

Separation of Church and State

Religious belief and practice remain vibrant in the United States despite—or more likely, because of—the separation of church and state. This paper provides an account of the history and current controversies over religious disestablishment. It explains how the constitutional structure of the American government affects religious freedom; and in surveying some of the most important Supreme Court cases dealing with religion, it provides an overview of the status of religious freedom in the United States.

INTRODUCTION

Religious belief among Americans today is as vigorous, dynamic and widespread as it ever has been. Immigration constantly brings new and different religious traditions and practices to the United States, even as the Christian traditions to which most Americans adhere continue to adapt to the needs of an ever-changing population. Approximately ninety percent of Americans profess a belief in God, and religion remains a pervasive influence on American culture, politics and public policy.

Yet the United States is among the few nations in the world that eschew an established state religion—indeed it was the first to do so, in 1791. As a result, the government is prohibited from supporting or endorsing any religion, or promoting one at the expense of another. Among other things, this means it cannot appoint religious leaders, compel worship or prayer, provide official interpretations of sacred

scriptures, or define creedal statements of faith. Although this arrangement is widely known in the United States as the “separation of church and state,” owing to the predominance of Christian churches, it also applies to mosques, synagogues, and indeed all religious institutions of any sort. Scholars often use the term “disestablishment” to specify the legal aspect of the concept, but by whatever name it is a core principle and defining feature of American political life.

Although many Americans find these facts unremarkable because they are so familiar, foreign observers—especially those from nations with official religions—often ask keen questions about the American form of church-state separation: If most Americans are Christians, why would they not support the establishment of Christianity as the state religion? If the vast majority of Americans believe in God, why not inculcate that belief in students and other citizens

as a matter of public policy? And how is it possible that religious belief has flourished without the protection and support of the state? This paper will address these and other questions through a focus on the legal issues involved in religious disestablishment specifically, and religious freedom in general. For a more thorough examination of institutional religious pluralism in the United States, and of the diversity of religious practices in this country, please see the accompanying Boisi Center Papers on these topics.

This paper is divided into two major sections. The first examines the religious, philosophical and political origins of disestablishment in this country, and explains the legal and constitutional provisions that codify the principle. Special care is taken to explain how the structure of the United

States government—its federal system and separation of powers—plays an important role in matters of religious freedom. In the United States the judiciary holds the exclusive authority to interpret the Constitution (including its provisions for religious freedom) and to nullify any laws that violate that interpretation. Constitutional interpretations have changed over time (albeit slowly), and will continue to change as new members of the judiciary apply the law to new contexts. The second major section of this paper illustrates the complexity (and sometimes incoherence) of the American church-state arrangement through an historical overview of the most important judicial decisions in this area, as well as an analysis of recent trends that will likely impact church-state relations for decades to come.

FOUNDING PRINCIPLES AND DOCUMENTS

The fifteen years from 1776 to 1791 represent a unique moment—the founding moment—in American history. It was a tumultuous time marked by war (the American Revolutionary War lasted from 1776 to 1783), political trial and error (each colony drafted a state constitution during this time, and the first attempt at national government—the Articles of Confederation, ratified in 1781—was abandoned after just eight years), and through it all, much debate about the form of government best suited to a free people. The decision to create a secular government to represent a religious people was undertaken in this unique context, and its full impact cannot be understood without taking that context into account. Indeed the precise confluence of events and ideas that led to the ratification of the

Constitution of 1789 and the Bill of Rights in 1791 remains a matter of great curiosity and speculation among historians. This section draws upon the work of John Witte, Mark Noll, Gordon Wood and other historians whose excellent accounts of this period have shaped current thinking about the American founding. Four subsections follow, describing in turn the context of the “founding moment,” the logic of religious establishment, the principles and principal supporters of religious disestablishment, and the structure of the federal government created by the United States Constitution.

The Founding Moment

On July 4, 1776 representatives of thirteen British colonies in North America published the Declaration of Independence, an open letter to the world stating their reasons for breaking the American ties of allegiance to King George V. Its opening paragraphs, written primarily by Thomas Jefferson, contain the stirring language that has inspired oppressed peoples for more than two centuries:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration argued that human rights were given by God, but that they must be protected by a government whose powers are derived from the consent of the governed, not from royal lineage or divine sanction. In like fashion—with an appeal to the heavens but grounded in the authority of citizens themselves—the Declaration stated its conclusion:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right

ought to be Free and Independent States... And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Although they do not offer a detailed theory of church and state, much less codify it into law, these passages do imply a certain view of the relationship between religion and government. According to this view, God is to be acknowledged as the creator of humankind and source of “inalienable” rights; but government is properly understood as a human, not divine, institution whose authority and power is derived from citizens themselves, not from God. This concept is known as “popular sovereignty,” which President Abraham Lincoln would famously describe nearly a hundred years later as “Government of the people, by the people and for the people.”

The Declaration of Independence is highly esteemed in American culture not merely as the document that marked the United States’ independence as a nation, but also as a succinct statement of the founding values of this country. As a result July 4 is celebrated across the country every year as Independence Day. There is another historic date, however, that arguably overshadows even July 4 in importance to this nation, despite the fact that few Americans know what happened on December 15, 1791. On that day the Bill of Rights was ratified and became part of the United States Constitution, giving American citizens the most extensive guarantees of liberty the world had ever seen. If the Declaration of Independence signaled the founding of the new nation upon grand ideals of freedom, the Bill of Rights gave power to that promise. It guaranteed the rights to religious freedom, free speech and free

association; protections against self-incrimination and unlawful search and seizure; guarantees of public trial, legal counsel and the “due process of law”; and the extraordinary recognition that citizens have many other powers and rights not enumerated in the Constitution.

Of the ten constitutional amendments that comprise the Bill of Rights, the first was the most novel. It reads, in its entirety, “Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The first sixteen words, known as the religion clauses, provided the legal framework for religious freedom in this country by preventing the new government from establishing a state religion, and by protecting the right of citizens to adhere to any religion they chose. In so doing, the aptly named First Amendment represented a revolution in the relationship between religion and government.

