategy to restrict free exercise.

The Establishment Clause before the Supreme Court

The Constitution was ratified in 1788. It would be nearly a century before any challenge to religious freedom reached the U.S. Supreme Court. The earliest cases had to do with free exercise and only in the 1940's did the Court turn to the meaning and scope of the Establishment Clause.

Application of Jefferson's "Wall"

The Supreme Court's interpretation of the Establishment Clause begins with the Court's landmark decision in *Everson v. Board of Education* (1947), in which the Court for the first time applied the Establishment Clause to the states through the Fourteenth Amendment. This was also the first time the Court used the phrase "separation between church and state" to describe the intent of the Establishment Clause.

As noted earlier, the First Amendment's ban on an establishment of religion applied only to Congress, and therefore only to the national government. Any later application to the states became unnecessary because all state establishments of religion were voluntarily eliminated by the 1840s. But in Everson, the Court used the provisions of the 14th Amendment to apply the Establishment Clause to the states in a way that opened the door for much broader application.

In *Everson,* the Court was asked to determine how widely the Establishment Clause could be applied. Acting under authority of a New Jersey statute, a local school board authorized reimbursement to parents for money they spent on bus transportation for their children. Reimbursements were paid to parents of both private religious and public school students. This angered Everson, a taxpayer in the local school district. He filed suit against the local board of education claiming that the payments from taxpayer funds to parents of students in private religious schools violated the Establishment Clause of the First Amendment.

The Supreme Court ruled that the local school board had not violated the Establishment Clause, and that public funds could not be denied to individuals simply because they held religious views. However, in explaining the decision, Justice Hugo Black drew upon Jefferson's metaphor writing that "*The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.."*

To opponents of the historic understanding of religious freedom in America, this was the endorsement needed to redefine the role of religion in American public life. Over 140 years after Thomas Jefferson wrote his letter to the Danbury Baptists, the Court now suggested that the Establishment Clause had erected a "wall of separation between church and state." Until *Everson*, the Establishment Clause, even if it had been understood within the framework of Jefferson's wall metaphor, had only applied to the Federal Government. The application of the Establishment Clause to the states, and the association of church-state separation with the establishment clause represented a seismic shift, that opened the door to future challenges and controversies.

Since *Everson*, there has been an ongoing, deeply divisive debate on the Court and among the general public about whether Jefferson's "wall of separation" metaphor accurately reflects the original meaning of the Establishment Clause. As a result, the Court has produced an extraordinarily complex, and sometimes contradictory, body of caselaw regarding the Establishment Clause. To illustrate this point, let's examine just two of the many issues that have come to the court.

School Prayer (K-12)

Some of the Supreme Court's earliest and still most controversial Establishment Clause cases have involved the issue of prayer and religious conversation in public schools. Prior to 1960, Bible reading, open discussion about religious principles, and prayer were common in many public schools across America.

A strong shift began to occur after 1960. In *Engel v. Vitale* (1962), the Court declared unconstitutional the practice in New York schools of students reciting a short prayer at the beginning of the school day. The following year, the Court used another case to declare unconstitutional Bible readings and reciting the Lord's Prayer in the classroom.

In each of these decisions, the Court ruled that any official prayer that required students to participate was unconstitutional. However, the rulings were sufficiently vague to open the door for some interest groups to claim that all religious expression in public schools, by teachers or students, was impermissible.

In 1990, the Court ruled against the administration at Westside High School who had prohibited the formation of a religious club on campus that would have operated with the same terms and conditions as other after-school student clubs. The Court rejected the administration's claim that such a club would violate the Establishment Clause and ruled that since Westside permitted other noncurricular student clubs to form, it must also allow after-school clubs to form based on religious content.

In *Kennedy v. Bremerton School District* (2022), Coach Kennedy, a high school football coach, lost his job after kneeling at midfield after games to offer a private prayer. After praying on numerous occasions, several players voluntarily joined the coach at midfield after games. When parents began to take notice, some complained, and the coach was placed on leave.

