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The Right of Conscience: Progressive Versus Conservative Understandings of Religious Liberty

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The Founding Fathers created the Constitution to favor religion by securing religious freedom. They limited the government's authority, recognizing that the right of religious liberty is "inalienable." They were cognizant of the priority of an individual's religious duties to God and the free manner in which these duties must be carried out. The Founders understood that religious institutions have an important, arguably essential, role to play in supporting American democracy and society. Government cannot and need not be neutral toward religion; state authority vis-à-vis religion is limited to facilitate worship according to conscientious conviction. This is why religious liberty is, and must remain, America's "first freedom"—a precious heritage to be preserved for the next generation of Americans.

Religious liberty, alas, has become a partisan issue. Conservatives are thought to be for it; progressives increasingly skeptical of it, especially of claims for religious exemptions from identitarian non-discrimination laws. These different dispositions reflect a deeper disagreement over the very grounds of religious liberty. Conservatives see religious freedom as following from the higher and more sovereign demands of faith—religious freedom as necessary for individuals to fulfill their obligations to God. Progressives tend to place religious freedom within the contexts of individual autonomy and identity politics—religious freedom as necessary for religious individuals to live their identities but also as limited so that other individuals can express their own identities.

This *First Principles* essay attempts to clarify the foundational differences between the conservative and progressive understandings of religious freedom, and then to explain some of the political and constitutional differences that attend those understandings. What conservatives still embrace, and what progressives seem to have moved past, is that American constitutionalism was not designed to be neutral or indifferent to religion. Rather, the Constitution secures religious freedom so that individuals, usually through their houses of worship, can fulfill their duties to the Creator.

Differing Conceptions of Religious Freedom

The consensus around the goodness of religious freedom has splintered, in part, because conservatives and liberals tend to conceive of this "first freedom" differently.

The Progressive Vision of Individual Autonomy. For contemporary progressives, human liberty involves the individual developing his or her own meaning-giving convictions.[1] William Galston, who served as an advisor to President Bill Clinton, captures the progressive view with what he calls "expressive liberty": the freedom for individuals to live their lives in ways that express their deepest beliefs about what gives meaning or value to life. University of Chicago philosophy professor Martha Nussbaum defends "liberty of conscience" by appealing to the special status of "the faculty with which each person searches for the ultimate meaning of life," a faculty, she says, that is not ordained toward anything beyond its own ability to search for meaning about "ultimate questions."[2]

For progressives, human freedom lies in creating meaning for oneself; religious freedom means creating meaning about God or "existence" and living authentically with one's own deeply held beliefs. Such beliefs may be associated with traditional religion and involve a higher power, but they are socially understood to be rooted within oneself.

The progressive understanding can be illustrated by a pair of Supreme Court cases involving conscientious objectors. In *United States v. Seeger*, the Court addressed the scope of the Universal Military Training and Service Act, a post–World War II conscientious objector law. The law exempted from combat service individuals whose conscientious opposition to war was based on "religious training and belief," a phrase the law defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." The legislation specified that religious training and belief "does not include essentially political, sociological, or philosophical views or a merely personal moral code." In light of these

limitations, Daniel Seeger's application for conscientious objector status was denied; he had been unable to confirm that his beliefs were grounded in belief in a "Supreme Being."

On appeal, the Supreme Court changed Seeger's status by reinterpreting what it means to possess religious beliefs. In a 9–0 decision, the Court held that

> [t]he test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not.[3]

As long as Seeger's beliefs were "sincere" and they occupied a place in his life that was akin to an orthodox believer's belief in God, the Court found he was, for the purposes of the law, "in relation to a Supreme Being."

Five years later in *Welsh v. United States*, the Court further advanced this understanding. Interpreting the same "religious training and belief" standard, the Court granted conscientious objector status to Elliot Welsh. Welsh had been denied such status because he would not affirm belief in God, and he denied that his opposition to war was based on religious training. Welsh, the Court instructed, might not be "fully aware of the broad scope of the word 'religious,'" so his own statements that his beliefs were non-religious were "a highly unreliable guide for those charged with administering the exemption."[4] The Court concluded that Welsh's beliefs were based on "religious training and belief," even though Welsh himself denied that they were.

