2020

The Wall We Need: The Necessity for Judicial Hostility Towards Religion and Mistakes Made by the Supreme Court Regarding the Separation of Church and State

Darin King
Claremont Graduate University

THE WALL WE NEED

THE NECESSITY FOR JUDICIAL HOSTILITY TOWARDS RELIGION AND MISTAKES MADE BY THE SUPREME COURT REGARDING THE SEPARATION OF CHURCH AND STATE

By

Darin King

Presented to the Graduate Faculty of Claremont Graduate University
in partial fulfillment of the requirements for the degree of Master of Arts
in Religious Studies.

We certify that we have read this document and approve
it as adequate in scope and quality for the degree of Master of Arts.

Daniel Ramírez
Faculty Advisor
Associate Professor of Religion

Matthew Bowman
Associate Professor of Religion and History
Howard W. Hunter Chair of Mormon Studies

2020

Acknowledgements

Thanks goes to Mister Lu and Daezee
for keeping me company as I wrote.

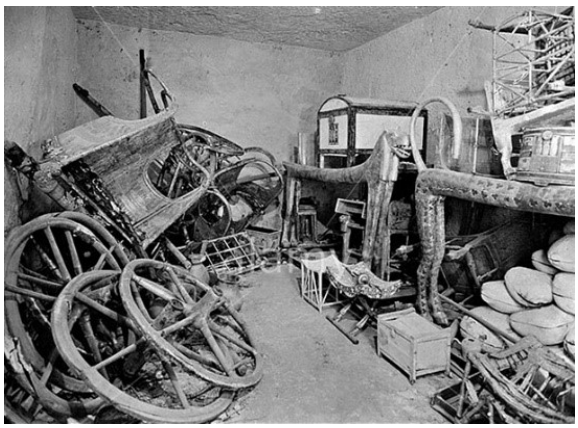
Most important, my deepest
appreciation to Kymberly,
without whom I literally could not have
gone back to school.

Table of Contents

Cases Referenced

Preface (on Religious Studies and New Atheism)

When in 1922 Howard Carter unearthed the tomb of Pharaoh Tutankhamen, he did so without worry that removing the sarcophagus and cataloguing the 5000-plus objects within would somehow disturb their originally-intended purpose of aiding Tutankhamen in his afterlife. Carter was, after all, an archaeologist. Who today laments that Tutankhamen's post-earthly journey has been interrupted, that his chariot wheels and gold statuettes are now behind glass windows in museums the world over as opposed to aiding him on his trek through Duat? Political arguments about imperialism and the looting of national treasures are appropriate concerns to raise, no doubt; but fears that a pharaoh's travel plans have been disrupted are not. The reason is obvious: no one really believes King Tut still needs a boat.[1]



The Hierarchy of Studies broadly identifies science, humanities, and art as—to borrow from biology—the three kingdoms of academia. Some overlap is inevitable, as music may be both artistic and mathematically formulaic; or history deals with humans/human culture yet also deals with immutable facts, like times and locations, as astronomy might. What unifies all of academia, however, is that whatever the field of study, all work undertaken therein is approached with an earnestness aimed at contributing honestly to the discipline. Thus, music is not made by picking notes randomly from a hat, as this would both negate the essence of the requisite artistic intent to qualify as music while also frustrating the study of it within the discipline. In the same

[1] Isabel and Imogen Greenberg. "Top 10 Things You Might Find in a Pharaoh's Tomb—In Pictures." The Guardian (Online). May 1, 2016.

vein, anyone attending a symposium for chemistry professionals who shows up and says that water is not two parts hydrogen and one part oxygen because a Bronze Age book implies otherwise will probably be asked to leave. Religious Studies—an interdisciplinary field squarely within the Humanities—seems unique, however: littered with scholars simultaneously working to bake a cake that advances human knowledge while often also hoping to eat it, too. That is, when current head of the National Institutes of Health and devout Christian Dr. Francis Collins donned his biology hat to lead the Human Genome Project for the United States, his study of genetics was not influenced by the claims in Genesis 1: 20 *et seq*.; he followed the evidence where it lead, that animals have evolved. Conversely, when a purported scholar "contributes" to the very field to which she professes belief or faith, concerns as to both motive and the veracity of any claim authored are, simply as a matter of course, inevitable.

This critique of Religious Studies is captured in Tyler Roberts' Encountering Religion: Responsibility and Criticism After Secularism wherein he writes, "By invoking [the eventual 104th Archbishop of Canterbury Rowan] Williams, a theologian and, until recently, one of the world's most powerful and influential religious leaders, I have ceded some authority for thinking academically about religion to a religious thinker. This violates a boundary that many of my colleagues consider to be absolutely necessary if the study of religion is to take its place as a legitimate *academic* enterprise, that is, the boundary separating secular academic thinking about religion from *religious* thinking about religion."[2] (emphasis in original). Roberts' use of the phrase "…if the study of religion is to take its place as a legitimate academic enterprise…" denotes his concern that Religious Studies is clearly not yet a legitimate academic enterprise. And the remaining portion of this quotation reveals the reason to be that the discipline is defiled

[2] Tyler Roberts. Encountering Religion: Responsibility and Criticism After Secularism. Columbia University Press. New York. 2003. Page 4.

by the baggage inherent in studying religion while religious. Roberts later adds that those who, "…seek to make the study of religion a legitimate contributor to academic knowledge often argue that the study of religion still has not detached itself sufficiently from theological or, more generally, religious modes of thinking. They believe that the field will only be placed on firm theoretical ground once we identify and put in place clear boundaries between the study of religion as an enterprise of the secular academy, on the one hand, and religion as the object of this study, on the other."[3] Count the author of this Thesis, though far less lettered than they, amongst that group.

Three brief notes need making. One, religiosity does not prevent one from being a successful academic, as in the case of Dr. Collins. Even if the research topic is actually religion—unlike Dr. Collins who studies biology—unbiased inquiry into the subject matter need not be influenced by the scholar's beliefs. The concern is one of bias, not of competence. Two, atheism is not the belief that there is no god. Rather, atheism is simply the overarching label applied to the position that the claim that some god exists (theism) has not met it burden of proof. Agnosticism, in the religious context, is not knowing a god exists, as the Greek-rooted *gnosis* relates to knowledge; and knowledge is a subset of belief. Thus, one who asserts no god exists is surely still an atheist, but making that claim that would impute a burden of proof on that claimant to positively show no god exists. The atheism discussed herein is therefore of the agnostic-atheistic ilk: the existence of a god is not known and no belief in any god is therefore justified absent evidence. Finally, and in all fairness, the discipline of Religious Studies is

[3] *Ibid.*, page 23. The related footnote seems to indicate the "those" Roberts is referring to. Specifically, "[3] In addition to Braun and McCutcheon, Masuzawa, Orsi, and Wasserstrom, see Bruce Lincoln, "Theses on Method," Method and Theory in the Study of Religion 8 (1996); and Donald Wiebe, The Politics of Religious Studies (New York: Palgrave Macmillan, 2000)."

somewhat new as a unique academic discipline[4] and, accordingly, its current status as not yet on par with other "legitimate academic enterprises[s]" need not be seen as a barrier to its hopefully-forthcoming ascent to such stature. Seeds do take time to grow.

Still, and until such time as Religious Studies achieves such a position, critique of it (when in its biased form) is warranted. It is into these waters that this Thesis treads. To expound, this Thesis is not a meta-analysis of Religious Studies; look to Roberts' book for that. Rather, it is simply that the academic discipline called Religious Studies is so polluted by the religious studying religion—not to mention so incredibly broad and interdisciplinary such that nearly any intellectual exercise that touches on religion even tangentially could be considered within its domain—that alongside any other religion-related scholastic enterprise can comfortably sit polemics, anti-apologetics, and inquiry into the sullying of society caused by religion. This Thesis is intended as the third of those, though the first two are regularly employed to provide the rationale for the ultimate argument about why church and state need separating.

In effect, then, this Thesis fits into what has been inappropriately called New Atheism. The reason the moniker is inappropriate is that atheism is, of course, not new. An easy example is Cārvāka—an Indian school of philosophy which dates back to 600 BCE that promotes skepticism and rejects supernaturalism.[5] A glance at the Table of Contents of Christopher Hitchens' The Portable Atheist anthology catalogues a litany of well-known historical figures

[4] *Ibid.*, generally. See Chapters 1 and 2, citing Robert Orsi's Between Heaven and Earth (Princeton University Press, 2005) and Mircea Eliade "exercise[ing] considerable influence during a formative period for the field, especially the 1960s and 1970s, when many of the existing departments of religion in the United States were established." (page 23).

[5] "Carvaka." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Charvaka.

making the case for skepticism, if not wholesale nonbelief.[6] Plus, all humans have at least some experience with it. Babies are not born believers and even those that become believers might well be labelled atheists regarding every other god but theirs. The term is therefore just shorthand to convey a concept. According to Amarnath Amarasingam's Religion and the New Atheism: a Critical Appraisal, this concept is argumentation about religion by nonbelievers that is "characteristically petulant and provocative, challenging yet cranky, urgent but uninformed."[7,8] This New Atheism began as a "recent barrage of anti-religion and anti-God books written by Richard Dawkins (2006), Sam Harris (2004, 2008), Christopher Hitchens (2007b), [and] Daniel Dennett (2006)…,"[9] "grouped together as a single phenomenon and were seen to represent a new stage of secular assertiveness."[10] Indeed, these four authors have collectively been labelled The Four Horsemen,[11] called by Amarasingam's author of his Foreward, Richard Harries, "attack dogs" on "something of a moral crusade" writing with a tone of "intellectual righteousness."[12] This sentiment is echoed in Tim Crane's The Meaning of Belief: Religion from an Atheist's

[6] Christopher Hitchens. The Portable Atheist: Essential Readings for the Nonbeliever. Hachette Books. Philadelphia. 2007.
[7] Amarnath Amarasingam. Religion and the New Atheism: A Critical Appraisal. Leiden: Brill. 2007. Page 1.
[8] In the Preface to the book, contributor Dr. Reza Aslan (Ph.D., Sociology, 2009, UCSB), writes at page xiv, "…the recurring patterns of religious phenomena that so many diverse cultures and civilizations—separated by immeasurable time and distance—seem to have shared as evidence of an active, engaging, transcendent presence (what Muslims call the Universal Sprit, Hindus call *prana*, Taoists call *chi'i*, Jews call *ruah*, and Christians call the Holy Spirit)…" In a book where the editor writes on page 1 (footnote 7) that the New Atheists are "uninformed," this statement is comical in its irony. To a Christian, the Holy Sprit is not a vibe; it is one-third the Trinity. It is God in a co-equal alternate form. The uninformed is he who would equate the Holy Spirit with chi'i and/or he who would include a writer of such claim in his anthology.
[9] *Ibid.*, pages 1-4.
[10] I*bid.*, Richard Cimino and Christopher Smith. "The New Atheism and the Empowerment of American Freethinkers." Page 143.
[11] The four sat together in 2007 for a recorded discussion in the Washington DC apartment of Christopher Hitchens. As to the term "Four Horsemen," according to the author of the transcription, and participant in the discussion, Daniel Dennett, "we were not responsible for those journalistic coinings but we didn't disown them. Nor did we collude with each other…" (page 1). The transcription became a book in 2019 and borrowed the term. The Four Horsemen: The Conversation that Sparked an Atheist Revolution. New York: Random House. 2019.
[12] *Ibid.* Richard Harries. "Foreword." Page xi.

Point of View wherein the New Atheist authors "have taken an explicitly combative attitude toward religion."[13]

Thus, better labels might be Vocal Atheism or even Militant Atheism, but "New Atheism," as a term, has stuck; and no issue, save for the above, will be made of it. All in all, what matters is not the moniker but the arguments themselves. Perhaps better said, the dialectic continues for that inaugurating series of books is well more than a decade old at the time of this writing and those at the forefront of the nonbeliever side of this discourse have changed, apart from Richard Dawkins who continues, despite recent health scares, to champion the cause of religious skepticism (atheism). Just some of the replacement horsemen, so to speak, include theoretical physicist Dr. Lawrence Krauss, author of The Physics of Star Trek (1995) and A Universe from Nothing (2012); historian and mythicist Dr. Richard Carrier, author of Proving History: Bayes's Theorem and the Quest for the Historical Jesus (2012); Matt Dillahunty, longtime host of The Atheist Experience web-series; philosopher Peter Boghossian, author of A Manual For Creating Atheists (2013); Dan Barker, former evangelical preacher and current co-President of the Freedom From Religion Foundation; and Dr. Michael Shermer, founder of Skeptic Magazine and alumnus of Claremont Graduate University (Ph.D., History of Science, 1991).