This revolution is best understood as an ongoing process centered around a particular historical “moment” rather than a transformation that occurred on one or two dates—even dates as important as July 4, 1776 and December 15, 1791. The theological and philosophical principles behind religious disestablishment have deep roots in the Western tradition, and indeed were codified into law in several American colonies more than a century before the First Amendment was written. Conversely (for reasons this paper will soon explain), the First Amendment did not attain its present importance in American law and culture until the 1940s, one hundred and fifty years after it was ratified.

Still, understanding the competing interests and ideas of the founding moment is critical in appreciating the impact of the fateful decision to disestablish religion by creating a secular constitution.

Established Religion

As the Founding Fathers contemplated the proper relationship between church and state in the emerging United States, they were aware of a range of options before them. (The Founding Fathers, also called the Founders or Framers, are a loosely defined group of political leaders who opposed the British during the American Revolutionary War and participated in the drafting of the Declaration of Independence or the United States Constitution.) Religious establishment had been the norm for Western governments since the fourth century, when the Roman Emperor Constantine declared Christianity to be the official religion of the Roman Empire. But there were limited historical precedents in Europe for the protection of religious freedom. In 1579, for example, a confederacy of seven northern Dutch provinces had declared their region to be a haven for religious freedom, in response to persecution from the Spanish Monarch who ruled the Netherlands. The Union of Utrecht, as the new government was known, drew dissenting religious groups from all over Europe, including the Puritans, many of whom would later settle the American colonies of Massachusetts Bay and Plymouth.

Religious establishment was the norm in the American colonies, although their unusual religious diversity made toleration of non-established churches a practical necessity. That

practical necessity became a legal necessity with the passage in 1689 of the Toleration Act, an English law that allowed Protestant dissenters from the Church of England to publicly practice their faith. (The Toleration Act was not exactly a model of generosity in twenty-first century terms—Catholic, Jewish, Muslim and other non-Protestant forms of worship could still be banned under the law—but it did provide limited rights for a large group of Protestant Christians.) In a formal sense all colonists owed allegiance to both the English state and the Church of England because by 1776 each colony operated under a royal charter that made the king (who was also head of the Church of England) their sovereign ruler. But in practice the colonial charters manifested several different models of church-state relations. A single established church, the Church of England, was the norm in the southern colonies, whereas several northeastern colonies authorized a multiple establishment of religion in which local communities determined which Protestant denominations would receive the public funds set aside for religion. (Most of these towns selected the Congregationalist churches founded by the Puritans.) Rhode Island rejected religious establishment entirely, heeding its founder Roger Williams' call for a "wall of separation" between the pure "garden" of religion and the "wilderness" of worldly affairs. As a result, it became a haven for religious dissenters like Williams, who had been exiled in 1636 from neighboring Massachusetts because his Baptist views did not comport with Puritan theology. Separation of church and state also prevailed in Pennsylvania, which was founded by a member of a pacifist Christian denomination known as the Quakers. Maryland was founded in part as an experiment in Protestant-Catholic coexistence, and though the Church of England became its

established church in the late seventeenth century, it retained a large measure of religious toleration. Political and theological arguments for religious establishment were thus quite familiar to the Founders.

The traditional logic of religious establishment held that tethering church and state allowed each powerful institution to reinforce the other. An established church can reinforce government authority by lending some measure of its divine legitimacy to civil laws and officials, and by helping to shape virtuous and law-abiding subjects or citizens. The state generally reinforces the established church by promoting the truth of its teachings, although this can be done in direct or indirect ways: suppressing alternate religious practices, compelling attendance at worship services, providing financial assistance for ministerial salaries and church buildings, or providing political status for religious leaders.

During the American founding period (1776-1791), when citizens and their leaders debated whether the new national government should establish a religion, the most influential arguments for establishment were rooted in Puritan theology and/or the political philosophy of civic republicanism.

Puritan Theology

Puritans (later known in the United States as Congregationalists) were dissenting members of the Church of England who wanted to purify what they believed to be the corruptions of the church's teachings. They were among the earliest colonists, and at the time of the Revolution they remained a majority in Massachusetts and Connecticut. Heirs to the Calvinist tradition, Puritans believed that

church and state were both ordained by God, but to serve separate ends; they should thus remain distinct but still “close and compact” with one another. Based on this theological conception of church and state, the Puritans instituted a form of religious establishment that would maintain institutional separation while still allowing church and state to assist one another in their pursuits.

Notably, the Puritans enforced an institutional separation that was in many ways more strict than the one currently employed in the United States. They prohibited religious leaders from holding political office, censuring political officials or serving on juries, just as they forbade political officials from serving religious functions, holding religious office, or censuring religious leaders. Like it is today, marriage was regulated by civil, not religious, law. But the Puritans also allowed more interaction between church and state—they were more “accommodating,” in current parlance—than present law would permit. Government officials collected special tithes and taxes to support the religious activities of Congregational churches; state funds were used to build and improve religious buildings; and churches served as the central meeting place and social service organization in the local community.

The Puritan model of close and compact relations between the church and state—or more precisely, churches and state, since by the time of the Revolution, Massachusetts and Connecticut allowed residents to specify which Protestant church their taxes would support—provided an example of the establishment of a specific religious denomination. Civic republicans, however, argued for a more diffuse form of religious establishment, one that would recognize

and encourage the nation’s Christian heritage while tolerating religious diversity of even non-Christians.

Civic Republicanism

In broad terms, civic republicanism is a set of beliefs linking the practice of virtue with the presence of freedom and the common good of society. Republicanism has an ancient genealogy, beginning in the classical Greek city-states, and forking and branching through the Middle Ages, Renaissance, and Enlightenment, through to the present day. Civic republicans in the American founding period believed that free governments—meaning those based upon the consent of the governed rather than the divine or patriarchal right of a monarch—are quite vulnerable to corruption and cannot depend upon force or fear to make their citizens act in ways that benefit society. Rather, free governments require citizens who are otherwise inclined to act for the common good; virtue is the word used to describe this inclination, and religious belief is the most common and effective source of virtue. Therefore, from the civic republican perspective, religion was essential to the maintenance of a free country.