Cases such as *Seeger* and *Welsh* and liberal thinkers such as Galston and Nussbaum defend religious freedom and liberty of conscience by stripping it of any distinctly religious elements, at least if "religious" is understood to require belief in a transcendent God.[5] In the progressive understanding, a commitment to religious freedom is a commitment to one's own deeply held beliefs. In the progressive mind, every individual is his or her own god.

The Conservative Understanding of Duties to the Creator. The conservative understanding, by contrast, follows the Founders' understanding by grounding religious liberty on the acknowledgement of man's duties to the Creator and his corresponding right to worship freely. The 1776 Virginia Declaration of Rights sets forth the Founders' basic framework:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise [sic] Christian forbearance, love, and charity toward each other.[6]

Article II of the 1780 Massachusetts Declaration of Rights similarly states:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.[7]

Because Americans have the duty to worship the Creator according to conscience, the Founders reasoned that they have a right among men to do so freely. Religious rights and religious duties in the original American understanding were not only *not* opposed: The more sovereign duties to God were understood to be the very foundation of Americans' political rights of religious freedom.

Religious faith, especially Christianity, animated much of the Founders' thinking about matters of church and state, just as faith animates many conservatives today.[8] Unlike many today, however, the Founders did not understand faith and reason to be opposed. They presumed that revealed truths about creation and man's relationship to the Creator could, at least to some degree, also be deduced by philosophical reflection—"reasoning from the effect to the cause, from Nature to Nature's God," in James Madison's words.[9]

The Founders' philosophical argument for religious freedom, which also is embraced by conservatives today, begins by recognizing two basic facts about creation: first, that if the world is not eternal, there must be some first, uncaused cause and, second, that mankind is not its own cause.[10] These basic facts—again, knowable through reason and confirmed by revelation—suggest the reasonableness of belief in a creator God. And if it is reasonable to believe that men have been created by a Creator, it is also reasonable to believe that they ought to give thanks and praise to Him. A basic principle of justice, after all, is that those who receive gifts freely bestowed ought to be grateful to the giver. This reasoning does not prove or demonstrate that the God of the Bible exists or that He is attentive to our prayers, but it does suggest the reasonableness of such beliefs.

Given the reasonableness of religious faith, the Founders philosophically deduced "that Religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."[11] Madison's basic insight follows from the type of beings men are. An omniscient and omnipotent God who created men rational, free, and with the ability to love would presumably want (and thus only find acceptable) worship that is directed "by reason and conviction, not by force or violence."

James Madison eloquently gathered these principles in a presidential proclamation that called for a national day of "public humiliation and prayer":

> If the public homage of a people can ever be worthy [of] the favorable regard of the Holy and Omniscient Being to whom it is addressed, it must be that, in which those who join in it are guided only by their free choice, by the impulse of their hearts and the dictates of their consciences.[12]

In deriving the right of religious freedom from our duties to our Creator, conservatives today adopt both the Founders' Biblical faith and their philosophical reasoning.

Before discussing their political implications, it is important to emphasize the foundational differences in the progressive and conservative conceptions of religious freedom.

- The progressive account exalts men as makers of meaning. The free man is the man who finds meaning within himself and lives authentically in light of that meaning.[13] The free human being is a creator.

- The conservative account, by contrast, recognizes that man is created and that he owes his existence to something beyond and above himself. The free man is thus a creature (that is, created) who lives in right relationship with his creator.

While secular progressives and religious conservatives both use the same language, they have radically different understandings of why individuals have a right to religious freedom and, as discussed below, different political and legal approaches to the protection of religious freedom.

From their different foundations, progressives and conservatives produce different understandings of what religious freedom means politically and how it should be protected constitutionally.

The Progressive Managerial Approach to Religious Liberty

Progressives seek to preserve the individual's autonomy to develop and live according to his or her own deeply meaningful life plan. Progressives also aim for equity, meaning the ability of all to equally realize and achieve their own unique identity. These guiding purposes necessarily eschew fixed rules or the equal application of law when trying to protect religious freedom. Progressive politics, instead, seek to ascertain the various threats to individual autonomy—of which religious liberty is a part—and then judiciously employ state power accordingly.

In practice, progressives seek to use state power to aid and support those who lack individual agency and social power (and thus struggle to live autonomously) and, at the same time, to restrain those who (in the progressive mind) dominate society and thus, through their social power, limit or restrain the relatively powerless. The progressive commitment to equity as equally achieved autonomy necessarily requires a process of negotiating the inevitable conflicts between individuals' and groups' competing life plans or values.