The reasons New Atheism took hold are certainly myriad and shall someday merit comprehensive study. Presumably, the ubiquity of technologies that make information readily available, the devil-may-care nonchalance of the generation(s) born into that information age, the witnessing by a historically-marginalized group (nonbelievers) the successes of the Civil Rights Era and gay rights advocacy of the mid-20th through early-21st centuries, and the religion-

[13] Tim Crane. The Meaning of Belief: Religion from an Atheist's Point of View. Harvard University Press. Cambridge, Massachusetts. 2017. Page x.

inspired attacks of September 11, 2001, certainly all played, and continue to play, a role. But again, what matters is not the who or even the why, but the what. An era of vocal, militant, or "New" atheism is here; its foci are neither history nor hermeneutics yet it nonetheless flies just as justifiably under the same banner of Religious Studies. Witness this Thesis.

Dubito ergo cogito. Please enjoy.

INTRODUCTION

In 1952, in a case held to permit early release of students from school in order to attend religious study off campus, the Supreme Court of the United States declared that, "[W]e find no Constitutional requirement which makes it necessary for government to be hostile to religion."[14] This Thesis argues the opposite: that government hostility towards religion is, in fact, necessary, both Constitutionally and for prudence's sake.

Some introductory table setting is, of course, first in order. To begin with, definitions for "religion" and "hostile" must be established. Next, a brief overview of the philosophical arguments in favor of separating church from state is presented, along with why such separation is, now more than ever, absolutely essential. Finally, as a primer for what follows thereafter and for the benefit of the intended reader—a layperson untrained in law—a cursory abstract of the relevant elements of the American judicial system is provided.

Thereafter, the Thesis turns to an examination of ten seminal cases addressed by the Supreme Court since our national founding, from the perspective of how a government rightly predisposed to hostility toward religion might have more properly decided them. This revisiting will sample from the broad range of cases the Supreme Court has taken up regarding religion, the goal being to provide the reader both some interesting history plus a keener eye for watching forthcoming news out of Washington and statehouses everywhere. A further aim is to prove prescient the author when, soon, the very arguments employed by pro-religion advocates to win cases before the Supreme Court will be commandeered by the opposition to demonstrate that government hostility to religion is the only sane disposition to hold in a pluralistic society.

[14] Town of Greece v. Galloway. 343 US 306, 314 (1952).

TABLE SETTING

What is Religion?

As Sam Harris put it, "We have a word 'religion' that is a suitcase term like 'sport.' You have a sport like Thai boxing where people get killed and hit in the head with elbows and knees and then you have a sport like lawn bowling. And what is common between these sports apart from breathing?"[15] A dictionary is no help. Dictionaries catalogue extant usage; they do not mandate how words are to be defined moving forward. Encyclopediae might offer a deeper dive into the etymological but would seem similarly bereft of authority. Famed French sociologist Emile Durkheim defined religion as "a unified system of beliefs and practices relative to sacred things,"[16] but useless is any definition which employs, as in the word "sacred," a vacuous tautology itself in need of defining. Perhaps an appropriate place to begin, then, is the very Supreme Court of the United States (variably, "SCOTUS") whose rulings this Thesis herein seeks to examine. While it has not, in the strictest sense, defined "religion" *per se*,[17] the Court can at least offer a starting point. In 1965, SCOTUS took up US v. Seeger wherein Daniel Andrew Seeger claimed conscientious objector status,

> "…under § 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who, by reason of their religious training and belief, are conscientiously opposed to participation in war in any form…The parties raise the basic question of the constitutionality of the section which defines the term 'religious training and

[15] Sam Harris and Rabbi David Wolpe Debate. American Jewish University, Los Angeles. Hosted 2007.
[16] Jones, Sue Stedman. "The Concept of Belief in The Elementary Forms." Allen, NJ; Pickering WSF; Watts Miller, William. On Durkheim's Elementary Forms of Religious Life. Roudedge Publishing. 1998.
[17] This Thesis has considered but ultimately rejected as useful the language of Davis v. Beason, 133 US 333 (1890), wherein SCOTUS wrote that religion in the First Amendment context is "one's views of his relations to his Creator." This choice was made because the existence of a creator (or Creator) need not accompany any religion, thus having no relevance to the instant context.

> belief,' as used in the Act, as '*an individual's belief in a relation to a Supreme Being* involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.'"[18] (emphasis added)

The case was ultimately decided in favor of Seeger on the grounds that the term "Supreme Being" should be interpreted broadly to include the concept of a power or entity to which all else subordinates or upon which everything is ultimately dependent.[19]

Five years later, the Supreme Court revisited the issue in Welsh v. US. Here, Elliot Welsh II could not bring himself, in his conscientious objector application with the Selective Service, to acknowledge belief in a "Supreme Being," even as loosely defined after the ruling in Seeger. In granting Welsh's application, the Court stated, "[W]e think Welsh was clearly entitled to a conscientious objector exemption…[The relevant law] exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[20]

It would seem, then, that a workable definition of religion, at least as it relates to government's relationship with it, might be that which inhabits the human conscience, guiding one's ethics in a way that would disturb one's peace if violated. Unfortunately, this turns out to be unsatisfactory. Often, in the law (or philosophy) it is a good idea to expose a concept to an analysis of the poles. That is, start with a given, take it down a slippery slope to an extreme, and then reanalyze the wisdom of the original postulate. Here, that starting point is the working definition described above. One might begin at one pole with Roman Catholicism or Sunni

[18] 380 US 163, 164-165.
[19] LexisNexis. Law School Case Briefs. https://www.lexisnexis.com/lawschool/resources/p/casebrief-united-states-v-seeger.aspx.
[20] 398 US 333, 343-344 (1970).

Islam as being, beyond debate, religion *per se*. This point will not be argued. Examining the other pole and the slippery slope it leads to is far more interesting. To wit, what if one, say Jeffrey Dahmer, were to argue that his controlling life-ethic was killing men, having sex with their corpses, and storing in his kitchen freezer the dismembered heads of his ~~victims~~ special sacrament such that not doing so would disturb his peace? This would be absurd, of course. The Supreme Court acknowledged such as early as 1897 in Reynolds v. United States when, in affirming a ban on Mormon polygamy in the western territories, it declared, "Can a man excuse his [harmful] practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[21]

As a result of this obviousness, the difficulty in defining religion does not seem to be at the poles. Rather, it seems to lie squarely in the middle, for it is readily knowable what religion is and readily knowable what religion is not. The working definition must therefore be thrown out, for a "guiding ethic," as has been shown, simply cannot be an acceptable end-all criterion.

Despite this, and somewhat as an aside demonstrating that American law is not totally inimical to someone being a law unto themselves, children can, in certain circumstances, be denied medical care, even to their deaths, without criminal consequence to the parents.[22] The Child Abuse Prevention and Treatment Act, first enacted in 1974 and occasionally amended over time, has been used as a shield from prosecution by Christian Scientists, Jehovah's Witnesses,

[21] 98 US 165, 166-167 (1897).
[22] Sandstorm, Aleksandra. "Most States Allow Religious Exemptions From Child Abuse and Neglect Laws." Pew Research Center. August 12, 2016.

and, most recently, an Idaho group called the Followers of Christ Church.[23] That said, the majority of states have righted this legal schizophrenia and done away with the medical-exemption shield and enacted laws, more in line with Reynolds, demanding children be treated in accordance with standard medical practices or, at the least, allow for judicial intervention to compel medical treatment for vulnerable children. As the point here is to work towards a definition of religion, the medical-exemption shield can be set aside as something of an American jurisprudential anomaly rendered moot by the corrective measures enacted by the states in the interests of protecting innocent children from the potentially-harmful madness of their parents.

Building off of that, though, does the dynamic change if instead of killing humans, as Dahmer purposefully did—or allowing humans to die by refusing them medical care—one's religion relates to the killing of animals? In Church of Lukumi Babalu Aye v. City of Haileah, Hawaii,[24] local laws that declared illegal the practice of animal sacrifice, written *after* (which is important) the founding of the Santeria church in the city of Haileah, were declared Unconstitutional by the Supreme Court (thereby permitting the ritual slaughter of chickens). Santeria, while not quite on par numerically with Christianity or Islam might nonetheless have as many as a hundred million adherents spread from Africa to the Americas[25]. It is surely a religion. Accordingly, the Supreme Court has deemed lawful the slaying of roosters to feed to the angry spirit Chango.[26]

---

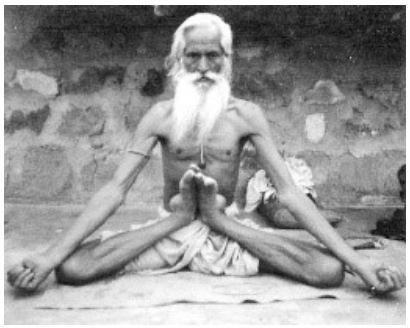
[23] Wolf, Carissa. "Medical Care Could Have Saved His Brother's Life. His Parents Prayed Instead." Idaho Statesman. February 20, 2018.
[24] 508 US 520 (1993).
[25] BBC. "Religions: The Growth of Santeria." https://www.bbc.co.uk/religion/religions/santeria/history/growth.shtml. September 15, 2009.
[26] Santeria Church of the Orishas. http://santeriachurch.org/the-orishas/chango/.

But what about killing chickens as part of a totemist or animistic tribal lore instead? Take, for instance, the Ndembu tribe of northwest Zambia. In their Isoma ritual, the Ndembu, in an effort to strengthen the birthing capabilities of a woman who has had trouble conceiving or had a number of stillborn births, dig a ten-foot trench wherein the woman walks back and forth before, at some point after various other ritual behaviors, a red-colored chicken is beheaded and its blood poured atop her. Is this religion, mere folk practice, or is there even a difference? The Supreme Court has not spoken on this specifically; Church of Lukumi Babalu Aye is the closest American law has come to defining whether ritual alone constitutes religion, though Santeria is not only ritual; it also includes a belief in deities.[27] So the question thus lingers—and keep in mind the issue here is exclusively about a definition for religion that is operational within the American legal framework—where an animal is killed, what constitutes protected religious behavior and what constitutes illegally-abusive conduct independent of what the animal-killer subjectively feels about the act? Does the answer change if instead of something like the Isoma, a quaint ritual practiced by very few people and half the world away, the act aligns with the far more popular Judeo-Christianity? Consider the ritual slaughter of a lamb so its blood can be smeared on the front door of the home of a Jewish family on the eve of Passover as a way to celebrate Yahweh killing all the first-born of Egypt but sparing theirs. Ought the law draw a distinction between avians and mammals? Is a swift beheading any different than a slow bloodletting via slashed throat? Glaringly, the more one looks at the question of what constitutes religion, the more questions that appear, for no direct answers have yet been given by the Court.

Instead of animals, what if the relevant praxis occurs between two consenting adults and no one is harmed (save, arguably, the mores of society)? Recall the case of Wilbur and Mary

[27] *Ibid*.

Ellen Tracy, founders of the Church of the Most High Goddess. Wilbur claimed to have had a revelation in 1984 which appeared to him as a "brilliant light… [through which] knowledge was being poured in without voice."[28] After the vision, the couple founded a church based on their own—and most would say flawed—understanding of ancient Egyptian rites. The liturgy manifest as Mary Ellen Tracy, in her pseudonymous capacity as High Priestess Sabrina Aset, engaging in sex acts with the male congregants.[29] Eventually, both Mr. and Mrs. Tracy were convicted under the prostitution section of the California penal code and sentenced to brief stints in jail.[30] But why? Is not revelation the very basis for the world's greatest religions? Why was Wilbur Tracy's revelation given far less shrift than that of Moses or Mohammad? Again, questions abound. For instance, are both of these people practicing religion or merely stretching their muscles for health reasons?



In the absence of specific answers from the Supreme Court, and as religion has, without doubt, played such a (no-pun-intended) defining role in human affairs, a look at how others have addressed the topic might offer some insight. The American philosopher Thomas Nagel wrote in Secular Philosophy and the Religious Temperament (2010) that the religious question is, "How can one bring into one's individual life a full recognition of one's relation to the universe as a

[28] "Mary Ellen Tracy." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Mary_Ellen_Tracy.
[29] *Ibid*.
[30] "'High Priestess,' Husband Sentenced for Prostitution." Padilla, Steve. Los Angeles Times. September 23, 1989.