This theme was often stated by two of the most influential Founding Fathers, John Adams and George Washington. John Adams drafted the Massachusetts state constitution that allowed multiple religious establishments and served as a diplomat to France and England in the early years of American independence before becoming its second president. Washington commanded the American armies that won the Revolutionary War, chaired the Continental Congress that wrote the Declaration of Independence, and later served as the nation’s first president. His most famous

speech, delivered just before he left office in 1796, put the matter succinctly: “Of all the dispositions and habits which lead to political prosperity,” he said, “religion and morality are indispensable supports.” He couched his message as warning: “Let us with caution indulge the supposition that morality can be maintained without religion. . . . Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.” Washington, like many other civic republicans, refers here to religion only in a generic way, not to any specific creed or sect, Christian or otherwise, and he is silent on religion’s transcendent purposes. His focus rather is on the important earthly role religion can play, as a source of the moral principles and behavior necessary to sustain popular democratic institutions.

Puritan theology and civic republican political philosophy shared the belief that a common religion can unite a people through shared experience in common practices and beliefs. But what single religion could unite all Americans? Dynamic patterns of religious immigration and conversion had already made even Christianity too diverse to serve as a national religion, because no single interpretation of its principles or practices could find agreement among the people.

Religious Disestablishment

By the time of the founding period, liberty of conscience was widely accepted by Americans as a core right of human beings that should not be abridged by government. Recognizing this liberty did not necessarily require, however, the separation of church and state; many people believed that a state which established a religion (or religions) but also tolerated non-established

religions could provide sufficient guarantees of the liberty of conscience. This opinion might have prevailed and led to the establishment of religion in the American Constitution were it not for the principled and persuasive objections drawn from evangelical theology and liberal Enlightenment philosophy.

Evangelical Theology

The term “evangelical” has a complicated and contested history, but in the seventeenth and eighteenth centuries it described a general characteristic of religious groups including the Baptists, Anabaptists, Methodists, and many others. (For more information about these groups and their beliefs, see the companion paper “An Introduction to Christian Theology.”) Christian evangelicals placed special importance on the voluntaristic component of faith: because God is the sole creator and governor of human conscience, only voluntary submission to and support of religion is genuine. Therefore any coercion in this process from church or state is illegitimate. This theological rejection of coercion in matters of conscience had important political consequences. Religious establishment constituted a clear and direct attempt to coerce religious belief and therefore must be rejected. Freedom of conscience, religious liberty and the separation of church and state were therefore tied together. According to these ideas, the establishment of religion actually weakens religion rather than strengthening it, and if a plurality of religions exists in society, it is for God, not the state, to decide which will flourish.

Of course it was also quite important (even if it was not decisive) that no single evangelical group was large enough in the eighteenth century to

garner support for establishing its church. Evangelicals such as Roger Williams, who championed the separation of church and state as the founder of Rhode Island, had been present in the earliest years of the American colonies. But it was not until the Great Awakening—a series of large religious revivals held in the colonies from roughly 1720 to 1780—that evangelicals came into cultural and political prominence. By the middle of the nineteenth century, evangelicals would dominate American religious and cultural life; had they held commensurate political influence during the founding period, they might have been tempted to seek the establishment of some form of evangelical Christianity. This possibility is quite remote, however, given how deeply rooted the theological commitment to separation of church and state had already become.

Liberal Enlightenment Philosophy

If evangelical theology provided a critical religious justification for disestablishment, Enlightenment liberalism would provide the key philosophical justification. The Enlightenment was a period of intellectual fervor in Europe (and to some degree the American colonies and states) during the seventeenth and eighteenth centuries that emphasized the importance of reason (as opposed primarily to religion) as the basis of all knowledge in philosophy, ethics, politics, science, and other areas of human existence. Among its primary political and moral philosophers were John Locke, Adam Smith, and David Hume in the British Isles; the Baron de Montesquieu and Marquis de Condorcet in France; and Thomas Jefferson, Thomas Paine, James Madison and Benjamin Franklin in the American colonies. The Americans among this group were of singular importance to the founding of the United States:

Jefferson and Madison were the primary authors of the Declaration of Independence and the Constitution, respectively, while Paine and Franklin were key advocates for national independence.

Among the Enlightenment philosophers known to Americans at the time of the founding, John Locke (1632-1704) was particularly influential. Locke argued in his *Letter on Toleration* (1689) and *Second Treatise on Government* (1690) that government and religion have separate ends. Government exists only to secure the things that can be enjoyed on earth, namely life, liberty, and property; religion has the transcendent end of saving souls. Religion and politics properly employ different means to achieve these ends: the former uses persuasion, the latter force. Because no physical force or threat of force can truly change someone's inner convictions, government should be precluded from trying to do so; the state has no legitimate authority over the realm of human conscience.

Despite the obvious support his argument gives for disestablishment, Locke did not take his position that far; he supported religious toleration but not disestablishment. In fact, he argued for tolerance of Protestantism alone; Catholics and atheists were too dangerous, in his opinion, because their loyalty to the King was suspect. Nevertheless, Locke's views on the liberty of conscience were unusually permissive for the period, contrasting sharply with those of Thomas Hobbes (1588 – 1679), an English philosopher whose views on the absolute power of the king over religion were influential at the time.

Thomas Jefferson echoed Locke's argument that the right to free conscience was rooted in the

futility of coercing human opinion, and that the protection of conscience was essential for maintaining civil peace. A prominent and powerful supporter of religious disestablishment, both in the federal government and in his home state of Virginia, Jefferson supported church-state separation primarily out of a concern for protecting the individual's right of conscience. For him, "building a wall of separation between Church and State" was to be undertaken on "behalf of the rights of conscience." Jefferson considered religion to be a private matter, outside the realm of government authority.

The writings of Jefferson's fellow Virginian James Madison also show the influence of Enlightenment thought. His *Memorial and Remonstrance against Religious Assessments*, written in 1785, famously defended separation of church and state. Madison began by describing the right of conscience in words that resonate with Locke: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." In contrast to Europe, where "torrents of blood have been spilt . . . by vain attempts of the secular arm, to extinguish religious discord, by proscribing all difference in religious opinion," American civil society enjoys moderation and harmony because the care of the soul is treated as a private matter. Religion also benefits from church-state separation, for history shows that "ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation," causing "pride and indolence in the clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution."