To achieve equity, marginalized groups (as judged by progressives) are preferred to more powerful, dominant groups. The more dominant must be restrained because progressives assume that achieving freedom is a zero-sum game. Dominant groups—in today's progressive mind, especially straight, white, Christian, evangelical men—are understood to have achieved freedom by dominating and oppressing marginalized groups—especially minorities, women, and LGBTQ+ individuals.

Justice Brennan and "Intersectionality." Contemporary progressive identity politics uses the language of "intersectionality" to produce a hierarchy of most preferred to least preferred groups, but the basic progressive playbook was anticipated constitutionally by the Supreme Court in the 1960s, most coherently by Justice William Brennan.[14] Brennan held that the underlying aim of the First Amendment's Religion Clauses is for every individual to determine for himself or herself his or her own religious beliefs.[15] He thus interpreted the Constitution to create space for individuals to live according to their deeply held convictions and, at the same time, to limit politically powerful religious denominations that might use state power to encroach upon the autonomy of others.

Through the Free Exercise Clause, he provided exemptions to religious believers (especially to members of minority religions) from otherwise valid laws that, in practice, burdened their ability to live according to their own convictions. Through the Establishment Clause, he restrained the

potential political and cultural power of institutional churches, especially those Christian denominations that had or might exercise dominance in America. Brennan wrote the judicial playbook for interpreting the Constitution to prefer minority religious believers and to restrain those religions and churches that have traditionally exercised political power.

***Abington* and Strict Separationism.** There are, again, a pair of cases that outline Brennan's progressive constitutional vision of religious freedom. In *Abington School District v. Schempp*,[16] the Court addressed state laws that mandated Bible reading and prayer at the beginning of the public school day. A Pennsylvania law provided that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."[17] Maryland school regulations provided for the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."[18]

The Court struck down these practices by a vote of 8–1. The Court's forgettable majority opinion, written by Justice Tom Clark, relied on *Everson v. Board of Education*,[19] the landmark "wall of separation" precedent, and a supposed commitment to state neutrality toward religion. More memorable and influential is Justice Brennan's *Schempp* concurrence, which creatively invoked John Locke, James Madison, and Thomas Jefferson. Brennan held that prayer within public schools ought to be adjudicated in light of the underlying purpose that animated the adoption of the Establishment Clause. The prohibition, he wrote, "was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief."[20] The Constitution, Brennan explained, aimed to remedy the mischief of state officials fostering or discouraging religious worship or belief in order to secure the individual's autonomy to determine for himself or herself his or her own religious beliefs.

Brennan provided a leading rationale for what became known as "strict separationism": Church and state should be strictly separated—meaning church authority should be eliminated from the public square—to safeguard individual autonomy in all matters of religion. Brennan's conception of the Establishment Clause would later guide Justice Sandra Day O'Connor's "no-endorsement" approach, which dominated Establishment Clause jurisprudence from the mid-1980s until her retirement in 2005 and continues to influence Justice Sonia Sotomayor, who remains the Court's most steadfast separationist.[21]

***Sherbert* and Individual Autonomy.** The progressive constitutional commitment to individual autonomy also animated the Court's decision in *Sherbert v. Verner*.[22] The case involved a Seventh-Day Adventist, Adell Sherbert, who was denied unemployment compensation by the state of South Carolina after she had been fired from her job for failing to show up for her scheduled Saturday work shifts. While the unemployment compensation regulations were facially neutral toward religion, they left Ms. Sherbert with the undesirable choice of accepting Saturday work (which violated her religious beliefs) or foregoing unemployment benefits (which were conditioned on there being no employment opportunities available). Given Ms. Sherbert's religious commitments, Justice Brennan wrote in his majority opinion that South Carolina's unemployment benefits regulations

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[23]

Brennan reasoned that Ms. Sherbert, unlike others who might have refused available work, experienced pressure from the state to abandon her religious convictions. That, he said, compromised her religious autonomy, understood as her ability to authentically live according to her own religious commitments.