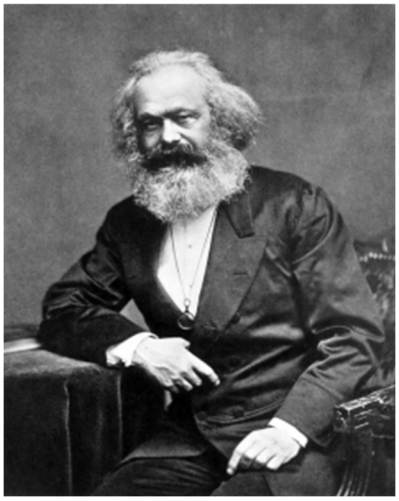
whole?"[31] For Nagel, who had some thirty-six years earlier authored the influential "What is it Like to be a Bat?," planting his flag as a leading thinker in consciousness and the phenomenology of subjective experience, religion is something uniquely personal. His question is, in effect, a statement: religion is the feeling that "one should live one's entire life in an awareness of the transcendent…[which is] something that is beyond this world: beyond the ordinary, the everyday, the world of experience, and the world of science too."[32] This answer to Nagel's "religious question," provided by Tim Crane, professor of philosophy at Central European University Budapest, and not Nagel himself, is as lacking as Durkheim's was: "transcendent" is as useless a word as "sacred." There is doubtless within the human experience that which is ineffable, a certain *je ne sais quoi* to moments in life that words cannot adequately convey, but to be "beyond" is nonsensical: there is only that which is material until such time as it is shown that there is that which is beyond material. People may prefer to have answers to all their questions or desire to give credit to someone or something for a serendipitous happenstance, but wanting there to be a string-puller does not make the string-puller real.

Nonetheless, this operational modality of the quest for the transcendent—or, rather, the claim that the transcendent is more than just the poetic and artful musings of a small and limited mind operating within a vast and mystifying universe—is a common theme for those who study religion. Steven Wasserstrom's study of religion scholars Gershom Scholem, Henry Corbin, and Mircea Eliade entitled Religion After Religion (1999) reveals that, to those influential thinkers, religion is that which connects symbols and myths to the "'depths' of the human spirit."[33] As

[31] Crane, Tim. The Meaning of Belief: Religion From an Atheist's Perspective. Cambridge: Harvard University Press (2017), Page 9, citing Nagel, Thomas, Secular Philsophy and the Religious Temperment. Oxford: Oxford University Press (2010), Page 5.
[32] *Ibid.*, Page 6.
[33] Roberts, Tyler. Encountering Religion: Responsibility and Criticism After Secularism. New York: Columbia University Press (2013), Page 6.

before, however, "human spirit" is a vacuous term. The unifying essence of religions must be something more than just word salad. Father of American psychology William James did offer a definition a bit more direct, categorizing it as "belief that there is an unseen order."[34]

This seems somewhat akin to saying that religion—rather, religiosity—is acceptance of a mere internal feeling of a divine presence, a so-called *sensus divinatatis*, though probably more of the "properly-basic" variety espoused by Alvin Plantinga in Warranted Christian Belief (2000) as opposed to the predestinationalism of John Calvin, who is credited for the first use of the term. Tim Crane expounds on the topic, though he calls it the Religious Impulse, the "familiar thought *that this can't be all there is; there must be something more to the world*"[35] (italics in original). He argues that the Religious Impulse is set against, and thus a response to, Max Weber's idea that the masses are disenchanted with the modern world.[36] This fits well with Karl Marx's famous quotation in his critique of Hegel's (Elements of) the Philosophy of Right (1820) wherein, in arguing that religion is a salve to the sick or needy and the basis of hope to the struggling or disillusioned, "Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people."



Sigmund Freud's approach in "The Future of an Illusion" (1927) is to identify the religious impulse as wish fulfillment and a calming presence in a world hostile to the individual (sometimes phrased as "god is dad.").

[34] Crane, Tim. The Meaning of Belief: Religion From an Atheist's Perspective. Cambridge: Harvard University Press (2017), Page 35.
[35] *Ibid.*, Page 40.
[36] *Ibid.*

Somewhat tangential, but sufficiently edifying, is the definition of "scripture" collectively amalgamated by future Religious Studies scholars under the direction of Claremont Graduate University archaeologist Dr. Tammi Schneider in her Fall 2018 seminar "What is Scripture?:" transmitted words recognized by a community as ultimately authoritative in regards to itself and somehow supernaturally revealed. This definition has two relevant parts, community and the supernatural. Supernature being as devoid of specificity as "sacred," "human spirit," or "transcendent"—and as equally walled off for study by the barriers of methodological naturalism—the word is still usable as a definition for the instant purpose of defining religion, as in religion includes, at the very least, the belief in something, perhaps anything, supernatural.

More important, however, is the first element; for whatever religion is, it must be more than just belief. Community is required; else, the belief in the undemonstrable by one person is certifiable delusion, but belief in the undemonstrable by the masses is religion. Said a bit more churlishly, "If you wake up tomorrow morning thinking that saying a few Latin words over your pancakes is going to turn them into the body of Elvis Presley, you have lost your mind. But if you think more or less the same thing about a cracker and the body of Jesus, you are just a Catholic."[37] Effectively, then, shared belief is a requisite for religion, though the number of believers required to graduate from fringe or cult into a recognizable religion is unestablished, possibly even completely subjective.

It may also be that group attachment drives people to become religious. Tim Crane argues in The Meaning of Belief that "the human need to belong is very important."[38] Citing Durkheim's The Elementary Forms of Religious Life (1912), Crane states that, "believers do not

[37] Sam Harris during debate against William Lane Craig, Notre Dame University, April 7, 2011.
[38] Crane, Tim. The Meaning of Belief: Religion From an Atheist's Perspective. Cambridge: Harvard University Press (2017), Page 28.

only embrace religious beliefs; they also belong to a church or religious group: 'Religious beliefs proper are always held by a defined collectivity that professes them and practices the rites that go with them.'"[39] For the purposes of both this Thesis and the government relationship to religion, this must be so. When, for instance, George W. Bush created by executive fiat the Office of Faith-Based and Community Initiatives to help religious organizations compete for federal funding opportunities, only recognizable organizations could garner the benefits. This, of course, makes sense. As the Reynolds ruling highlighted, one cannot be a religion "unto himself" in any meaningful legal/governmental context. One may certainly, and lawfully, start their own religion. Indeed, as the term is defined,[40] there are over 45,000 denominations of Christianity[41] and each of those started as an idea by one creative or entrepreneurial person. Further, owing to the unique individuality of the human mind and its accompanying preferences, it could be said without hyperbole that there are, in effect, as many different religions as there are religious people, though what matters is not the esoteric beliefs of each individual but rather their membership in, or identification with, some sort of overarching easily-recognizable-as-a-unit religious organization. It is these recognizable religious organizations, independent of the reasons they exist, that matter for government and, concordantly, this Thesis.

In sum, a definition for religion may well be impossible. Friedrich Nietzsche in On the Genealogy of Morality (1827) philosophizes that only that which has no history can be defined; to understand something such as Christianity, one must disentangle its separate threads to view it

[39] Crane, Tim. The Meaning of Belief: Religion From an Atheist's Perspective. Cambridge: Harvard University Press (2017), Page 89.
[40] "Christian Denomination." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Christian_denomination.
[41] Gordon Conwell Theological Seminary. "Status of Global Christianity, 2019, in the Context of 1900-2050." PDF at https://www.gordonconwell.edu/wpcontent/uploads/sites/13/2019/04/StatusofGlobalChristianity20191.pdf.

holistically (doing so is forging a genealogy, which is then, perhaps, understandable).[42] Religious commentator Karen Armstrong flat out states in Fields of Blood (2014) that "there is no universal way to define religion."[43] Still, since it is specifically referenced in the United States' Constitution's First Amendment and numerous laws passed subsequently thereto, some means of identifying that which is a religion is necessary, at the very least to address whether a piece of legislation is relevant to it. Somewhat fortunately, an *ad hoc* approach has heretofore worked and it is, despite the musings of philosophers and theologians alike, perhaps best to simply yield, accept that any definition of religion is elusive and, much like pornography in Jacobellis v. Ohio (1964), [44] employ as the best, albeit imprecise, definition the government can use, "I know it when I see it."[45]

[42] Kelley, Matthew. "The Body of Ideas: Nietzsche, Embodiment, and the Genealogical Method." Ph.D. Thesis, Georgia State University. August 2019. Page 14.
[43] Crane, Tim. The Meaning of Belief: Religion From an Atheist's Perspective. Cambridge: Harvard University Press (2017), Page 5.
[44] 378 US 184, 197 (1964).
[45] While "I know it when I see it" is, as argued, the best SCOTUS can do, it did at least, in Torcaso v. Watkins, 367 US 488 (1961), identify as potentially-qualifying non-god religions Buddhism, Taoism, Ethical Culture, and even Secular Humanism.

What is Hostility?

The answer here is obviously highly contextual. Basic hostility is, by definition, "opposition or resistance."[46] As it relates to government taking a hostile position towards religion, however, something a bit more nuanced is needed. The United States was founded by those seeking religious freedom absent persecution; any definition must therefore respect this root ethic. Furthermore, as religion is not limited to how its practitioners engage with the material world—but, at its core, is found within the mind of the believer—it would be ridiculous to extend the instant analysis into the realm of thought-crime. Therefore, one cannot simply say that hostility in this context is SCOTUS siding with whatever does maximal harm to the religious litigant (if such was even calculable). Rather, the government hostility towards religion as herein postulated must be something more akin to government hostility towards tobacco: a tap dance between the permissible and the regulated with some overarching greater good in mind. Other examples are myriad, for, in a society where freedom is the default, any deviation therefrom is hostility of a sort. For instance, motorcyclists in California are required to wear a helmet; this is hostility towards the freedom to cruise with the wind in one's hair. State property laws allow Homeowner Associations to impose rules that preclude certain paint colors or landscaping of one's own private dwelling; this is hostility towards art and personal expression. Government is even hostile to people's relationships to their own bodies. In 41 of the 50 states one may not even lawfully terminate their own pain-ridden life with the aid of a doctor, not to mention the varying obstacles conservative state legislatures have placed on terminating a pregnancy. That said, tobacco is a fine analogue and will serve the purpose envisioned within this Thesis.

[46] "Hostility." Dictionary.com.

Smoking remains legal to this day, but the landscape has changed drastically since the early 20th century. Statistics from that period do document tobacco farming and sales, but cannot be reliably categorized into cigarettes versus cigars, snuff or chewed forms.[47] As a result of technological advancement in production, cigarettes took off in the 1920s[48] such that by 1964, 40% of Americans were regular smokers, including more than half of men (53%).[49] Indeed, a government survey noted that cigarette smoking "was widely accepted, highly prevalent, and not discouraged in homes, and it took place in public spaces of all kinds, including hospitals, restaurants, airplanes, and medical conferences."[50] The first foray into government hostility towards smoking took place in 1929 when Surgeon General Hugh S. Cumming, himself a smoker, warned that smoking caused nervousness, insomnia, and could lead to the diminishment in "physical tone" of the nation.[51] In the 1940s—after Camel was claiming their product "stimulates the natural flow of digestive fluids" and Kool was asking doctors to hand out menthols to patients "suffering from colds and kindred disorders"—the FTC took legal action, albeit with limited success, to curb these types of advertising claims.[52] In 1964, Surgeon General Luther Terry released a landmark report citing the link between smoking and increased cancer rates.[53] One year later, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965, adding

[47] David Burns, et al. "Cigarette Smoking in the United States." US Dept. of Agriculture. 1996.
[48] *Ibid*.
[49] The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General. National Center for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health. Atlanta (GA): Centers for Disease Control and Prevention (US); 2014. Section Two: Fifty Years of Change 1964-2014.
[50] *Ibid.*, pages.1-2, citing Brandt, Allan M. "The Cigarette, Risk, and American Culture." Daedalus 119(4): 155-176. (1990).
[51] *Ibid.*, p.3, citing Burnham, JC. "American Physicians and Tobacco Use: Two Surgeons General, 1929 and 1964." Bulletin of the History of Medicine. 1989;63(1):1–31.
[52] *Ibid*., p.3. See, for instance, *FTC v. P. Lorillard Co.*, 46 FTC 735 (1950).
[53] Erika Hayden. "Anti-Tobacco Efforts Have Saved Millions of Lives Around the Globe." *Nature*. January 7, 2014.