Most historians today agree that the institution of a secular government was not a foregone conclusion during the Revolution, and that disestablishment was an enormous risk requiring both foresight and conviction. The "founding moment" was indeed a surprisingly brief and tenuous period in which a relatively small group of statesmen influenced by Enlightenment philosophy shared a common enterprise—the disestablishment of religion—with a surging population of religious enthusiasts who explicitly rejected the Enlightenment's reliance upon reason. By 1830 evangelicalism and populism had become the dominant trends in American public life, and Enlightenment philosophy had largely disappeared from public prominence. Yet during these critical years, evangelicals and Enlightenment liberals were able to compromise in other areas with those who drew upon Puritan theology and civic republican political philosophy, and the resulting Constitution contained a unique combination of mechanisms to sustain religious freedom.

The United States Constitution

The United States Constitution was designed to promote the rule of law through the separation of powers into three parts or branches. A directly elected bicameral legislature known as the Congress is charged with writing laws; its upper house is the Senate, the lower house is the House of Representatives. The executive branch enforces these laws; its head is the President, who is elected by members of the Electoral College, whose votes are cast based on the popular votes of all citizens. The third branch of government is the judiciary, charged with interpreting the laws passed by the legislature; its highest court is the Supreme Court, comprised of nine members (Justices) who

are granted lifetime appointments in order to insulate them from short-term political influence.

All three branches of government are said to be co-equal, and each is given special powers over the others. Congress has the sole power to levy taxes and authorize spending by the executive and judicial branches, and it can require members of both branches to appear before its committees to testify on matters of national importance. The President is given the power to appoint (with the Senate's approval) members of the federal judiciary, and in addition to nearly complete authority over foreign policy, he (or someday she) has a measure of latitude to enforce federal law in the manner befitting his policy goals. Finally, the judiciary is given the sole power to interpret the Constitution (including its amendments), and under the doctrine of "judicial review" it has long held the power to invalidate any laws it deems contrary to its interpretation. This system of "checks and balances" was designed by the Framers of the Constitution to reduce abuses of power, and although such abuses do arise, the system has worked well enough that it has been mimicked by a number of countries around the world.

The American political system is further balanced by its federal structure: each of the fifty states comprising the United States has its own government (with three co-equal branches) that retains a large measure of autonomy in the regulation of local issues. For the first hundred years of the nation's history, the states retained even more power (*vis-à-vis* the federal government) than they presently do. At the founding, states were considered the primary locus of citizenship and identity; being a Virginian, for example, meant more than being

an American in both a legal and philosophical sense. Citizenship was granted—or denied—by the various states until after the Civil War (1861-1865), when the Constitution was amended to make citizenship a federal status that carried all rights and privileges (including the due process of law) guaranteed by the federal Constitution.

The importance of this constitutional amendment—the Fourteenth—cannot be overstated in a discussion of religious disestablishment. Recall that the First Amendment, in part, forbids *Congress* from making a law "respecting an establishment" of religion or "prohibiting the free exercise thereof." On their face these provisions apply only to the federal Congress, which is thus prohibited from either establishing a federal religion or interfering with the existing established religions in some states. Indeed, as noted above, several states maintained religious establishments well into the nineteenth century, with Massachusetts becoming the last to eliminate public support for religion in 1833. As a result, state constitutions were much more important determinants of religious freedom than the federal constitution. This situation was largely reversed in the 1940s when the Supreme Court began to interpret the Fourteenth Amendment (which had been ratified in 1868) as a guarantee to all persons of the rights enumerated in the federal Constitution and its amendments. Henceforth the First Amendment's Establishment Clause would apply to the executive, judicial and legislative branches of *all* levels of government; and the Free Exercise Clause would apply to all persons living in the United States. This was a controversial legal interpretation at the time, but today it is rarely challenged. One upshot of this shift has been a dramatic increase in the consequences—and

therefore public awareness—of Supreme Court decisions regarding religious freedom. Simply put, the Supreme Court *matters* more today to most citizens than it did in its first one hundred fifty years of existence.

One other aspect of the Supreme Court, its adherence to precedent, is important to set forth in advance of a discussion of its major rulings on religious freedom. To encourage continuity and the principled application of legal theory, the Court employs the principle of *stare decisis* (a Latin phrase meaning “to stand by things decided”)

when adjudicating cases. This institutional resistance to change means that most of the Court’s decisions entail applying previously agreed-upon principles to the case at hand; reversals or reformulations of these principles are less common, and thus noteworthy. In the past twenty years, however, the Supreme Court has struggled to find a consistent principle by which it can adjudicate the religion clauses, and thus it has reversed itself in several important areas. The second section discusses this search for a legal principle of religious freedom by outlining the Court’s responses to a wide array of issues.

THE SHIFTING BOUNDARIES OF CHURCH AND STATE

Understanding the distinction between the two religion clauses in the First Amendment is essential to comprehending the legal boundaries of religious freedom in the United States. They are written in just sixteen pithy words: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” Together, these clauses institutionalize the American conception of religious freedom by prohibiting the government from discriminating on the basis of religious belief or practice. The Establishment Clause prevents the government from discriminating in favor of religious beliefs or practices by adopting or endorsing them through its laws or the actions of its employees, while the Free Exercise Clause prevents the government from discriminating against the religious beliefs or practices of individuals and organizations.

While the religion clauses are closely related as anti-discrimination provisions, they protect religious freedom in different ways. On the one

hand, the Establishment Clause is focused on the actions of government institutions and employees. If, for example, a public school teacher tells a student in class that Christianity is the only true religion, this teacher has violated the Establishment Clause because the government (which the teacher represents when acting in his or her capacity as a government employee) is prohibited from endorsing religious beliefs or practices. On the other hand, the Free Exercise Clause is focused on private citizens and their religious associations. For example, the government would violate the free exercise rights of Muslims if it sought to discourage the practice of Islam, whether by regulating licensure for imams, creating especially strict zoning laws for mosques, refusing to allow Muslim religious practices in prisons, or by any other means.