Sherbert did not mandate that religious believers always ought to receive exemptions from burdensome laws. Rather, the Court held that the Free Exercise Clause provides a right to consideration by the judiciary for an exemption, subject to the state pursuing other compelling interests. In practice, the Court's use of "strict scrutiny" allowed it to protect religious minorities who could not defend themselves in the majoritarian political process while, at the same time, preventing other religious believers (especially those of dominant religions) from taking advantage of a constitutional right to exemption from burdensome laws. The application of religious exemptions through the judiciary allowed the justices to achieve equity-as-autonomy and overcome the limitations of equality by *not* applying the same law against all individuals.

Exemptionism and Separationism. Establishment Clause separationism, similarly, does not always mean that religious litigants lose (though Brennan regularly voted against religious litigants in Establishment Clause cases). Both Free Exercise Clause exemptionism and Establishment Clause

separationism empower state officials (especially judges) to "manage" religious liberty—that is, to prevent more powerful religious denominations from legislating their own policy preferences while at the same time aiding religious minorities and the nonreligious (as seen in *Seeger* and *Welsh*) from the baneful effects of democratic majoritarianism. The judicial management of religion and religious freedom fits hand-in-hand with a progressive notion that rights evolve and, most fundamentally, with the progressive commitment to achieving equity in individual autonomy.

Conservative Limitations on State Authority and Prudential State Support of Religion

The conservative approach to religious freedom lacks a lodestar such as equal individual autonomy, which perhaps explains why conservatives increasingly adopt the language of autonomy. Most conservative judicial opinions—especially those by the late Justices William Rehnquist and Antonin Scalia and by Justice Samuel Alito—have focused on how Court progressives have misinterpreted the Constitution.[24] They have been especially effective in documenting that the original meaning of the Constitution did not erect a "wall of separation" between church and state, but they have been less clear about what exactly the Constitution attempts to promote by prohibiting religious establishments and protecting the free exercise of religion.

Religious Duties. A principled conservative approach can begin with the nature of religious duties and how they ought to limit the scope of political authority. To paraphrase Madison, because man has duties to God, he has rights among men.[25] The foremost right, Americans' "first freedom," is the freedom to worship, which means that the government may never prohibit, mandate, or regulate religious worship as such. Thankfully, there have been precious few attempts by state officials to prescribe or proscribe worship. But this limit on the government's authority ought never be overlooked or forgotten.

Limitation on State Authority. The most fundamental way government is limited and must remain limited pertains to how men worship, or even whether they worship.[26] George Washington poetically captured this understanding in his letter to the Hebrew Congregation at Newport, Rhode Island:

> All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class

> of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.[27]

The citizenship of a patriotic American certainly involves duties—for example, to follow the law, to pay taxes, to support the country in times of war—but it does not require that one worship in a particular manner. There are no religious requirements for American citizenship.

It must be emphasized that this limitation on state authority is not animated by indifference or hostility toward religion. The state lacks legitimate authority to supervise religious exercises because we the people never give government that authority. We the people do not grant government religious authority because that authority belongs to God. The right to worship according to conscience is "inalienable" because our duties to God are more sovereign, and always remain more sovereign, than our political obligations. Government, therefore, may not prescribe or proscribe religious worship, dictate who can or cannot preach, or direct who is or is not appointed to be bishop or church authority. We limit government out of recognition of and respect for divine authority.[28]

Principled Lessons from the Founders

Recognize Fixed Constitutional Limits. A conservative approach to religious freedom thus will begin by recognizing fixed limits on the state, limits that are necessary for individuals to worship freely and for churches to minister freely. The most fundamental limits on government authority are the prohibitions of the state criminalizing religious worship as such, mandating religious worship, imposing official tenets of religious orthodoxy, and exercising jurisdiction over the appointment of church officials. This understanding of the proper separation of church and state follows from the "inalienable" right to worship according to conscience and the corresponding limits on state authority. It recognizes the duty of the individual to search for religious truth and to worship according to the truth, and the responsibility of churches to carry out their divine commission—a commission *not* given to the state.