to packs "Caution: Cigarette Smoking May Be Hazardous to Your Health."[54] The 1979 Surgeon General's report made the first reference to "Involuntary Smoking," what we now call second-hand smoke.[55] By 1981, Ronald Reagan's Surgeon General, C. Everett Koop, called for smoke-free public places.[56] In 1988, Congress banned smoking on domestic flights of less than two hours; in 1990, to all domestic flights.[57] In 1995, California outlawed smoking in all indoor workspaces, including restaurants; in 1998, to all bars and casinos.[58] In June 2014, Manhattan Beach, California (where this Thesis is being authored), passed an ordinance prohibiting smoking in all public places—leaving permissible smoking only in a moving vehicle or private residence (unless that residence was used for child care) and demanding hoteliers allow smoking in no more than 20% of their rooms for rent.[59]

The rational is obvious. Smoking is a health hazard, both to those who do it and those inadvertently exposed to it. It is estimated that, primarily due to the 1964 report by Surgeon General Terry and associated dissemination of information about the links between smoking and health, 795,000 American lives were saved just between 1975 and 2000.[60] Had all smoking ceased in 1964, that number would have been 2.5 million by 2000.[61] Doubtless, it would be far larger by 2020 and effectively incalculable beyond that.[62] Today, smoking prevalence is down 65% from what it was in 1964, 14% versus 40%.[63]

---

[54] *Ibid.*, p. 8.
[55] *Ibid.*, p.14.
[56] *Ibid.*, pages.14-15.
[57] *Ibid.*. pages. 15.
[58] Terry, Don. "California's Ban to Clear Smoke Inside Most Bars." *New York Times*. December 31, 1997.
[59] The Official City of Manhattan Beach website: https://www.citymb.info/departments/environmental-sustainability/breathe-free-mb-smoke-free-public-areas.
[60] National Institutes of Health. "Nearly 800,000 Death Prevented Due to Declines in Smoking." March 14, 2012.
[61] *Ibid*., p.2.
[62] Thun, Michael J., *et al*. "50-Year Trends in Smoking-Related Mortality in the United States." *N. Engl. J. Med.* July 24, 2013.
[63] US Department of Health and Human Services Centers for Disease Control and Prevention. https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm. February 4, 2019.

It would seem that government hostility towards tobacco is just what the doctor ordered, literally. While it would be reasonable to ask if there is a relevant nexus between government hostility towards tobacco and government hostility towards religion, keep in mind that the purpose of this section is to define hostility, not to equate the two. For the purpose of this Thesis, then, government hostility is the construction of a public policy paradigm that, if necessary, is willing to disregard the appetites of the people[64] so as to, in the language of the Preamble to the US Constitution, "insure domestic tranquility" and "promote the general welfare" of the citizenry. This is effectuated, amongst other avenues, via statements by public officials, commissioned reports, judicial action, legislation, and, if necessary, punishment.

With a definition in hand, the question then becomes, why would government even want to be hostile to religion? The section that follows addresses this question, presenting philosophical arguments in favor of separating church from state; and why such separation is, now more than ever, absolutely prudent.

[64] Madison, James. Federalist No. 10: "The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection." New York Daily Advertiser, November 22, 1787.

Why Be Hostile?

One obvious reason to be hostile to religion is that it is so broad a term as to possibly provide cover for bad or unsavory acts. Government needs to be in the business of, amongst other duties, protecting the masses by mitigating harms endemic to specific behaviors wholly independent of whatever subjective justifications are offered for them. As illustrated in the ludicrous Dahmerism example, killing people because it serves a personal ethic cannot be permitted. Conversely, attending a gathering open to the public, singing, hearing a speech about how to be a good neighbor, and then eating a cracker to remember someone who, it is said, lived a life worth emulating is a Sunday morning that must be permitted; or, rather, such a Sunday should not be proscribed. The sweet spot is somewhere in the middle; and it is the challenge tasked to democratically-elected legislators and jurists to situate the law within. The benefits of this approach to governance are evident. Not only does it treat every citizen equally, it avoids having to carve out exemptions. Reemploying an example from above, take the hypothetical case of a devoutly-religious family in New York City that wants to keep a lamb as a pet so that, come Passover in April, the animal can be ritually slaughtered in Central Park and its blood harvested for smearing on a door. New York City law specifically prohibits the keeping of all "even-toed ungulates (*Artiodactyla*)," [65] as well as a number of other dangerous or nuisance-creating creatures. The law is not intended to discriminate against pious Jewish people but, in effect, it does. Since it is not targeted discrimination, then, the Jewish family simply has to deal with it. Perhaps they can purchase their lamb's blood from a licensed and subject-to-inspection local butcher or just employ washable red dye as a symbolic substitute; else, if an exemption

[65] Health and Safety Code §161.01(b)(15).

were possible, the city would have to spend money to not only conduct a hearing and potential appeal, but, intrusively, inquire about the private beliefs of the family and investigate their sincerity. And, of course, the city would have to do this repeatedly. Soon there would be Hindus asking to keep cows in a fifth-floor Bronx walk-up and Pentecostals invoking Mark 16:17 or Luke 10:19 petitioning to keep snakes and scorpions in their Brooklyn co-op.

Ultimately, it all comes down to pluralism. Iran—or, rather, The Islamic Republic of Iran[66] as it has officially been known since 1979—understandably prescribes a national religion (Jaafari Shia) and implements Sharia; they are a theocracy, after all. The United States is not. We are the home to Lady Liberty, she holding a plaque literally asking the world for, "your tired, your poor, your huddled masses yearning to breathe free."[67] America is a nation of both immigrants and natives, living together under a unifying document that mentions God, gods or the supernatural zero times and whose only reference to religion is to limit it. The Thirteen Colonies were a smorgasbord of faith: from myriad Puritanical variations in the Northeast, to the Quakers in Pennsylvania, to the tolerant and open-minded liberals of New England, the Catholics of Maryland, and the Baptists in Georgia. They came together first in opposition to the rule of England and then, once bound together following a Revolutionary War, to form not merely a collective, not merely a union, but a "more perfect union" than the one they had just discarded. Pluralistic is not just *what* Americans are, it is *who* Americans are.

[66] "The Islamic Republic." www.britannica.com/place/Iran/The-Islamic-republic.
[67] National Park Service, quoting "The New Colossus" by Emma Lazarus, 1883.

Nowhere is this more clear than in the First Amendment, guaranteeing neither a government establishment of religion nor a barrier to the free exercise of one's own. The seeds of the First Amendment, enacted in 1791 along with the rest of the Bill of Rights, had been planted in Virginia in 1786. Authored by Thomas Jefferson, the Virginia Statute for Religious Freedom declared:

> "Be it enacted by General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened 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 opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."[68]

Later, as the third President, this same Jefferson would pen a letter to a religious minority stating that, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[69] The letter had been written in response to one he had received from the Danbury Baptists Association of Connecticut calling upon President Jefferson, as a known advocate for religious freedom, to alleviate their concerns about what the Baptists perceived as an encroaching establishment threat by the more numerous, but still altogether Christian, sect called the Congregationalists. It is true that, in some sense, Jefferson had wanted to use the letter for political gains, knowing it would become public, as a vehicle for countering condemnation levied by the Federalists for his refusal as President to issue an executive proclamation establishing national days of fasting and thanksgiving, as Presidents Washington and Adams had

[68] Virginiahistory.org.
[69] Library of Congress. https://www.loc.gov/loc/lcib/9806/danpre.html.

done before him.[70] That said, to limit the purpose of the Danbury Letter to mere political expediency is to, first, pigeonhole the experienced and erudite Jefferson as lacking the creativity to counter his opponents through more direct means and, second, to willfully forget Jefferson's track record regarding religious freedom and tolerance, not to mention his own interest in not being religiously bullied given his own atheism (or, perhaps, belief in no more than first-mover deism).

In any event, there can be no doubt that what is now colloquially called "the separation of church and state," wherever observed in the world today, was originally birthed in The New World. That is, while there are some mentions of it prior to the founding of America, the deep marinating of the topic took place here, culminating in a godless Constitution, the First Amendment, and, subsequently, within the chambers of the Supreme Court. James Madison, primary author of the First Amendment, credited Martin Luther's (1483-1546) doctrine of two kingdoms ("render unto Caesar" versus "render unto God"[71]) as the inaugural wellspring from which emerged the wisdom in separating church from state.[72] Separation started to gain real traction during the pre-Revolutionary Enlightenment, though it would be a mistake to say it was the primary focus of the philosophy of the Age. Rather, church-state separation was merely one arrow in an Enlightenment quiver aimed squarely at reason, science, and the folly of monarchism. John Locke's 1689 Letter Concerning Toleration alludes to a limited form of separation, though it primarily advocates for mere toleration, as its title implies.[73] Pierre Bayle,

[70] Dreisbach, Daniel. Thomas Jefferson and the Wall of Separation Between Church and State. New York University Press. 2002. Page 17. See also, Dreisbach, Daniel, ed. The Founders on God and Government. Lanhan: Rowman & Littlefield Publishers. 2004. Pages. 4-5.
[71] Matthew 22:21.
[72] Letter to Reverend F.L. Shaeffer. December 3, 1821. Letters and Other Writings of James Madison. Volume III. Published by Order of the US Congress. Philadelphia: J.B. Lippincott & Co. 1865.
[73] Hamburger, Philip. Separation of Church and State. 2002. Harvard University Press. Cambridge, MA, 2004. p. 53.

Montesquieu and Voltaire also voiced their preference for separation, but did so tangential to their main foci. Diderot was perhaps most direct when writing, "The distance between the throne and the altar can never be too great. In all times and places, experience has shown the danger of the altar being next to the throne."[74]

On this side of the pond, Thomas Payne was the most influential pre-Revolutionary advocate for separation. Still, Payne's rationale was not necessarily an antagonism to religion itself; rather, his separation arguments were aimed at showing how leadership by birthright was illegitimate, that it "[could not be defended] on the authority of Scripture; for the will of the Almighty, as declared by Gideon and the prophet Samuel expressly disapproves of government by kings."[75]

The pious language of Payne makes clear that advocates for separation were not merely nonbelievers. Indeed, many worried that not only might religion taint government, but that government might taint religion. Such was part of the argument James Madison made in his rebuke of a proposal by well-known patriot Patrick Henry that called for a general tax throughout New England with proceeds therefrom used to support Christian ministers and educators.[76] In his pamphlet "Memorial and Remonstrance against Religious Assessments," apart from making traditional pro-secular arguments in favor of separation, Madison wrote,

> "[the proposed tax bill] at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian

[74] Diderot D. Diderot: Political Writings. (Mason JH, Wokler R, eds.). Cambridge: Cambridge University Press; 1992.
[75] Hutson, James H. Religion and the Founding of the American Republic. Yale University. 1998. p. 41-42.
[76] Hamburger, Philip. Separation of Church and State. 2002. Harvard University Press. Cambridge, MA, 2004. p. 104-105.

> timidity would circumscribe it with a wall of defence (sic) against the encroachments of error."[77]

The "Memorial and Remonstrance" was so successful that it not only galvanized sufficient opposition to the bill to defeat it, but its inclusion of the phrase "great Barrier"[78] was very likely borrowed by Jefferson in his letter to the Danbury Baptists ("wall of separation").[79]

Into this environment—and amidst the impotence of the Articles of Confederation and a desire to unify the otherwise-independent former colonies into one nation—sprang the Constitutional Convention in 1787. In 1791 the Bill of Rights was ratified, permitting the Free Exercise of one's religion and prohibiting the government from establishing one. Specifically, the First Amendment uses the words, "Congress shall make no law respecting an establishment of religion…" A literal reading indicates that only the federal government, not the states, through Congress as its legislative body, is barred from establishing a religion. Current Supreme Court Justice Clarence Thomas has even argued this point, writing in his partial concurrence with the decision in Town of Greece v. Galloway (2014),[80] "the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States." While a deep dive into Justice Thomas' pro-state/pro-religion jurisprudence is beyond the scope of this Thesis, it is worth noting that it fits within an argument he has been making since 2002[81] and therefore bears watching by those who care about church-

[77] Bill of Rights Institute: Primary Source Documents: Memorial and Remonstrance (billofrightsinstitute.org).
[78] "The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people…"
[79] Dreisbach, Daniel. Thomas Jefferson and the Wall of Separation Between Church and State. New York University Press. 2002. Page 86, citing Noonan, John T. Jr., Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government. New York: Foundation Press (2001).
[80] Town of Greece v. Galloway. 572 US ___ (2014).
[81] Zelman v. Simmons-Harris. 536 US 639, 678 (2002).

state separation. Fortunately, his is a fringe opinion and very likely violative of the Fourteenth Amendment, let alone the spirit of the fundamental rights enunciated in the First Amendment. Regardless, his words in Town of Greece v. Galloway serve to show that, even today, work remains to do be done to validate the arguments in favor of secular governance.