In fact, the two religion clauses are in constant tension with one another: an expansive interpretation of one clause often requires a restrained interpretation of the other. Those who

seek to give the broadest protection possible to the free exercise of religion are keen to ensure that the government not *disfavor* (discriminate against) religious believers of any sort; they often encourage the state to specially accommodate religious believers whenever possible. This “accommodationist” position is rejected by those who are especially adamant that the government not *favor* one or more religions, meaning they support an expansive interpretation of the Establishment Clause. Sometimes these opponents of accommodationism argue that the state must be neutral in its posture toward religion, favoring neither religion nor nonreligion as such, nor one religion over other religions; this position is known as “neutrality” in this context. Other opponents of accommodationism, however, are known as “separationists” because they seek to separate religion from the state as much as possible, even if this means favoring nonreligion over religion.

It has been widely noted that the Supreme Court’s interpretation of the Establishment Clause has shifted dramatically in the last half-century from a strict separationist position in the 1960s and 1970s to an accommodationist stance in the last two decades; free exercise jurisprudence has taken a more complex and meandering path since the 1970s. The remainder of this major section is given to an extended discussion of these legal trends as they relate first to free exercise cases, then to Establishment Clause cases. (A note on nomenclature: court cases in the United States are identified by the names of the plaintiffs and defendants, separated by the letter “v” for versus, meaning “against.” Often, a government entity is a party to the case as either defendant or plaintiff, as in *Reynolds v. United States*.)

Challenges to the Free Exercise of Religion

Like the other rights enumerated in the Constitution, the right to the free exercise of religion is not absolute, at least as it applies to religious practices. While American citizens enjoy absolute liberty of conscience (meaning that they are legally entitled to believe or reject any idea, religious or otherwise, that they encounter), it would be impossible for them to have equal rights to act upon those ideas without being subject to some sort of regulation. Some of these actions would invariably conflict with the goals or actions of others, and the freedom of one or the other person would therefore be restricted. (For more on the distinction between religious belief and practice, and on the diversity of religious practices in the United States, please see the companion paper “Religious Practice in the United States.”) Thus in principle the laws and regulations protecting the free exercise of religion are intended to grant an individual the most expansive set of liberties compatible with the same liberties granted to all others.

But this concept of equal treatment under the law is controversial, because it sometimes fails to take into account the special importance of some practices to some religious groups. Do some religious practices deserve special exemptions from otherwise generally applicable laws? If so, how does the government decide which exemptions are valid or desirable? Since the Constitution explicitly singles out religion for special protection—there is no explicit protection for secular beliefs or practices—does that mean religion can be favored over non-religion? These are some of the most pressing questions the Supreme Court has addressed in its free exercise cases, the most important of which may be

clustered under two categories: restrictions on particular religious practices; and religiously motivated rejections of civic obligations.

Restrictions on Religious Practices

Perhaps the most straightforward examples of free exercise cases involve situations where a person feels compelled by her religion to engage in a certain practice that is illegal or otherwise regulated by the government. Marriage, evangelism, sabbatarian observance, ritual drug use and religious dress codes are among the many religious practices that have received hearings in the Supreme Court.

In the Court's first application of the Free Exercise Clause (in *Reynolds v. United States*, 1878), the justices upheld a federal law banning the practice of polygamous marriage, despite the fact that the defendant believed—and indeed his church leaders taught—that his Mormon faith encouraged him to take multiple wives. (Mormons no longer officially support polygamy; for more about their beliefs and practices, see the companion paper “Religious Pluralism in the United States.”) In refusing to grant an exemption to the law, the Court argued that while religious *belief* is absolutely protected—Mr. Reynolds could legally believe, and even advocate in public, the principle of plural marriage—there is no corresponding absolute right to *act* on those beliefs. When the general welfare or common good of the society is jeopardized by a practice, as legislators claimed about polygamy when writing this law, then that practice is not protected by the Free Exercise Clause.

This general principle was refined in a 1940 case involving religious evangelism by members of the

Jehovah's Witnesses, a Christian denomination known for its door-to-door proselytization. The town of New Haven, Connecticut had passed a law requiring that all religious groups register with the town before soliciting residents at their homes. Jesse Cantwell and his son were arrested for disturbing the peace by soliciting without a permit, and they challenged the law. The Supreme Court ruled that the registration requirements were unconstitutional because they unfairly disadvantaged religious believers, and because they required government officials to determine which messages were religious and which were not. This case, *Cantwell v. Connecticut*, represented the first time the Court used the First and Fourteenth Amendments together to invalidate a state law; thanks to the Court's reliance on precedent, the federal Free Exercise Clause would henceforth apply to all state laws.

The Supreme Court set an important new accommodationist standard for evaluating free exercise cases in 1963, when it upheld the right of Adeil Sherbert, a member of the Seventh-Day Adventist Church, to refuse to work on Saturday, the Sabbath Day of her faith. The state of South Carolina offered unemployment benefits only to persons who actively seek employment, and since she would not work on Saturdays the state did not consider her to be actively looking for work. In ruling for Ms. Sherbert, the Supreme Court announced a new test it would apply to future such cases: if a law creates a “substantial burden” upon a person's religious practice, it must be justified by a “compelling state interest” in applying the law with equal force. Absent such interest, the state must accommodate the religious practice by exempting it from the law in question.

For the next thirty years free exercise cases often focused upon subtle definitions of what constituted a “substantial burden” on a person’s religious practice, or what makes a state’s interest “compelling” enough to warrant universal application. In 1972 (in *Wisconsin v. Yoder*), for example, the Court ruled that the Old Order Amish—a Christian denomination that seeks to separate itself from mainstream culture out of a religious desire to live simply and peaceably—in Wisconsin be granted a partial exemption from compulsory schooling laws that required attendance to the age of 16. Amish parents in these communities generally removed their children from public school at age 13 out of a belief that further education was unnecessary for the Amish way of life and would expose children to worldly temptations. Despite the state’s argument that universal education is essential to the maintenance of a democracy, the Court ruled that the extra three years of education constituted a substantial burden on the Amish’s religious way of life, and that, conversely, the state did not have a compelling interest to require those extra three years in the face of the burdens it imposed upon the Amish.