In delivering the opinion of the Court, Justice Neil Gorsuch tied his comments to understanding the importance of the Establishment Clause:

> *…the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.*

In these and similar cases, the Court is suggesting that private prayer at school does not violate the Establishment Clause of the First Amendment if the prayer is voluntary and uncoerced. Further, it suggested that religious expression and activities on public grounds are entirely constitutional when they are not part of a planned, formal activity that requires compliance by all students.

REFLECT

According to the Supreme Court, is religious expression and activity on public grounds legal? If so, what conditions might make it illegal?

The Lemon Test

In an attempt to define the scope and meaning of the Establishment Clause, the Supreme Court eventually decided to provide guidelines to interpret these cases. In the 1971 case *Lemon v. Kurtzman*, the Court identified three factors that determine whether a government action is constitutional and does not violate the Establishment Clause: (1) it has a primarily secular purpose; (2) its primary effect neither aids nor inhibits religion; and (3) government and religion are not excessively entangled. Those three factors were known as the "*Lemon test*."

In the 50 years since *Lemon*, the Lemon Test has been harshly criticized by Members of the Court, the lower courts, and commentators alike, and the Court has often decided Establishment Clause cases without using it. After all, there is no such thing as an ideology free public square. If the government is only allowed to promote secular ideologies (factor #1), is that not a violation of the Court's own guideline to neither aid nor inhibit religion (factor #2)? Further, what does "excessive entanglement" mean? No one was ever quite sure and the Court would eventually abandon this "test" after years of frustration. However, the *Lemon test* emboldened the views of those who believe the ban on an established religion is the same as "separation of church and state," which is, in their view, a constitutional reason to limit religion to private settings. As we have seen, this was not the intent of the founders and would likely lead to the coercive removal of religion from American public life.

Religious Displays

"A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion."

--Justice Alito writing for the majority in American Legion v. American Humanist Association (2019)

Establishment Clause cases involving displays of religious symbols on public property—nativity scenes, the Ten Commandments, and crosses—have produced varying results that leave both legal professionals and the general public confused about the Court's decisions.

In *Lynch v. Donnelly* (1984), the Court decided that a municipal display of holiday decorations that included a nativity scene and some nonreligious objects did not violate the Establishment Clause. But in *County of Allegheny v. ACLU* (1989), the Court decided that the display of a nativity scene, by itself, at the top of the grand stairway in a courthouse violated the Establishment Clause, stating it was "indisputably religious."

In 2005, the Court decided that two recently erected Kentucky state courthouse displays of the Ten Commandments violated the Establishment Clause, even though they were surrounded by other historical monuments. The same day, the Court held in another case the legality of a Ten Commandments monument on the Texas State Capitol grounds, which was donated by a secular organization dedicated to reducing juvenile delinquency.

Most recently, in *American Legion v. American Humanist Association* (2019), the Court

decided that a century-old Peace Cross in Bladensburg, Maryland, erected to honor fallen World War I soldiers did not violate the Establishment Clause. The "Bladensburg cross case" is especially important because of its implications for the *Lemon test*. In reaching its decision, several Members of the Court suggested that the Lemon test had been overruled with Justice Gorsuch stating the case most strongly when he wrote *"Lemon was a misadventure. It sought a 'grand unified theory' of the Establishment Clause but left us only a mess."*

At the suggestion that the Establishment clause required a purging of all public monuments and symbols that were religious in nature, Justice Alito writing for the majority stated that *"a government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive."* So, the monument was allowed to stay—for now.

The mixed signals received through dozens of Establishment cases over the last 50 years on a variety of topics suggests something. From the Nation's highest Court to the streets of every town and city in America, there seems to be a misunderstanding of the value of religious freedom, its connection to a host of other civil liberties, and the reason the Founders gave it a prominent place in our country's system. Perhaps Free Exercise has fared better?

2 The Free Exercise Clause

"…or prohibiting the free exercise thereof"

Free Exercise in the Colonies

Many people believe that religious freedom arrived in North America with the Pilgrims in 1620. It is true that the seeds of religious freedom were planted through the famous Mayflower Compact that recognized the equality of all the ship's inhabitants regardless of religion and social standing. But, in truth, religious freedom only developed gradually in what would become the 13 colonies.

The Puritans who arrived in Massachusetts Bay a decade after the Pilgrims banished dissenters from their own Congregationalist denomination and executed four Quakers who defied laws banishing them. One individual that was banished was Roger Williams, who founded Rhode Island in 1636 as a haven for religious freedom.