A conservative approach to the Free Exercise Clause, at minimum, would interpret it to categorically ban government regulation of religious worship as such. If state officials ever tried to proscribe or prescribe religious

worship, such legislation should be recognized as beyond the authority of the state and thus null and void. No "compelling state interest" tests would need to be administered, as the state could never legitimately possess an interest in suppressing religious worship as such.[29]

There also ought not be religious tests to possess the privileges or immunities of citizenship. Though traditional religion may nurture the qualities of good citizenship, as discussed below, neither one's natural rights nor the rights one enjoys as an American citizen depend on religious affiliation or sectarian beliefs. The Constitution's prohibition on religious tests for federal office is an essential element in keeping the state within its rightful jurisdiction. The 1786 Virginia Statute for Religious Liberty powerfully articulated America's commitment to religious free exercise:

> No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened [sic] in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[30]

Limit State Authority to Protect Religious Institutions. A conservative approach to the Establishment Clause, similarly, would focus on limits to the state's authority, especially vis-à-vis institutional churches. State officials cannot act like a church and impose official religious tenets of faith through law. State officials lack authority to regulate who can be a church official or how church officials are appointed. State officials also cannot delegate the coercive authority of law to churches or grant the state's taxing authority to churches. Properly understood, the Establishment Clause does not hinder institutional religions from operating as such but protects institutional religions from state intrusion into the domain of religious authority.[31]

Recognize Participation Rights. A conservative approach to church-state relations would also recognize that religious individuals and groups can participate—indeed, they have a right to participate—in governmental programs on equal grounds with other individuals and groups. Given that religion and religious education historically have played an important role in nurturing the moral character that democratic citizenship requires—religion and morality are "indispensable supports" to political prosperity according to George Washington—government legitimately can support and even fund the cultivation of good citizenship through religious education and other civic programs that benefit or cultivate the religious sensibilities

of the American people.[32] Government ought to support those habits of mind and character that support good citizenship, be they religious or not, while always being mindful of its jurisdictional boundaries.

Conclusion

Thankfully, the Supreme Court recently took an important step toward securing such an approach with its 2022 decision in *Kennedy v. Bremerton School District*. The Court recognized that its leading "wall of separation" precedent, *Lemon v. Kurtzman*,[33] had been "abandoned," thus instructing lower court judges to not rely on or employ *Lemon* or its progeny.[34] What remains is for the Court to articulate a sound interpretation of the Establishment Clause, consistent with the Clause's original design. Doing so would protect churches from state interference and enable the civic participation of religious institutions and individuals in all aspects of the public square.

The Founding Fathers created the Constitution to favor religion by securing religious freedom. They limited the government's authority, recognizing that the right of religious liberty is "inalienable." They were cognizant of the priority of an individual's religious duties to God and the free manner in which they must be carried out. They understood religious institutions have an important, arguably essential, role to play in supporting American democracy and society.

Conservatives understand that government cannot and ought not be neutral toward religion, and that state authority vis-à-vis religion should be limited to facilitate worship according to conscientious conviction. This is why religious liberty is, and must remain, Americans' "first freedom," a precious heritage of liberty, which we have a duty to secure for the next generation of Americans.