Interestingly, a lower court ruling on a related educational issue in 1987 took an opposite approach. In the state of Tennessee a family of Christian fundamentalists objected to the books their children used in the local public school, claiming that they inculcated false notions of gender equality, religious toleration and other principles contrary to their beliefs. They asked the school to allow their children to read different books that did not violate their religious beliefs, but the school ultimately declined. A federal appeals court (in *Mozert v. Hawkins*) upheld the school’s decision, arguing that exposure to such

ideas is an important part of educating students to become citizens in a diverse society.

Two important free exercise cases in the late twentieth century illustrate the checks and balances at work between Congress and the Supreme Court. In 1986 the Supreme Court refused to grant a Jewish military chaplain an exemption from the military dress code so he could wear a yarmulke (a skullcap worn indoors by many Jews) with his uniform. The decision (*Goldman v. Weinburger*) was unpopular among citizens and their representatives in Congress, so the next year Congress passed a law specifically allowing chaplains to wear religious paraphernalia so long as it does not interfere with their duties nor detract from the uniformity sought by the military dress code. Because the Courts interpret the laws but do not write them, Congress’ new law prevailed.

The second example reveals how complex this give-and-take between Congress and the Supreme Court can become. In a landmark 1990 case (*Employment Division v. Smith*) regarding drug laws, the Supreme Court refused to mandate an exemption for a Native American man who ingested peyote—an hallucinogenic drug that was illegal to consume under Oregon state law—as part of a religious ceremony. He had been fired from his job as a result of this drug use, and the state had refused to grant him unemployment benefits. The Supreme Court sided with the state in this case, declaring that it (the Court) would no longer invalidate state laws which only incidentally burdened religion; so long as the laws under review were not written with the purpose of impeding religious belief or practice, they would not be struck down as unconstitutional.

As a result of the *Smith* case, religious minorities lost an important protection against abuse by the majority; they would henceforth need to seek redress in the legislatures, where by definition they lack the obvious support of the majority of representatives. Responding to the public outcry about this decision, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which directed state and federal governments to accommodate religious minorities who are substantially burdened by a general law. Four years later, however, the Supreme Court overturned parts of the RFRA, ruling that it unconstitutionally forced states to enforce federal laws. In the latest installment of this saga, the Supreme Court again ruled on a challenge to RFRA, this time (in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 2006) upholding its applicability to federal law.

While at times the details of these cases can numb the mind with their intricacy, they are nevertheless critical to the protection of religious freedom for religious minorities across the country. The passage of RFRA, for example, has led to legal victories for a girl who was initially not allowed to wear her *hijab* (headscarf) to public school in Oklahoma, to a Muslim firefighter in Philadelphia who was initially not allowed to wear a beard (for safety reasons), and to Muslim women in several (though not all) states who asked to be photographed in their *niqab* (veil) for their drivers license photographs. In both cases the accommodationist impulse derived from Congress, not the Court, which continues to apply its position of neutrality to most cases.

Religiously Motivated Rejections of Civic Obligations

The primary occasions in which citizens have rejected, for religious reasons, an otherwise binding civic obligation involve the expressions of civic loyalty (including oaths of office and the Pledge of Allegiance) and the call to military service. The Constitution explicitly allows those who refuse to take oaths to “affirm” (rather than swear) their loyalty to the Constitution when taking office, but in the early twentieth century most of the nation’s schoolchildren were required to stand, salute and recite the Pledge of Allegiance every day. Until 1954, when it was altered to include the words “under God,” the Pledge read as follows: “I pledge allegiance to the United States of America, and to the Republic for which it stands, one nation indivisible, with liberty and justice for all.” In several cases in the 1940s, the Supreme Court first upheld the ability of schools to require recitation of the pledge; then it reversed itself three years later, arguing that the First Amendment protects persons who conscientiously oppose such rituals.

Conscientious objections to military service represent another interesting component of free exercise jurisprudence. Congress and the Supreme Court have long granted exemptions from military service to those who profess an abiding belief in pacifism for religious reasons. Over the course of the twentieth century, the Court expanded this exemption to include pacifists who hold their views for nonreligious moral and ethical reasons, but insisted that the objection must demonstrably include participation in all wars, not merely a particular war. Thus a person who opposes a given war as unjust, but believes it morally permissible to serve in a just war, will not

be granted conscientious objector status in any war.

The principle of neutrality that the Court outlined in 1990 remains the controlling precedent for free exercise cases today. This approach requires only that the legislature avoid writing laws purposely designed to hinder the practice of a particular religion; it makes no affirmative requirement upon the legislature to write exemptions into the law for the sake of religious believers, nor (in and of itself) does it forbid the legislature from making such exemptions. To clarify the extent to which the legislature may (not whether it must) recognize popular faith in the law and in public life, the Establishment Clause must be interpreted.

Religious Establishment and the Separation of Church and State

Although there is little risk in the foreseeable future that federal or state governments will explicitly establish one sect or religion as an official religion, there are myriad subtle ways in which the government supports religious groups or practices, both directly and indirectly. Churches are exempted from income taxation; clergy are employed by the government in prisons, the military, and both chambers of Congress; and government funds are given to religiously affiliated hospitals, universities, primary and secondary schools, and social service organizations. The key to assessing whether a particular instance represents an unconstitutional establishment of religion is not whether a religious person or group receives some financial benefit from the government, but whether that benefit is given (or withheld) *because* the person or group is religious.

The case law in religious establishment is voluminous and complicated, even impenetrable at times. Nevertheless in broad strokes, three clusters of Establishment Clause cases can be identified: those dealing with religion and education; religious displays on public property; and government-sponsored religious messages. This section takes up each cluster of cases in turn.

Religion and Education

Almost ninety percent of America's fifty-three million school-aged children attend primary or secondary schools funded by the government. Though only a quarter of American voters currently have school-aged children, everyone is connected in some way to the public school system: taxpayers finance it, employers hire its graduates, and more importantly, its effectiveness is widely understood to be a key measure of social and economic justice. Schools are sometimes expected to do nearly everything for society: raise children out of poverty through education and job training; shape virtuous citizens; teach the skills of critical thinking and encourage autonomy; and improve American workers' competitiveness in science and technology fields.