As discussed above, and worth echoing, the primary reason government should limit its entanglement with religion is pluralism: separation is the only sure way to guarantee equal treatment of all citizens disposed to a multitude of beliefs. Nonetheless, since this Thesis has posited that religion should be treated with hostility—akin to how government has treated tobacco in light of its associated health issues—a bit more needs to be said about why. To begin with, religion—using the aforementioned "I'll know it when I see it" definition—is *per se* irrational. That is, rationality is defined as that which accords to reason and logic.[82] Since reason and logic have not yet been employed in such a way as to conclusively demonstrate the veracity of any non-material religious claim—evinced most obviously by the lack of homogeneity amongst believers worldwide as to which supernatural entity is the real one, if there even is such a real one—then the only appropriate position to take is to withhold belief in the non-material until such time as the claim has satisfied its burden of proof. Understanding and accepting the null hypothesis as the default need not equate to imposing a prohibition on religion; freedom must include the right to believe in both those things supported by evidence and those that are not. Rather, the irrationality of religion is relevant because it leads to the employment of flawed epistemological models.

[82] "Rationality." Lexico.com, a collaboration between dictionary.com and Oxford University Press.

Government has an interest in an educated citizenry. This is because of what flawed thinking can lead to.[83] How might the fool discern between a good deal and a scam; scientific fact and pseudo-scientific promises; news and conspiracy theories? And while it might be argued that the religious can bifurcate subjective belief from objective reality, this argument is wanting. In other words, postulating that "because Isaac Newton could both invent differential calculus and believe in 'sacred geometry' and alchemy thereby proves that rationality is not sacrificed merely by being religious" fails to ask the bigger question: what might a genius of Newton's station been able to accomplish had his mind been free of delusion and committed exclusively to the reasonable? Another way of looking at it: no one seems to lament government's power to forcibly medicate the schizophrenic criminal defendant so he can gain the clarity of thought needed to understand the charges against him.[84] All told, an educated citizenry is superior to a delusional or stupid one.

Inescapably, it is from that often-delusional-and-stupid citizenry that our elected officials ultimately come. When asked in 2019 if global warming was a threat, Vice President Mike Pence—a well-known evangelical Christian of the most fundamental sort—refused to answer.[85] Christians of Pence's ilk tend to accept Biblical answers to scientific ones when the two are in conflict. As but one more example from many, consider the words of Senator James Inhofe (R-Okla.), author of The Greatest Hoax: How the Global Warming Conspiracy Threatens Your Future.[86] Offered in a radio interview with the Voice of Christian Youth America, Inhofe said, "The Genesis 8:22 that I use in there [my book] is that 'as long as the earth remains there will be

[83] "A well-informed citizenry is the best defense against tyranny" or "a well-informed electorate is a prerequisite to democracy" are often attributed to Thomas Jefferson, but these appear to be fictionalized, per monticello.org.
[84] Cal. Penal Code §1368, *et seq*.
[85] Edavane, Gillian. "VP Mike Pence Refuses to Directly Answer Whether Climate Change is a Threat in Tapper Interview." Newsweek. June 23, 2019.
[86] Washington DC: WND Books, 2002.

seed time and harvest, cold and heat, winter and summer, day and night.' My point is, God's still up there. The arrogance of people to think that we, human beings, would be able to change what He is doing in the climate is to me outrageous." In other words, the world need not address climate change; Yahweh is on watch. Incidentally, Mr. Inhofe sits on the Senate Committee for Environment and Public Works.

In the same vein, it does American children in a globally-competitive environment no good to teach them pseudoscience in biology class by equating intelligent design/creationism with evolution. The former is an apologetic conceived to sustain the Biblical creation myth wherein, quizzically, plants exist before the sun;[87] the latter is, by contrast, proven fact. Courts have been notably consistent in ruling against anti-evolution/pro-creationism legislation, but efforts continue to this day by local- and state-level legislators who seek to hamstring schoolchildren from understanding what has been learned about the diversity of life since Darwin's groundbreaking work in 1859.[88] These efforts do not invariably fail, however. In 2008, then-governor Bobby Jindal signed the ironically-named Louisiana Science Education Act allowing teachers to supplement approved textbooks with ancillary materials critical of evolution and global warming.[89] All efforts to repeal the legislation have, to date, failed. At least Ken Hamm and the Ark Encounter only got $18

[87] Genesis 1: 11-19.
[88] For a general discussion and various links, see "Creation and evolution in public education in the United States." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Creation_and_evolution_in_public_education_in_the_United_States.
[89] Louisiana Senate Bill SB733 (2012).

million in tax rebates[90] and do not foist their dinosaurs-amongst-humans lunacy to captive audiences like public school children… except, perhaps, when public schools take field trips there.[91]

Children are, of course, not the only folks imperiled by religion. Women in Islamic societies are, amongst other inequalities, subject to genital mutilation (merely to minimize sexual gratification),[92] disparate marital and divorce laws,[93] diminished weight given to their courtroom testimony,[94] dress code requirements,[95] driving restrictions,[96] limited inheritance rights,[97] and preclusion from being educated[98] or participating in religious reasoning (*ijtihad*).[99] Women in Christianity, though arguably under less of the lash, are still, per the New Testament, to "remain silent in the churches. They are not allowed to speak, but must be in submission, as the law says. If they want to inquire about something, they should ask their husbands at home."[100] They may not teach religion or assume authority over a man.[101] They are to be "subject to their husbands in all things."[102]

Additionally, as homosexuality is a moral sin in Islam, gays are regularly executed. In Iran alone it is estimated that thousands have been killed since the revolution in 1979.[103] It also

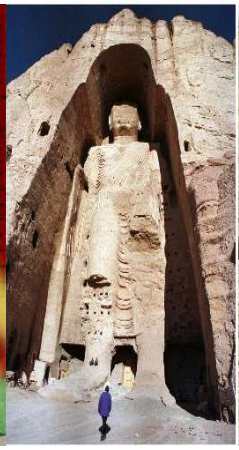
---

[90] Yetter, Deborah. "'Ark Park' Violates Agreement, Gets Over $18 Million in State Tax Breaks Suspended." Courier Journal (USA Today). July 21, 2017.
[91] Image Courtesy of The Guardian. Gabbatt, Adam. "Creators of the Los Ark: Replica of Noah's Vessel Unveiled in Kentucky." The Guardian. July 6, 2016.
[92] World Health Organization (https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/).
[93] Issue in Women's Rights: A Practitioner's Resource Book. Edited by KM Baharul Islam. Pages 55-56. See also Quran 4:3.
[94] Quran 2:282; 4:11.
[95] Quran 24:31; 33:53 (speak to women from behind a "partition" or "curtain").
[96] Samuelson, Kate. "Saudi Arabia Refuses to End its Ban on Women Drivers…" *Daily Mail*. June 26, 2016.
[97] Quran 4:7.
[98] Quran 58:11. See also, Malala Yousafzai's I Am Malala (2013).
[99] Gisela Webb. Windows of Faith: Muslim Women Scholar-Activists in North America. Syracuse University Press. 2000. Page 57.
[100] I Corinthians 14:34-35 (NIV).
[101] I Timothy 2:11-12 (NIV).
[102] Ephesians 5:22-23.
[103] Walsh, Alistair. "Iran Defends Execution of Gay People." DW Akademie (Germany). June 12, 2019.

leads members of the Westboro Baptist Church of Topeka, Kansas to picket funerals for fallen American servicemembers—after coming to prominence in 1998 for picketing the funeral of Matthew Shepard, murdered for being gay—on the auspices of "the Lord punishing this evil nation for abandoning all moral imperatives worth a dime."[104]

Religion is also at the root of international conflicts. While certainly tinged with other factors, examples include the Crusades, the Reformation, Northern Ireland, the bifurcation of Pakistan from India, the Lebanese Civil War, Bosnia and Herzegovina, and the unremitting Arab-Israeli conflict.

There's also this,[105] this,[106] and this.[107]



[104] Jonsson, Patrik. "Why is the Westboro Baptist Church Picketing Elizabeth Edwards' Funeral." Christian Science Monitor. December 11, 2010. Quote of Pastor Fred Phelps (1929-2014).
[105] The Catholic Church Sex Abuse Scandal (intended not to impugn Catholicism as a doctrine, but to demonstrate the corruption possible by an organization and its members when immune to prosecution because of power, influence, money, clergy privilege, and even statehood (The Vatican)).
[106] Buddhas of the Bamyan Valley, Afghanistan; destroyed by the Taliban, March 2001.
[107] September 11, 2001, Terrorists Attacks in New York City (World Trade Center).

The pious will regularly counter that religion also does much good, just look at all the religion-affiliated colleges or hospitals named after saints! But, as the late polemicist Christopher Hitchens would ask in retort, "Name me one charitable act that could not be undertaken or one moral statement that could not be uttered by an atheist?" It turns out, there are none. Almost amusingly—were it not true—he then would add, "now name me one wicked action that could only be done or one vile statement that could only said because of religion. There, you've already thought of one."[108]

In sum, religion promotes flawed epistemology, stultifies minds, thwarts scientific advances, marginalizes women, foments social discord, causes war, incentivizes the destruction of cultural artifacts, arouses corruption, and excuses terrorism. How is hostility towards it not warranted?

[108] Paraphrase of various Hitchens statements done during his book tour of God is Not Great: How Religion Poisons Everything. Toronto: McClelland & Stewart. 2007. See for instance, Debate of Hitchens v. William Lane Craig, Biola University, April 4, 2009.

A Brief Primer on American Appellate Law

Trial courts in the United States are the venue for the hearing of testimony. Once a verdict is rendered by the trier of fact (either a judge or jury), a case is primed for appeal. An appeal is initiated by a litigant, not the system itself, and must be based on legal grounds, as opposed to factual ones. That is, an appeal may not be heard because a jury did not find the testimony of a witness to be compelling, but rather, employing the same illustration, because the witness was not properly qualified as an expert or spoke about a writing not authenticated as an original.[109] When an appellate ruling is issued, appeal to a yet higher court may be available. The United States Supreme Court is the highest appellate court in the land.[110] Not all appeals are able to be heard by SCOTUS—due to limitations on whether a federal court may have jurisdiction to hear a uniquely state matter and other esoteric concepts—and very few cases actually do wind their way to this topmost Court. Indeed, from the list of qualifying candidate cases, SCOTUS gets to determine which cases it will hear. Some are taken because they are vital (see Bush v. Gore,[111] regarding the hanging chads in Florida during the 2000 Presidential election); others are accepted because the Justices are politically motivated to do so (see Masterpiece Cakeshop v. Colorado Civil Rights Commission,[112] accepted to set a national standard on a gay rights issue[113]); and others are chosen because a sufficient number of Justices

[109] More pedantically, not the "Best Evidence" (per the Best Evidence Rule) or appropriate "Secondary Evidence." In California, see Evidence Codes §1401 and §1521.

[110] The Supreme Court does have non-appellate, original jurisdiction in matters "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." US Const. Art. III, § 2.

[111] 531 US 98 (2000).

[112] 584 US ___ (2018).