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Endnotes

1. This point is developed in more detail in Vincent Phillip Muñoz, "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion," *American Political Science Review*, Vol. 110 (2016), pp. 377–378.
2. William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York: Cambridge University Press, 2002), p. 28, and Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), pp. 168–169.
3. *United States v. Seeger*, 380 U.S. 163, 165–166 (1965).
4. *Welsh v. United States*, 398 U.S. 333, 341 (1970).
5. For an elaboration of this understanding as applied to church–state law, see Micah Schwartzman, "What If Religion Is Not Special?" *University of Chicago Law Review*, No. 79 (2012), pp. 1351–1427. Compare Vincent Phillip Muñoz, "If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Right of Religious Liberty," *Notre Dame Law Review*, No. 91 (2016), pp. 1387–1418.
6. "The Virginia Declaration of Rights," § 16, National Archives, https://www.archives.gov/founding-docs/virginia-declaration-of-rights (accessed October 4, 2024).
7. "Bill of Rights, Massachusetts Constitution of 1780, Pt. 1," March 2, 1780, Art. II, http://moglen.law.columbia.edu/twiki/pub/AmLegalHist/AngelaProject/Mass_Declaration_of_Rights_1780.pdf (accessed October 4, 2024).
8. Even Thomas Jefferson, among the most religiously heterodox of the Founding Founders, began his Virginia Statute for Religious Freedom with the relatively orthodox religious sentiments "that Almighty God hath created the mind free" and "that all attempts to influence it by temporal punishments, or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do." Thomas Jefferson, "Virginia Statute for Religious Freedom," 1779, § 1, https://cas.umw.edu/cprd/files/2011/09/Jefferson-Statute-2-versions.pdf (accessed October 4, 2024).
9. James Madison, letter to Frederick Beasley, November 20, 1825, in Ralph Ketcham, ed., *Selected Writings of James Madison* (Indianapolis, IN: Hackett, 2006), p. 303.
10. See Kody W. Cooper and Justin Buckley Dyer, *The Classical and Christian Origins of American Politics: Political Theology, Natural Law, and the American Founding* (New York: Cambridge University Press, 2022), especially Ch. 3.
11. James Madison, "Memorial and Remonstrance Against Religious Assessments," 1785, https://constitutioncenter.org/museum/historic-document-library/detail/james-madison-memorial-and-remonstrance-against-religious-assessments-1785 (accessed October 4, 2024).
12. James Madison, "Presidential Proclamation," July 23, 1813, in J. C. A. Stagg et al. eds., *The Papers of James Madison: Presidential Series* (Charlottesville: University of Virginia Press, 1984), Vol. 6, pp. 458–459. For a development of this argument and the natural theology that underlies it, see Vincent Phillip Muñoz, *Religious Freedom and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses* (Chicago: University of Chicago Press, 2022), pp. 74–82.
13. For an outstanding elaboration of this point, see Carl R. Trueman, *Strange New World: How Thinkers and Activists Redefined Identity and Sparked the Sexual Revolution* (Wheaton, IL: Crossway, 2022), foreword by Ryan T. Anderson.
14. For a helpful overview of contemporary identity politics, see David Azerrad, "The Promise and Perils of Identity Politics," Heritage Foundation *First Principles* No. 72, January 23, 2019, https://www.heritage.org/progressivism/report/the-promises-and-perils-identity-politics.
15. Vincent Phillip Muñoz and Kate Hardiman Rhodes, "Constructing the Establishment Clause," *Loyola University Chicago Law Journal*, No. 54 (2022), pp. 411–415.
16. *Abington School District v. Schempp*, 374 U.S. 203 (1963).
17. Ibid. at 205.
18. Ibid. at 211.
19. *Everson v. Board of Education*, 330 U.S. 1 (1947).
20. *Abington,* 374 U.S. at 234.
21. *See generally Lynch v. Donnelly*, 465 U.S. 668, 687–694 (1984) (O'Connor, J., concurring); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (O'Connor, J.); *Carson v. Makin*, 596 U.S. 767, 806–810 (2022) (Sotomayor, J., dissenting); and *Kennedy v. Bremerton School District*, 597 U.S. 507, 545–578 (2022) (Sotomayor, J., dissenting).
22. *Sherbert v. Verner*, 374 U.S. 398 (1963).
23. Ibid. at 404.
24. See, for example, Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985); Scalia's dissents in *Lee v. Weisman*, 505 U.S. 577 (1992) and *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005); and Alito's majority opinion in *American Legion v. American Humanist Association*, 588 U.S. ____ (2019).

25. James Madison, "Memorial and Remonstrance Against Religious Assessments," June 20, 1785, Art. 1, National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163 (accessed October 4, 2024).
26. Government's lack of jurisdiction over worship protects the atheist as well as the believer; that the state can neither *prescribe* nor *proscribe* worship means that the atheist cannot be punished for not worshipping.
27. George Washington, "From George Washington to the Hebrew Congregation in Newport, Rhode Island," August 18, 1790, National Archives, https://founders.archives.gov/documents/Washington/05-06-02-0135 (accessed October 4, 2024).
28. For an elaboration of this argument, see Vincent Phillip Muñoz, *Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses* (Chicago: University of Chicago Press, 2022), especially Ch. 2.
29. For an elaboration of this point and further explanation as to why "strict scrutiny" is an inappropriate approach to at least some Free Exercise Clause cases, see ibid., pp. 257–260.
30. James Madison, "Act for Establishing Religious Freedom," October 31, 1785, National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0206 (accessed October 4, 2024).
31. See Muñoz, *Religious Liberty and the American Founding*, Ch. 7.
32. See George Washington, "Washington's Farewell Address to the People of the United States," September 19, 1796, https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf (accessed October 4, 2024). For further discussion, see Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (New York: Cambridge University Press, 2009), Ch. 2.
33. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
34. *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022), slip op. at 22.