Because public schools are government entities, schoolteachers are legally considered to be agents of the state. This means that teachers speak for the government when they enter a primary or secondary school classroom. Since the Establishment Clause forbids the government from endorsing a particular religious viewpoint, the same applies to public school teachers, administrators, and governance boards (when they are acting in their official capacity). This restriction has important effects on everything from the structure of education financing (e.g.,

can the government pay for religious education?) to the religious activities in which students engage (e.g., prayer, Bible study groups, evangelizing) to the curriculum students are taught (e.g., can creationism or intelligent design theories be taught in science classes?).

On numerous occasions in the last hundred years, the Supreme Court has considered the government's proper relation to religious education, with decidedly mixed results. Before 1971 the Court generally took an accommodationist stance toward the state's involvement with and regulation of religious schools, in the sense that it protected religious schools from excessive government interference and allowed public aid to flow to such schools under certain circumstances. The Court first applied the Establishment Clause to the states in 1947 in a case (*Everson v. Board of Education*) that provided a crucial distinction between direct government aid to religious schools (which was prohibited) and indirect aid given to parents to use according to their own choice (which was allowed). In 1971 (in *Lemon v. Kurtzman*) the Court took a decisive turn to a separationist approach, arguing that a law is valid only if it has "a secular legislative purpose," a "primary effect" that neither advances nor inhibits religion, and does not foster "an excessive government entanglement with religion." These criteria, later known collectively as the Lemon test, was used to strike down several state laws that supplemented the salaries of teachers in religious schools; the "cumulative effect" of such programs, the Court held, was an excessive entanglement of government and religion. The Lemon test was routinely used for nearly thirty years to adjudicate Establishment Clause cases, but by the mid-1980s

it had received so many qualifications and caveats that the law was nearly impossible to understand.

In the early 1980s the Court systematically began to expand the permissible areas of interaction governed by the Establishment Clause. Reversing a number of earlier decisions, the Court has since ruled that proper interpretation of the Establishment Clause allows states, for example, to offer parents tuition vouchers to pay for religious education in lieu of public schooling (2002); to purchase or loan computers and other equipment to religious schools (2000); to send public school teachers to provide remedial education for students at religious schools (1997); to pay for sign language interpreters and other services to students at parochial schools and colleges (1993); and to offer tax deductions to parents who pay private school tuition and other educational expenses (1983). In each case the state program in question was deemed to provide a benefit or service that was neutral with respect to religion, because it was provided to a broad class of citizens defined without reference to religion. Though in effect these laws provide benefits to religious persons or institutions—at times, almost exclusively so—the court's accommodationist majority found that their intent was not discriminatory, and thus the benefits passed constitutional muster.

When students and teachers (or other adults) join together in a religious practice on school grounds, the free exercise and Establishment Clauses both come into play. As a general rule, the Free Exercise Clause prevents the government from unnecessarily restricting the individual religious practice of private citizens, including students while at schools. But teachers and school administrators represent the state when they are

working in their official capacity, and the Establishment Clause prohibits the state from acting to promote one religion over another. By this rule, state-sponsored (i.e. teacher-sponsored) religious practices constitute a violation of the First Amendment, but most student-led religious activities do not, so long as they do not disturb the school's regular educational program. Thus the Court outlawed teacher-led prayers in 1962 (in *Engel v. Vitale*) and teacher-led devotional Bible reading in 1963 (in *Abington v. Schempp*); in both cases the Court ruled that these common practices were clear examples of the state promoting a particular form of religion. Later rulings of the Court have banned the practice in schools of mandatory moments of silence, posting of the Ten Commandments and other Bible verses, and the teaching of the biblical creation narrative as scientific fact. But it has also held that religious groups (including Bible clubs) can meet at public schools on equal terms with non-religious groups; teachers can teach about religion and the Bible in the classroom if the material is presented in an objective manner; and students can read the Bible and pray, alone or in groups, at school as long as the practice is not initiated or led by teachers or administrators.

Teaching about religion is a particularly controversial issue, but in the very case that banned school prayer (*Abington School District v. Schempp*), the Court noted that teaching about religion in the public schools was not only permissible but advisable. "It might well be said," wrote Justice Tom Clark for the Court, that "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. . . . Nothing we have said here indicates that such study of the Bible or of religion, when presented

objectively as part of a secular program of education, may not be effected consistently with the First Amendment." The view was reaffirmed by Justice Powell in 1987, and it has never been challenged since that time.

Religious Displays on Public Property

Religious displays on public property are controversial in the United States insofar as the government (which by definition owns public property) is perceived as endorsing or establishing the religion or religions that the display is intended to celebrate or invoke. Examples of such displays include a crèche or Hanukkah menorah erected in a town square during the winter holiday season or a Ten Commandments monument installed outside a state capitol building. In each instance a relationship—real or perceived—is created between government and religion; the controversy arises over the exact nature of that relationship, and whether or at what point the relationship violates constitutional or theological principles of the separation of church and state.

Three kinds of religious displays on public property have generated the most legal controversies since 1980. First, there are government-sponsored celebrations or acknowledgements of religious holidays (e.g., Christmas or Hanukkah) with a public display of religious icons, symbols, or objects (e.g., a nativity crèche or a menorah). Federal, state and local governments in the United States celebrate a wide range of holidays during the year, including some of religious origin such as Christmas and Hanukkah. These winter holidays are often commemorated by the installation of festive displays in parks, capitols, town halls or

courthouses—public places of high visibility and unfettered access. In the 1980s a number of these public holiday displays were challenged in the courts as unconstitutional establishments of religion; three such cases were argued before the U.S. Supreme Court, which rendered landmark decisions that continue to serve as the final word on these issues. The common thread in each case was a close scrutiny of the context in which the display was placed and a concern for whether the particular arrangement would leave a “reasonable observer” to believe that the government was endorsing a particular religion. In these instances, a nativity scene depicting Jesus Christ’s birth was allowed when symbols of the secular celebration of Christmas (e.g. Santa Claus’ mythical reindeer) were also included in the display, but disallowed when it stood alone in a courthouse stairwell; and a Jewish menorah was allowed when it was displayed alongside a Christmas tree and a sign promoting liberty.