[113] Petition for Certiorari granted June 26, 2017. But do note that appellate courts also tend to apply the "political question doctrine," refusing to interfere in a matter that is merely political in nature (and generally highly charged or controversial). For instance, SCOTUS refused to rule on President Nixon's challenge that Article I of the Constitution was violated by Congress in its impeachment of him. Nixon v. United States, 506 US 224 (1973). Differentiate between United States v. Nixon, 418 US 683 (1974).

think the matter represents a unique or interesting jurisprudential issue that should be addressed. Appeals must also be considered ripe and not moot. As Justice Scalia wrote, "Ripeness require[s] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[114] Mootness is a question of whether the relief sought can still be granted. A simple example would be that of a student applying to a public law school who gets denied admission because of race; if that student has received a law degree from another institution during the period it took the case to get to the Supreme Court, the issue would be moot, the student already a lawyer.[115]

Relevant to this Thesis are Constitutional questions: issues brought before SCOTUS which relate to whether a law enacted—and then challenged—is void because it violates the United States Constitution or its Amendments. If the Court had, in the past, issued a ruling relevant to the instant case before it, the Court would be free to alter, clarify, or even overturn it in full. But in all cases the Court must rule based on the laws already codified; it cannot write its own laws. It may, however, read that already-codified legislation in a unique way so as to effectively make law—a process often disparagingly called "judicial activism." For instance, the Constitution does not expressly say that there exists a "right to privacy" yet SCOTUS has nonetheless found one: in Roe v. Wade,[116] SCOTUS invoked the Due Process Clause of the Fourteenth Amendment to create this fundamental right to privacy. That Due Process Clause, however, only says this:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

[114] Texas v. United States, 523 US 296, 300 (1998), citing Abbott Laboratories v. Gardner, 387 US 136, 149 (1967).
[115] My example was chosen because it resembles the case of Abigail Fisher, denied entry into UT as an undergraduate. See Fisher v. University of Texas, 579 US ___ (2016) and her original case 570 US ___ (2013).
[116] 410 US 113 (1973).

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Finally, when SCOTUS is ruling on a Constitutional issue it must employ one of three standards to determine whether to render the law void. Any of the First Amendment's enumerated rights or any right otherwise deemed fundamental (including the aforementioned Court-made "right to privacy") are subject to the highest standard, strict scrutiny; rights related to gender, illegitimacy (birth out of wedlock), and media[117] are subject to intermediate or heightened scrutiny. All other laws are examined under the rational basis test, essentially giving deference to the legislature to pass whatever bills they are empowered to pass. Once the level of examination is determined, what the Court asks itself is this:

Strict Scrutiny:	a) Does the law in question serve a *compelling* government interest?
	b) If so, is the law narrowly tailored to achieve that interest? (In other words, is the law drafted scrupulously to be as specific as possible so as to not stray into other areas or affect other rights?)
Heightened Scrutiny:	a) Does the law serve an i*mportant* government interest?
	b) If so, is the law substantially related to that interest?
Rational Basis Test:	a) Does the law relate to a *legitimate* government interest?
	b) If so, is the law rationally related to the statute's goals?

[117] A Constitutional question related to speech would, undoubtedly, fall under strict scrutiny. The intermediate scrutiny herein referenced does not call into question the lawfulness of the speech *per se*, but rather limitations to its dissemination, typically within a commercial context. This is called the "Central Hudson Test," following Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 US 557 (1980). For instance, a statute prohibiting tobacco advertising near a school would fall under intermediate scrutiny. See, also, Sorrell v. IMS Health, 564 US ___ (2011).

Generally, the cases discussed below are suited to strict scrutiny—the free exercise of religion and the Congressional prohibition on Establishment being fundamental rights. Ripeness, mootness, and standing to bring the challenge itself (a requirement that the litigant be a legally-interested party) are all naturally assumed, as well; else, the Supreme Court would not have heard them to begin with. Finally, the motivations of the Court to accept the case or the political/historical context in which they were heard are generally not taken into account. Rather, all that is under analysis is how the Supreme Court of the United States, if properly predisposed to be hostile towards religion, as both of those terms are defined herein, should have ruled on the case (or, put differently, ought now to rule on the case if the exact same facts were presented before it today).

CASES

Case #1: Reynolds v. United States. 98 US 145 (1879).

Facts and History: Section 5352 of the Revised Statutes of the United States (the precursor to the United States Code) declared unlawful the act of bigamy.[118] As Utah was not yet a state, the law applied directly those who lived in the western territories, including the Mormons (indeed, the law was very likely written to target the Mormons and their bigamous practices[119]). George Reynolds, a high-ranking member of the Church of Jesus Christ of Latter-Day Saints, sought to challenge the law; he therefore purposefully took a second wife and lived openly with her so as to provide the US Attorney ample witnesses to convict him. As desired, he was convicted in 1876 and that ruling upheld by the relevant Appellate Courts.

How SCOTUS Ruled: Conviction affirmed. The Court took note of both Madison's "Remonstrance" and Jefferson's Danbury Letter in warning that unchecked religious freedom could allow a man to become a "a law unto himself [wherein] government could not [thereafter] exist."

How SCOTUS Got it Wrong: SCOTUS should have declared all federal laws related to marriage unconstitutional, both in its plural and singular forms. This would have left the states free to validate marriage, had any chose to do so; but there is no real governmental rationale to involve itself in what is effectively a religious artifact or personal approach to love, intimacy,

[118] Bigamy and polygamy are treated the same herein. Note, however, that bigamy is the illegal practice of marrying another while married and polygamy is the term given to having more than one concurrent spouse.
[119] "Morrill Anti-Bigamy Act." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Morrill_Anti-Bigamy_Act.

and cohabitation. Indeed, this is very near where the law is presently settled.[120,121] That is, in 2013 in United States v. Windsor,[122] SCOTUS declared Unconstitutional the Defense of Marriage Act wherein marriage was defined as a union between one man and one woman. As a result, the states are now free to define marriage as they choose, but, of course, are bound by the Privileges and Immunities Clause of Article IV of the Constitution requiring comity between the states as it relates to their citizens.

It might be argued that federal blindness to marriage would present logistical issues, but this is not so. Any question the government asks related to marriage could simply be reworded. For instance, instead of the military asking, "who is your spouse in case you die in war?" it might be phrased, "who do you assign as your designee in case you die in war?" Similarly, while there is currently a tax benefit to being married, there does not have to be. The Sixteenth Amendment—ratified some fifteen years *after* Reynolds—merely empowers the federal government to collect income taxes from citizens. It does not mandate that marital status be considered or tax benefits be afforded the married. Again, then, logistics is no hurdle to removing marriage from the purview of government.

In the end, what matters is that government need not involve itself in the private and personal relationships between humans when, first, not only do alternate solutions exists to solve any logistical citizen-government or legally-tangential issues but, second—and more important—humans enter into and maintain myriad forms of interpersonal relations, very often

[120] Ogletree Deakins, PC. "US Supreme Court Declares Federal Law Defining 'Marriage' is Unconstitutional." June 26, 2013. Lexology.com

[121] I predict, for instance, that challenges will eventually be forthcoming related to disparate treatment of married or unmarried taxpayers, intestacy laws for children of unwed parents, and in torts (such as standing for the loss of consortium or the right to collect insurance proceeds).

[122] 570 US __ (2013).

informed by their religious traditions. Polygamy, for instance, is legal in 58 countries.[123] The Koran specifically tells men to "marry those that please you, two or three or four."[124] The Torah catalogues numerous men with multiple wives, never condemning the practice.[125] Polygamy is popular in sub-Saharan tribal cultures. Polyandry is not uncommon in India.[126] Even group marriage occurs.[127] Amidst this human diversity, where personal matters of love and sex are at the heart of it, and in light of America as a land of immigrants, no compelling government interest actually exists to write any laws which involve and validate marriage. In the alternative, however, if a compelling government interest could be shown—perhaps by the mere ubiquity throughout history of the practice of forming publicly-recognized bonds—there still seems no reason why the people within these bonds should be precluded from defining them in accord with how they practice them. As but one lone example, as it stands now, a polygamist immigrant resettling in America is compelled to acknowledge only his first wife, a complete affront to how the participants constructed their family in their nation of origin.[128] This is not fair to the immigrant and it is likewise restrictive to the native citizen who might want to forge an atypical familial structure of his or her own.

This critique is therefore not rooted in a Free Exercise argument,[129] as the issue was originally framed by George Reynolds. Rather, the mistake by SCOTUS is failing to slap the

---

[123] "Legality of Polygamy." *Wikipedia*, Wikimedia Foundation, Inc. 10 May, 2020. en.wikipedia.org/wiki/Legality_of_polygamy.
[124] Koran 4:3.
[125] Lamech in Genesis 4, Jacob in Genesis 29-37, Gideon in Judges 8, David in Samuel 5 & 11, Solomon in 1 Kings 11
[126] It is even widespread "in Asia, Africa, and Oceania." Walker, Anthony. "The Truth About the Todas." Vol. 21, Iss. 5. Frontline. 2004.
[127] Westermarck, Edward. The History of Human Marriage. Volume 3. MacMillan and Co., Limited: London. 1921. Page 240-242. The report is criticized, however, as mere cicisbeism. I nonetheless include it because the practice is what matters, not the state sanctioning of it. In other words, *punalua* in the Sandwich Islands and "sexual communism" of Melanesia are, effectively, group marriage.
[128] "Will You Be Denied US Citizenship Based on Polygamy, Bigamy, or Multiple Marriages?" Nolo.com.
[129] Interestingly, the question could be framed as an Establishment one, for, in some real sense, the ruling in Reynolds is preferencing the "two shall become one flesh" language of Matthew 19:5 over the purported

hand of government for wading into either uniquely-religious or uniquely-personal territory to begin with. As a result, however, the net result would look exactly as if the Free Exercise argument had prevailed, though citizens would not have to construct a *per-se*-religious argument for the benefit of the government as to why they seek to live other than as "monogamous heterosexual;" the rationale for government not being allowed to care how people love or cohabitate would be founded on reasons keenly secular. In short, government should not insert itself in the interpersonal relationships of its citizens given the worldwide diversity that exists in how people form and maintain their bonds.

revelation of Joseph Smith in 1843 (and later by Brigham Young in 1852). In other words, the law forms a *de facto* Establishment of a Protestant marital ethic (albeit not a *de jure* establishment) in lieu of any other.

Case #2: Cantwell v. Connecticut. 310 US 296 (1940).

Facts and History: Connecticut had passed a law requiring door-to-door solicitors to get a certificate of permission before asking for money from the public or to apply for an exemption on religious grounds; the law also included a common law prohibition against breach-of-the-peace. Newton Cantwell and his sons, all Jehovah's Witnesses, went door-to-door in New Haven and were subsequently arrested. The Cantwells challenged these arrests.

How SCOTUS Ruled: The Cantwells actions were protected by the First Amendment's guarantee against government interference in the Free Exercise of religion.

How SCOTUS Got it Wrong: SCOTUS erred on two fronts.

First, while SCOTUS was correct in their acknowledgment that protections against fraud justify the requirement for a certificate of permission before solicitors may knock on doors asking for money, the exemption process gave too much subjective power to the state. That is, the statute read, "Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one…"[130] This language implicates what has above been labelled Dahmerism; one man's calling being another man's crime. Specifically, who is to decide what constitutes a legitimate religion? Consider, the Jehovah's Witnesses was founded in 1931 (though the group was an offshoot of the Adventist movement from about the 1830s) and this case was heard in 1940.[131] Time has surely legitimated the Jehovah's Witnesses as a viable religion of today, but if the first believer of any religion were to apply to the Connecticut Secretary of State for an exemption, how would—how could—the Secretary "determine whether

[130] 310 US 296, 302.
[131] "Jehovahs Witnesses." Encyclopaedia Britannica (Online). https://www.britannica.com/topic/Jehovahs-Witnesses/Beliefs.

such cause is a religious one?" This subjectivity should invalidate the statute as clearly favoring one religion over another, a known religion over a nascent one. As such, it treads too near an Establishment Clause violation and the exemption element of the law should have been deemed Unconstitutional on its face.

The second SCOTUS error here relates to their treatment of the breach-of-the-peace aspect of the law. Certainly, the voicing or publishing of ideas cannot be suppressed on Freedom of Speech grounds; implicated therein, however, is the Free Exercise of religion. A state also has an interest in preserving public order, limitations on speech (religious or otherwise) being permissible under certain circumstances. For instance, despite a general disdain for "prior restraint" on speech, as educed in Nebraska Press Association v. Stuart,[132] the Court has, at times, allowed for certain speech restrictions in limited contexts.[133] Accordingly, a balance is in order. Because the law here—now viewed absent the religious exemption portion (for the reasons discussed above)—was neutrally written, seeking to save residents from the nuisance associated with people violating a resident's zone of privacy without invitation, it created no obstacle to the free market of ideas nor placed an undue restraint on the free exercise of one's religion; it simply mandated the marketplace of ideas be, and the proselytizing of one's religion take place, on public grounds. Again, Dahmerism: one man's door-to-door proselytizing is another man's breached peace. If one's religion requires the former, they and their ilk are invited to form their own theocratic nation, for it may rightfully be denied in a secular one.

[132] 427 US 539 (1976).