Like Rhode Island, Maryland experimented with religious freedom. From its beginnings, Maryland was meant to be a refuge for persecuted Catholics. In 1649, an Anglican-led assembly passed the *Act Concerning Religion* (also known as the *Maryland Toleration Act of 1649*). The law as written provided religious tolerance for most Christian settlers, and was notable for containing the first mention of "the free exercise" of religion, the exact language which would be used later in the First Amendment.

The Act represented an important step in the struggle for religious freedom in America, but was limited by its application only to certain Christian communities and notable for the harsh punishments it imposed upon those,

including some dissenting Christian groups, who fell outside its protections.

The landing of William Penn / J.L.G. Ferris.
Source: LOC Digital Holdings

Pennsylvania was the most successful colonial experiment with religious freedom. By its 1682 Frame of Government, Pennsylvania granted freedom of belief and worship to those who believed in God. Accordingly, Pennsylvania became a place of refuge for Quakers and other persecuted religious dissenters. Later, in 1701, William Penn, who himself laid the foundation for the Pennsylvania Colony and promoted peaceful religious toleration, signed the *Charter of Privileges*, guaranteeing a majority of citizens of Pennsylvania freedom of worship and freedom of speech.

Though Virginia is often contrasted with Massachusetts in having been established for commercial rather than religious reasons, the Anglicans who settled in Virginia were serious about Anglicanism becoming the established religion. As in Massachusetts, Virginia authorities banished Quakers and threatened them with death if they insisted on returning to Virginia for a third time, and Baptists regularly faced beatings and imprisonment for preaching without a license. It would not be until 1786 that the Virginia legislature would pass Thomas Jefferson's Virginia Act of Religious Freedom (see Lesson 2), which prohibited coerced religion and declared religious freedom to be a natural right.

Against this backdrop, the ratification of the First Amendment in 1791 made the "free exercise" of religion a recognized right of the new nation.

The Free Exercise Clause before the Supreme Court

It is of interest that the Supreme Court first addressed the Free Exercise Clause (or any religious freedom case) in *Reynolds v. United States* in 1879, almost a century after the First Amendment's ratification.

In *Reynolds*, the Court considered the constitutionality of an anti-polygamy law passed in response to the early Church of Jesus Christ of Latter-day Saints (also known as Mormons or the LDS Church), who then practiced polygamy as a central belief of their faith and had migrated to the federal territory of Utah to avoid religious persecution.

George Reynolds was convicted of practicing polygamy and sentenced to two years hard labor and fined $500. He argued that the anti-polygamy law violated his free exercise of religion. The Court disagreed, and upheld his conviction. The Court upheld the conviction concluding that "Congress was deprived of all legislative power over mere opinion, *but was left free to reach actions which were in violation of social duties or subversive of good order*."

In other words, according to the *Reynolds* Court, the Free Exercise Clause protected all religious beliefs, but not all religious actions. Thus, Reynolds was free to believe in polygamy, but he could not practice it. Critics of the Court's decision were quick to point out how dangerous that precedent could be if widely applied. It would be many years before the Court would again take up a significant "free-exercise" case.

REFLECT

What do you think of a court decision that suggests an individual is free to believe what he or she wants but not necessarily free to live out that belief?

The Free Exercise Clause in the 20th Century

After *Reynolds*, the next major case under the Free Exercise Clause did not arise for another 60 years. In the landmark case, *Cantwell v. Connecticut* (1940), the Supreme Court declared that Connecticut laws restricting Jehovah's Witnesses from promoting their faith through sidewalk evangelization and solicitation violated the Free Exercise Clause.

In reaching its decision, the Court for the first time applied the Free Exercise Clause to the states through the Fourteenth Amendment. As a result, going forward, the First Amendment's protection of religious free exercise would also apply to state and local governments. This is why religious individuals or communities who believe their fundamental right of religious free exercise is violated by state or local governments now find it easier to seek federal protection of religious free exercise under the First Amendment.