The second controversial kind of religious displays are those objects or symbols (e.g. a cross) erected by private citizens or groups in public places known as public forums. In the broadest sense, “public property” means the interior or exterior of any property owned by federal, state or local governments; this includes public schools, city halls, courthouses, and capitol buildings, as well as parks, streets, sidewalks, town squares, plazas, and other public spaces. But the Supreme Court has recognized some of these places—those that have been devoted, by long tradition or government fiat, to public assembly and debate—as “public forums” where the state’s right to limit expressive activity is sharply circumscribed. When a place is considered a public forum, the courts are less likely to consider a religious display on the site to be an establishment or endorsement of

religion. Such was the case when the white supremacist organization known as the Ku Klux Klan (KKK) sought to construct an unattended cross on the plaza around the Ohio state house in Columbus, known as Capitol Square. State officials rejected the KKK’s application to erect the cross, arguing that the display would be construed as government endorsement of the organization’s hateful and intolerant message. The Supreme Court rejected the Board’s claim, ruling that the proposed display was private religious speech, fully protected under the First Amendment’s Free Speech Clause. Because Capitol Square is designated as a traditional public forum, where any group may express their views, the Court held that a reasonably informed observer would not see the KKK cross as the government’s endorsement of its message.

The third kind of contested religious displays involve the celebration or acknowledgement of religion’s influence on American political and legal history with the installation of plaques or monuments inscribed with religious symbols or passages. The Ten Commandments, or Decalogue, is believed by Jews and Christians to be a fundamental theological, ethical and legal code given by God to Moses (Exodus 20:1-14; Deuteronomy 5:6-18). The first four commandments, collectively known as the First Table, concern the relation between believers and God (e.g. You shall have no other gods before me); the last six commandments, or Second Table, concern the relations among believers (e.g. You shall not steal). As one of the most ancient codes of conduct in the Western world, the Decalogue has deeply influenced Western conceptions of right and wrong, and thus it has also influenced, at least indirectly, the development of Western law. In 1980 the Supreme Court ruled that public

schools could not post copies of the Ten Commandments in each room, because the posting of this “undeniably sacred text” was a form of religious coercion. Nearly twenty-five years later the Court drew upon its decisions regarding holiday displays to rule on another form of Ten Commandments displays: stone monuments on courthouse lawns that depict the Decalogue do not endorse religion if they are placed in secular historical context, for example by the inclusion of monuments that display the Declaration of Independence.

Government-Sponsored Religious Messages

There are many other ways in which a religious message is communicated directly or indirectly by the government. Religious language and symbols can be found in the official government motto (“In God We Trust” became the national motto in 1956, replacing “E pluribus unum”), national anthem (the “Star Spangled Banner” refers to God in its fourth stanza), pledge (the Pledge of Allegiance was amended in 1954 to include the words “under God”), seal and currency (which contain the national motto). Establishment Clause challenges have been brought against each of these items (except the national anthem), but in every case so far the Court has allowed the religious phrases to remain on the grounds that they have been, in effect, secularized by their ceremonial civic role. This is a controversial argument, but the maintenance of these religious

expressions in prominent places is overwhelmingly popular among citizens.

Another difficult example of government involvement in religious practice is the employment of government chaplains by legislatures, the armed forces, and state prisons. Here again the Supreme Court has allowed such practices. In the case of prayers at legislative and judicial sessions, the Court argued that such religious rituals are an important American civic tradition with a longstanding history and are thus acceptable.

One additional example of government-sponsored religious messages was considered by the Supreme Court in 2006, namely the permissibility of government financing of “faith-based” social service providers. Thousands of religious organizations currently provide needed programs like job training and substance abuse counseling with an emphasis on spiritual as well as mental and physical health. The federal government now allows such organizations to apply for federal funding on the same terms as secular social services organizations, meaning that the “pervasively religious” activities of such groups cannot be funded by federal money. The programs were challenged by those who argue that all activities of such groups are pervasively religious, and thus the government is establishing a particular religion when it funds any of their activities.

CONCLUSION

The separation of church and state, and the freedom of conscience it is intended to protect, are widely embraced core principles of the American

form of liberal democracy. Church-state separation is at once simple in concept and irredeemably complex in practice. It is both a

pragmatic strategy for maintaining religious vitality and a principled expression of the belief that theological and political legitimacy are distinct. In a sense the aspiration for legal neutrality vis-à-vis religion is doomed to failure because the concept of disestablishment itself rests upon a distinctively Protestant Christian understanding of religion as something that can be equated with faith, then privatized and separated from other parts of life. But in another sense, the “lively experiment” of religious liberty

in the United States has been an extraordinary success, and not just for Protestants: thousands of different religious groups now make up the American religious landscape. In the years ahead the contours of religious liberty will continue to shift as compromises are made and cultures are integrated; this dynamism comprises the essential strength of “government of the people, by the people, and for the people.”

FOR FURTHER READING

In order to provide an accessible introduction to religion in the United States, this paper has been produced without footnotes and with few direct quotations from secondary literature. It nevertheless reflects the influence of a wide range of scholarly arguments. This annotated bibliography presents a complete list of the texts to which this paper refers, as well as a number of other resources with further information about the topics discussed. Comments following each citation indicate the nature of the text and, where applicable, the extent of the paper’s reliance upon it.

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- Cantwell v. Connecticut* (1940)
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- Engel v. Vitale* (1962) [Prohibited teacher-led prayer in public schools.]
- Everson v. Board of Education* (1947) [Applied the Establishment Clause to the states through the Fourteenth Amendment; allowed public funds spent to bus students to religious schools.]
- Goldman v. Weinberger* (1986) [Denied exemption to Jewish military chaplain who sought to wear a yarmulke with his uniform.]
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Other Resources

The Avalon Project at Yale Law School (documents in law, history and diplomacy):
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First Amendment Center (news, research and analysis): www.firstamendmentcenter.org

The Oyez Project (information about the U.S. Supreme Court and its decisions): www.oyez.org

Pew Forum on Religion and Public Life (news and analysis): www.pewforum.org

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