[133] See, for instance, the dicta in Near v. Minnesota, 283 US 697 (1931), where the Court said national security or pornographic "obscene publications" could be at the root of an appropriate limitation on speech. The Court has also established restrictions on commercial speech. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 US 557 (1980), and Lorillard Tobacco Company v. Reilly, 533 US 525 (2001).

Case #3: Everson v. Board of Education of the Township of Ewing. 330 US 1 (1947).

Facts and History: Ewing, New Jersey, passed a law permitting reimbursement to parents of bussing costs to and from school. The vast majority of the reimbursements went to parents who sent their children to private, Catholic schools (96%[134]). A local taxpayer, Everson, sued, alleging the funds aided religion.

How SCOTUS Ruled: The law did not violate the Establishment Clause because it was neutrally-written with the intent of educating children, did not give money directly to the schools (but rather the parents only), and any benefit to religion was merely incidental.

How SCOTUS Got it Wrong: SCOTUS again erred in two ways. First, it mischaracterizes the term "education;" second, tax dollars are, in fact, being used to support religion.

Justice Black, of whom there can be little doubt is the architect of 20th century church/state separation jurisprudence,[135] issued the majority opinion of the court. In the opening paragraph, he wrote, "These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." Justice Black, it would appear, forgot what the phrase "in addition to" actually means. A rewording of his opening might well read, "These church schools teach their students that an invisible wizard created the universe, then created the two people from whom all of humanity descends, then He flooded the Earth to kill everyone He had created because He did not so much like His own work, then eventually sent a version of Himself to be crucified and then risen from the dead such that failure to believe such a resurrection occurred would doom

[134] Oyez.com (https://www.oyez.org/cases/1940-1955/330us1).
[135] Perry, Barbara. Journal of Church and State: Justice Hugo Black and the 'Wall of Separation Between Church and State." Oxford University Press. Vol. 31, No. 1. Winter 1989. Pages. 55-72.

any person to eternal punishment in a lake of fire; and they also teach arithmetic." This is no more deserving to be labelled "education" than showing up to a black-tie affair in shorts and a T-shirt would be called "appropriate attire." Sure, nudity is avoided, but the purpose of the black-tie requirement is not to prevent a mass of nakedness; it is to preserve the dignity of the event. Similarly, the purpose of education is to instruct the learner on facts and skills that comport with, and help her navigate, reality. If any individual wants to glom onto that—for themselves or their children—a mythos about the origin of the universe, the destiny of a soul at death, or any other unproven, unfalsifiable, non-material, non-naturalistic pseudology, they certainly may; they simply cannot do so and call it "education." So, where government is in the business of education, it must be in the business of education and nothing more.[136] Religious instruction is the "more."

SCOTUS' second mistake in Everson is to fail to see the obvious: tax dollars are *per se* being used to support religion here. In all fairness, some on the Court did see this. The vote was 5-4, after all. In his dissent, Justice Rutledge wrote,

> "The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not 'support' in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion 'entangled in precedents.' Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing

[136] Wholly irrelevant, but a compromise might have been to schedule religious classes in the afternoon. Then, those students who required bussing (and whose parents were in line for the reimbursement) could get their secular education during the morning and take subsidized bussing home before the religious portion of the day. The parents of those students who stayed into the afternoon to be educated about Catholicism would then not get reimbursed for later-in-the-day rides home. Call this failure to consider such a compromise an error within an error in how SCOTUS mischaracterized "education" in this case.

> which they are sent to the particular school to secure, namely, religious training and teaching."

Rutledge's final sentence hits the nail on the head: the express purpose of sending one's children to religious school is for the religious training. That which aids religious training, aids religion. Aiding religion is akin to establishing religion. Establishing religion is a Constitutional violation.

SCOTUS should have, one, stated that education that includes superstition is not "education" as defined by the government, and two, denied reimbursement to parents for bussing their students to private, religious schools.

It should be noted that despite what is undoubtedly a pro-religious ruling, Everson actually sets the table for what becomes the trend in church/state jurisprudence thereafter. Because Justice Black rooted Everson in the arguments, and language, of Jefferson (the Danbury Baptists letter and the Virginia Statute for Religious Freedom) and Madison ("Memorial and Remonstrance Against Religious Assessments"), the case serves as a guidepost for every First Amendment establishment case that has come after it. Indeed, it reads in part more as a history lesson than a reasoned legal decision. Justice Black even concludes with this: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. [It just turns out that] New Jersey has not breached it here."

Case #4: Zorach v. Clauson. 343 US 346 (1952).

Facts and History: In 1948, SCOTUS ruled in McCollum v. Board of Education[137] that it is an unconstitutional establishment when religious educators use public school facilities to teach religion. Soon thereafter, New York instituted a law that allowed, on an opt-in basis, students to leave school early to attend off-campus religious training. No public funds were used to support the off-site training though administrators were responsible to provide oversight of the children to assure a minimization of truancy under a false claim of religious training. Children whose parents did not opt in remained at school until the normal dismissal time.

How SCOTUS Ruled: The New York law, being distinguishable from McCollum, does not involve public funds or utilize school grounds. It is therefore Constitutional. Justice Douglas, in writing for the majority, penned, "[there is] no Constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

How SCOTUS Got it Wrong: While it must be acknowledged that school grounds are not here being used, as they were in McCollum, the rationale behind McCollum is still violated. To wit, McCollum correctly identified the role of the public-school system as the mechanism which provides a secular education to children. It is, in effect, a contract[138] between the taxpayers to pay for a secular education of the children of their neighbors and the student, by and through their parents, to participate therein or otherwise elect homeschooling. Permitting a deviation from the contract on the basis of religion is a favor to religion. Religion may be accommodated by government—just as The Loch Ness Monster Club may be accommodated by government by,

[137] 33 US 203 (1948).
[138] Justice Black framed it is "pupils compelled by law to go to school for secular education" at page 316.

say, paying its taxes or being a recognizable litigant in a civil court case—but it ought not be given favors.

Furthermore, the government needs to be very careful in categorizing its citizens as anything other than "citizen X with Social Security Number Y." There are times, such as in the American with Disabilities Act or the Age Discrimination in Employment Act where the government must look at a person's handicap or age, but this is done only to identify whether said person may have a valid claim in tort as a member of a protected class. In treating religious students differently than non-religious students, the Court is sewing division amongst the citizenry based upon purely personal beliefs/opinions. Moreover, the division is not simply one of religious student versus non-religious student; this ruling also creates a bifurcation between the outwardly-pious religious student and the privately-pious religious student (or one who simply approaches their religious training differently or otherwise respects the value in separating church from state, regardless of the depth of their piety). On the grounds that McCollum is not adequately distinguished and for the practical purpose of avoiding social division based exclusively on religious difference, the Court herein erred.

Because this Thesis is, in effect, a response to Justice Douglas' famous dicta in this case (that government need not be hostile to religion), a brief aside seems warranted to address the latter half of his statement about the relationship between government and religion—that government need not "throw its weight against efforts to widen the effective scope of religious influence." To that, it must be asked, who else could? As government is the *only* body capable of writing and enforcing laws, government is the *only* entity that can limit efforts to widen the scope of religious influence. To clarify, as the language here is a bit nuanced, government is not

the only entity that can exert religious influence. Pro-religious and anti-religious organizations are free to operate in America, and do. What is at issue in Justice Douglas' statement is the "scope" of religious influence; or, more specifically, the "effective scope" of religious influence. It might be argued that Justice Douglas is merely identifying the existence of a free market of ideas, and government need not wade into picking and choosing winners therein. But if this is the case, why has he called it an "effective scope?" It seems that scope, in its "effective" sense, must refer to an entanglement of government and religion (and presumably a Protestant ilk). Where else would a widened scope of religious influence be effective if not government? He surely cannot mean merely in the mind of the person being proselytized to, for this is "religious influence" and not "effective scope." Effective scope is where the influence takes effect. So, much as government must be hostile to tobacco, despite our appetite for it, it must be hostile to religion, despite our appetite for it. Similarly, while government must surely allow itself to be modified, it must, until such modification takes place, throw its weight against efforts to widen the effective scope of that which the system is specifically designed to subdue: the influence of religion on that government. It would make no sense to proffer a secular approach to governance only to simultaneously advantage one position inimical thereto.

Case #5: Walz v. Tax Commission of the City of New York. 397 US 664 (1970).

Facts and History: New York Real Property Tax Law §420(1) provided that, "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, Bible, tract, charitable, benevolent, missionary,…patriotic, historical or cemetery purposes and used exclusively for carrying out thereupon one or more of such purposes shall be exempt from taxation as provided in this section." Frederick Walz, a Staten Island property owner, sued the New York City Tax Commission responsible for issuing the exemptions. His argument was that the exemptions served as indirect contribution to churches in violation of the Establishment Clause.

How SCOTUS Ruled: Tax exemption to churches is not an Unconstitutional Establishment.

How SCOTUS Got it Wrong: If the aforementioned Loch Ness Monster Club has to pay taxes, the similarly-oriented Yahweh Monster Club—despite being shrouded euphemistically in the moniker First Methodist Church of Main Street, or something of the kind—should have to, as well. The reason churches are afforded tax exemption stems from the argument that religious organizations serve a public good, a charitable function. The facts, however, do not support this contention.

To begin with, poisoning the minds of children and aiding in the delusion of adults is not a public good. That is, because membership within any religion requires acceptance of that which is patently unprovable (or, perhaps said better, has yet to be proven), belief therein is irrational. As discussed, irrationality is *per se* detrimental to the public good, though there can be some benefit to the individual believer. The fraternity that comes from group membership—regardless of what coheres that group—cannot be denied. This truth, however, serves to

illustrate the point: the Yahweh Monster Club is essentially no different than the Loch Ness Monster Club, save that the former posits the existence of an omnipresent deity and the latter the existence of a Scottish lake-dwelling plesiosaur. What each group is is a collective of like-minded folks bound by a common unifying factor. That unifier can be anything from seeking to understand man's place in the universe, to celebrating mythical sea life, to mere fun (as would be the case with something like the United States Hang Gliding and Parasailing Association[139]).

The existence of this fraternal, unifying element ought to mean either all such groups be tax exempt, or none. That debate is why legislators are elected. As it stands presently, however, all fraternal organizations are not treated alike, being designated either as for-profit or not-for-profit. Churches are, by sheer assumption, treated like non-profits.[140] Herein lies the rub: non-profit organizations that do tax exempt work such as the prevention of cruelty to animals or the promotion of international sports competition[141] must annually file IRS Form 990 wherein they detail their income, operating expenses, and charitable distributions in order to continue qualifying as tax exempt. The legal standard is complicated but the IRS conducts analysis of the Form 990 to deduce whether the operating expenses and salaries, as compared to the net charitable outlay, warrants continued exemption. Churches need not do this. This is unjust. While there is a certain amount of money that a church may rightfully withhold as it saves for a new addition to the parking lot, some churches certainly prioritize social welfare more than others. Because churches are protected behind a government-sanctioned wall of secrecy, figures are illusive. One look at the Holy See (of Rome), or simply the whole of the Catholic Church, is

[139] USHPA is a 501(c)(3) non-profit dedicated to unpowered free flight. Their website, ushpa.org, acknowledges that fun is their foremost aim: "USHPA strives to promote pilot safety, skill, knowledge and above all fun."
[140] 26 USC §501(c)(3).
[141] These are two examples from 26 USC §501(c)(3) as *per se* tax exempt, like churches.

illustrative.[142] For instance, does this opulence—the tomb of Pope John Paul II in St. Peter's Basilica—comport with the ethos of the founding hippy carpenter who purportedly said, "sell your possessions and give to the poor, and you will have treasure in heaven."?[143] Furthermore, it is not charity in the truest sense if a homeless person is required to sit behind a sermon paywall before being given a free sandwich. Rather, this seems more like bribery than purity; at best, it is a private contract: sit and listen in exchange for food.

In sum, some churches excel in public service where others do not; some churches maximize their philanthropy and some build gold-plated mausolea. As such, the unquestioned tax exemption for churches is not merited. Churches should be required to demonstrate Form 990 compliance as other non-profits do. A blanket preferencing of churches over other organizations is Unconstitutional Establishment.