In *Sherbert v. Verner* (1963), the Supreme Court declared a South Carolina law that had denied unemployment compensation to Adele Sherbert was unconstitutional. As a Seventh-day Adventist, Sherbert refused to accept a job that required her to work on Saturdays (her Sabbath). Though the law did not single out religion as a reason for the denial of benefits, the Court concluded that it did have a "substantial" effect on her religious free exercise. The state of South Carolina did not have a "compelling interest" to restrict Sherbert's religious free exercise.

The "compelling interest" language became part of a three-part test known as "Strict Scrutiny." In theory, the test ensured that all laws were "neutral" toward religion. Only when all three parts of the test were met could the government restrict the free exercise rights of religious individuals or communities.

THE STRICT SCRUTINY TEST

(1) A law may not *substantially burden* a religious practice.
(2) If it does substantially burden a religious practice, it is only justified if the state has a *compelling interest* to do so.
(3) If this substantial burden is justified by a compelling interest, the burden must be imposed by the state using the *least restrictive means* possible.

Restoring Religious Freedom in America

By 1990, the Supreme Court seemingly overruled its own guidelines established in *Sherbert* through a case known as *Employment Division v. Smith* (1990). In *Smith*, members of a Native American Church were denied unemployment benefits in Oregon because they routinely used peyote, an illegal drug, as part of religious ritual. In response, the Church asked the Court to recognize an exemption for their use of peyote under the *Sherbert* standard. The Court, however, refused to create an exemption and announced that the *Sherbert* standard was no longer the law.

Smith caused considerable controversy as it seemed to assault religious exemptions to

laws and even broader claims of free-exercise. Congress was sufficiently startled that by 1993, it passed the *Religious Freedom Restoration Act* (RFRA) which restored the compelling state interest test from Sherbert. The bill was originally introduced in the House by Congressman Chuck Schumer (D-NY) and in the Senate by Senator Ted Kennedy (D-MA). A unanimous U.S. House and near unanimous U.S. Senate passed the bill, and President Bill Clinton signed it into law. In his comments at the signing ceremony, President Clinton reaffirmed and endorsed the views of the founders with the following words:

Photograph of President Clinton signing the Religious Freedom Restoration Act on the South Lawn at the White House.

Source: U.S. National Archives and Records Administration

The free exercise of religion has been called the first freedom, that which originally sparked the development of the full range of the Bill of Rights. Our Founders cared a lot about religion. And one of the reasons they worked so hard to get the first amendment into the Bill of Rights at the head of the class is that they well understood what could happen to this country, how both religion and Government could be perverted if there were not some space created and some protection provided. They knew that religion helps to give our people the character without which a democracy cannot survive.

--The President delivered his remarks at 9:15 a.m. on the South Lawn at the White House.

Though RFRA originally applied to governmental action at all levels, the Court determined in a 1997 case that it only applies to the actions of the federal government. As a result, 23 state legislatures and an additional 9 state courts enacted RFRA provisions at the state level. However, by 2021, RFRA at both the national and state level was under assault from a new wave of questions regarding religious freedom in America.

The Free Exercise Clause in the 21st Century

The future of the Free Exercise Clause lies at the intersection of religion and new civil rights claims based on identity. Of course, every individual deserves to be treated with dignity and possesses the same natural rights as any other person (see the distinction made between civil rights and natural rights made in Lesson One). The universal nature of human dignity and the inalienable, natural rights possessed by all people is, in fact, the basis for religious freedom. In this case, the opponents of religious freedom seem to have something different in mind.

One of the important cases at that intersection of religion and these new civil rights claims is *Masterpiece Cakeshop v. Colorado Civil Rights Commission (2019).* In that case, two men asked Jack Phillips to create a custom wedding cake celebrating their same-sex marriage. Phillips declined, saying that using his creative energy to design a custom wedding cake for a

same-sex marriage contradicted his religious convictions about marriage. He did offer to sell them anything else in his store.

The Colorado Civil Rights Commission acted on the complaint of the two men, finding that Phillips violated Colorado's anti-discrimination law and that Phillips's free exercise had not been infringed. However, the Supreme Court ruled that the Free Exercise Clause forbids government hostility toward religion, and that members of the Commission had shown hostility by comparing Phillips to a racist for his views on marriage. For those reasons, Phillips prevailed.

However, Mr. Phillips was taken back to court and additional cases involving bakers, florists, health-care professionals, school employees, military officers, and others have become regular features at the nation's highest Court as the free exercise rights of religious individuals and groups has come under attack in contemporary American society. Beginning in 2020, a series of bills were introduced in the US Congress that sought to repeal religious freedom protections recognized by RFRA.

Conclusion

So, what are we to make of the Court's inconsistent record over the last 150 years? If the legal experts in the United States Supreme Court can't be consistent, what can we expect from the rest of the country? It is important to note that despite this inconsistency, the Court remains an important part of the checks and balances established by the Founders. It is certainly important for American citizens to have a basic understanding of the Court's actions over the last 150 years and to be aware of trends, whether they are troubling or encouraging. But in a larger sense, perhaps this uncertainty underscores the reason you are taking this course. If Americans are to elect individuals with a commitment to protecting this cherished freedom and if judges are to be held to a high standard that protects this inalienable right, we all must understand why the Founders made religious freedom America's First Freedom and must possess the ability to articulate religious freedom's value as the cornerstone of the civil liberties held dear in this country. Only then, is it reasonable to expect we will continue to enjoy the fruits of religious freedom and flourish as a diverse people.

CHALLENGE YOURSELF
"UNDERSTANDING THE COURT'S ACTIONS"

Listed below are several U.S. Supreme Court cases not mentioned in the lesson. Choose one to research and then compete the Facts and Summary template (available online in the AFFC Lesson 4 Resource Section) based on your research.

Torcaso v. Watkins (1961)	County of Allegheny v. ACLU (1989)	Burwell v. Hobby Lobby (2014)
Wisconsin v. Yoder (1972)	Lee v. Weisman (1992)	American Legion v. American Humanist Association (2019)
Stone v. Graham (1980)	Zobrest v. Catalina Foothills School District (1993)	Espinoza v. Montana Department of Revenue (2020)
Marsh v. Chambers (1983)	Santa Fe Independent School District v. Doe (2000)	Little Sisters of the Poor v. Comm. of Pennsylvania (2020)
Lynch v. Donnelly (1984)	Locke v. Davey (2004)	Fulton v. City of Philadelphia (2021)
Wallace v. Jaffree (1985)	Christian Legal Society v. Martinez (2010)	

KEY QUESTIONS

Now that you completed the lesson, can you answer the following key questions?

1. Describe the Founders' solution for preventing the federal government from assuming too much power while still promoting virtue in the people.
2. What are some evidences that the Founders ban on an established national religion was not meant to keep religion out of politics and public life?
3. What was the context of Jefferson's "Wall of Separation" letter and what does that context suggest was Jefferson's intended meaning for the phrase?
4. What was the Lemon Test? Was it a reliable standard that accurately applied the Founders' intent for the First Amendment's "religion clauses?"
5. Was the free exercise of religion a widely held standard in the American colonies?
6. Can you explain and apply the "compelling interest" language that became part of the Court's Strict Scrutiny test?
7. What motivated the U.S. Congress to pass the Religious Freedom Restoration Act (1993) and what did it intend to accomplish with this legislation?

ADDITIONAL READING

Dreisbach, Daniel. The Mythical 'Wall of Separation': How a Misused Metaphor Changed Church–State Law, Policy, and Discourse (2006)
Dreisbach, Daniel. Thomas Jefferson and the Mammoth Cheese (2010)
Goodrich, Luke W. and Rachel N. Busick. Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases (2018)
Hamburger, Scott. Against Separation (2004)
Lankford, James and Russell D. Moore. The Real Meaning of the Separation of Church and State (2018)
Noll, Mark A. The Founders and Religious Freedom: A Critical Look (2016)
O'Connor, Sandra Day City of Boerne, Petitioner V. P. F. Flores, Archbishop of San Antonio
Royer, Ismail. The Supreme Court's Tale of Two Cities (2019)
Royer, Ismail. Protect Religion's Place in the Public Square (2020)
Smith, Steven D. The Tortuous Course of Religious Freedom (2018)
Soloveichik, Rabbi Meir. The Bible, the Founders, and the War on American History (2023)
The American Charter (2019)
White, Adam J. A Republic, If We Can Keep It (2020)