As Justice Douglas elegantly put it in his dissenting opinion,

> "There is a line between what a State may do in encouraging 'religious' activities, *Zorach v. Clauson,* 343 U.S. 306, and what a State may not do by using its resources to promote 'religious' activities, 343 U.S. 306, and what a State may not do by using its resources to promote 'religious' activities, *McCollum v. Board of Education,* 333 U.S. 203, or bestowing benefits because of them. Yet that line may not always be clear. Closing public schools on Sunday is in the former category; subsidizing churches, in my view, is in the latter. Indeed, I would suppose that, in common understanding, one of the best ways to 'establish' one or more religions is to

[142] There is also a wealth of critique that can be aimed at the Holy See. For instance, "The Top 5 Financial Transgressions Committed by the Vatican." https://www.europeanceo.com/finance/top-5-financial-transgressions-committed-by-the-vatican/.
[143] Matthew 19:21 (NIV).

subsidize them, which a tax exemption does. The State may not do that any more than it may prefer "those who believe in no religion over those who do believe." *Zorach v. Clauson, supra,* at 314…

If believers are entitled to public financial support, so are nonbelievers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith. Believers are doubtless comforted that the cause of religion is being fostered by this legislation. Yet one of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects, but also between believers and nonbelievers. The present involvement of government in religion may seem *de minimis.* But it is, I fear, a long step down the Establishment path. Perhaps I have been misinformed. But as I have read the Constitution and its philosophy, I gathered that independence was the price of liberty."[144]

[144] Various sections of Douglas' dissent pieced together, beginning at page 700 (397 US 664, 700).

Case #6: Sherbert v. Verner. 374 US 398 (1963).

Facts and History: Adell Sherbert had been working in a textile mill for two years when her employer changed to a six-day work week, adding Saturdays. As a Seventh-day Adventist, Sherbert refused to work Saturdays and was resultingly fired. Her application for unemployment compensation was denied because she refused to accept any job that included working on Saturdays, acceptance of which was required by the relevant South Carolina unemployment compensation law. Specifically, one must be "able to work and…available for work."

How SCOTUS Ruled: Sherbert should receive the unemployment dole. The First Amendment's Free Exercise Clause prohibits the government, absent some compelling state interest, from establishing eligibility requirements for entitlements that impose a significant burden on one's ability to freely exercise their religion.

How SCOTUS Got it Wrong: Once again, the slippery slope of Dahmerism rears its head. Imagine a personal ethic of extreme hedonism—one that might be felt with such conviction that if others agreed and they all routinely held meetings to discuss it—it could fairly be called a religion. An adherent to this ethic might well never take a job that was not simultaneous financially beneficial and extraordinarily fun. If let go from this job, this person would not take a replacement position offered to them by a potential employer unless both lucrative and enjoyable, and the rationale would be rooted in a (quasi-) religious precept. It would be fair to deny this person unemployment compensation because of their fun-first, self-serving life choice, even if part of a deeply-held, life-guiding conviction. Similarly, it is fair to deny a Seventh-day Adventist unemployment compensation based on the same reason: an elected worldview.

Now, it could, of course, be argued that the extreme hedonist deserves unemployment compensation because his worldview is a religion in need of protecting. In that circumstance, perhaps SCOTUS got it right, perhaps government should jump through every hoop demanded of it by the person receiving the entitlement. In practice, however, this would be absurd and completely impractical to implement. Government can only successfully operate if it treats all citizens equally.[145] Consider the November 4, 2019, Georgia Pathways plan outlined by Governor Brian Kemp.[146] Heralded as a compromise between Democrats favoring the broad expansion of Medicaid and a mandate under Obamacare for states to cover adults with low income, the Georgia Pathways plan demands that those who receive the entitlement either work, volunteer, attend job training, or go to school for a minimum of 80 hours per month.[147] A religious exemption to this neutrally-passed work-for-aid package could neuter the law, allowing those convinced of the irrational—or the extreme hedonist, from the example above—to benefit over freethinkers or the more mildly pious.

SCOTUS should have identified the South Carolina unemployment compensation law as neutrally written and serving the compelling government interest in providing short-term bridge funds during one's search for employment if said person is both "able" and "available" to work, as those words are typically employed: as in, respectively, being neither quadriplegic nor imbecilic and being neither incarcerated in jail nor supine in a hospital bed. Indeed, Justice Harlan's dissent captures this spirit,

[145] Save for carved-out exceptions such as minority-owned businesses vying for government contracts where Affirmative Action is the law or where diversity is preferred, as within the State Department operating embassies abroad or electing who to send to a discussion group at the United Nations to debate policy.
[146] Hellman, Jesse. "GOP Georgia Governor proposes limited Medicaid expansion." The Hill Online. November 4, 2019.
[147] Livingstone, Shelby. "Georgia unveils Medicaid expansion plan with work requirement." Modernhealthcare.com. November 4, 2019.

> "Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was 'unavailable for work,' and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus, in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not 'available for work' for personal reasons."[148]

This is how it must be when many people can claim many divergent beliefs yet the same government has dominion over them all. This faulty decision by the Supreme Court has more than just Free Exercise implications. By, in effect, giving government funds (read, money garnered through taxation) to a believer in one religion, where a non-believer would be denied for the same net conduct—electing not to work on a Saturday when otherwise "available"—the government is committing an Unconstitutional Establishment.[149] As the case was not decided on Establishment grounds, however, this angle can be disregarded as moot.

SCOTUS' error was therefore, independent of this undiscussed and, hence, moot Establishment Clause breach, its kowtowing in the name of Free Exercise to a claimant demanding the government accommodate her because she believes, as do all Seventh Day Adventist, that a 19th-century woman named Ellen White had prophetic powers and visions lasting up to three hours during which Ms. White did not breath. Adell Sherbert was not denied her freedom to believe or worship as she saw fit. Rather, Adell Sherbert was simply being told

[148] 374 US 398, 419-420.
[149] Justice Harlan's dissent called it "direct financial assistance to religion that today's decision requires." 374 US 398, 423.

she could not get unemployment benefits if she hid behind the wall of personal subjectivity with her hand out.

In ruling as it should have, SCOTUS would have sent a powerful message. It would have said to all Americans that there is a need to work together to keep our pluralistic tapestry held together by strands we all share responsibility to keep knit. Hall of Famer, and Mormon, Steve Young did not sue the NFL—in some legal sense beholden to the same standards as the government because it receives collective bargaining protection[150]—asking that the 49ers only play on Monday nights. He played. He adapted. He fit his own religiosity into the society that celebrated his football prowess.[151] One does not have a right to play professional football only on Mondays any more than one has a right to receive unemployment compensation when refusing to work out of personal choice. Sherbert should have worked Saturdays or, if that was too much for her, at least contributed to the national fabric of plural beliefs and said nothing whilst looking for a Monday-through-Friday gig on her own dime. Instead, the consequence has been a sort of intergovernmental back-and-forth.

Specifically, the ruling in this case created what became known as the Sherbert Test, the standard whereby SCOTUS (and, by proxy, the whole of the lower appellate judiciary) would, in

[150] This argument serves a rhetorical purpose and does not constitute a true legal argument. Nonetheless, consider International Shoe Co. v. Washington, 326 US 310 (1945), and its progeny. At the very least, it forms the basis for an argument that any corporation with "minimum government contacts" operate pursuant to federal laws. See also White v. NFL. 41 F.3d 402 (8th Cir. 1994).

[151] A purportedly Mormon blogger named Monster Hunter details that Young wrote to him personally to say, *"…*playing on Sundays was never an easy decision. I felt comfortable that I was able to serve the Lord as an ambassador and missionary to millions of people all over the world. This was a very unique opportunity for me and does not always apply to everyone. Even though I worked on Sundays, I still kept my regard of the Sabbath the best I could – just as I did in my youth. Actually, when I was with the 49ers, we had enough LDS members on the team to have our own '49er branch.' With church approval, we conducted sacrament together each week during the season. I can't say what is right or wrong for anyone else, but I know I grew up with an appreciation of the Sabbath day and also the responsibility involved with being on a team."
http://mormonmonsters.blogspot.com/2009/09/steven-young-permission-to-play-on.html.

future cases, *require the government* to show that the law in question, when a litigant claimed that law interfered in their free exercise of religion, served a compelling government interest and was narrowly tailored in construction. Failure of the government to make this showing, the law would be deemed Unconstitutional and the litigant prevail, with damages to be later determined. Apparently realizing its mistake, the Court—albeit three decades too late—changed its mind and decided Employment Division v. Smith,[152] renouncing the Sherbert Test as too broad when applied to religiously-neutral laws that had an incidental effect on free exercise. In Smith, two purported members of the Native American Church were fired from their employment as drug rehabilitation counselors on the grounds they had used peyote. Alleging the use of peyote is a religious rite and their firing therefore unlawful, the two applied for unemployment compensation in Oregon but were denied on the grounds that their termination was appropriate as work-related "misconduct."[153] SCOTUS, quite rightly this time, validated the denial of the benefits, acknowledging that allowing exceptions every time some citizen claimed religious interference "would open the prospect of Constitutionally required exemptions from civic obligations of almost every conceivable kind."[154] Justice Scalia, who authored the majority opinion, provided, as possible examples of where a future litigant claiming aggrievement might seek special dispensation: military service, taxation, vaccinations, paying minimum wage to employees, child labor, drug laws, environmental laws, and "laws providing for equality of opportunity for the races."[155] Laws that specifically target religion, or are enforced in a discriminatory way, however, remain subject to the Sherbert Test. The new rule as announced in

[152] In full, the case is called Employment Division, Department of Human Resources of Oregon v. Smith. 494 US 872 (1990).
[153] Ibid.
[154] 494 US 872, 888.
[155] 494 US 872, 889.

Smith applied only to neutrally-written, generally-applicable laws that merely happen to interfere with one's free exercise of their religion.

In response, Congress sought to reinstitute the Sherbert Test in its pre-Smith form and accordingly passed the Religious Freedom Restoration Act of 1993 (RFRA). Then, in City of Boerne v. Flores[156] in 1997, SCOTUS declared the RFRA Unconstitutional as applied to the states, though it is still good law when federal law controls, such as was considered in 2014 in Burwell v. Hobby Lobby.[157] After crippling the RFRA in City of Boerne, Congress responded anew by passing in 2000 the Religious Land Use and Institutionalized Persons Act prohibiting the imposition of free exercise burdens on the incarcerated and exempting churches and other religious institutions from zoning law restrictions. Furthermore, following City of Boerne's disapplication to the states, twenty-one states have subsequently passed their own versions of it, effectively reinstituting the Sherbert Test for free exercise cases in these jurisdictions.[158] Currently, then, the law as it relates to Free Exercise is a jumbled mess. Such is the consequence of Sherbert v. Verner when the Court prioritized government yielding to the subjective superstition of one citizen in a pluralistic nation of multiple superstitions over equal and just enforcement of a neutrally-passed law that did not actually interfere with that one person's ability to practice their religion but merely declared—the horror!—that unemployment compensation is not warranted for she who is "available for work" but declines to do so.

[156] 521 US 507 (1997). Here, Archbishop of San Antonio, Patrick Flores, invoked the RFRA after his application for a building permit to enlarge his church was denied in light of a city zoning ordinance in Boerne, Texas, prohibiting new construction in historic districts.
[157] 573 US ___ (2014).
[158] National Conference of State Legislatures. "State Religious Freedom Restoration Acts." May 4, 2017. http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

Case #7: Marsh v. Chambers. 463 US 782 (1983).

Facts and History: Ernest Chambers, a Nebraska state senator, challenged the constitutionality of the practice of opening each legislative session with a prayer by a state-funded chaplain.

How SCOTUS Ruled: Neither the prayer nor the funding of the chaplain is a violation of the Establishment Clause.

How SCOTUS Got it Wrong: This case easily could have been decided on the grounds that public funding of an inherently-religious chaplaincy is exactly what the Establishment Clause was meant to prevent, invoking Justice Black's history lesson in Everson. Alternatively, the case easily could have been decided on the grounds that a building funded by the public is not appropriate for religious activity, as it did with schoolgrounds in McCollum.

Instead, SCOTUS declined to invoke the low-hanging fruits of Everson and McCollum and elected instead to carve out an exception to an Establishment Clause test it had only twelve years earlier constructed. That is, in 1971, the Supreme Court declared Unconstitutional in Lemon v. Kurtzman, 403 US 602, a Pennsylvania statute[159] that provided state funds for teachers' salaries and secular textbooks to religious schools. The language of the decision created a three-pronged test to decide if an action was an unconstitutional establishment:

1) The statute in question must have a secular legislative purpose,
2) The primary effect of the statute must be to neither advance nor inhibit religion, and
3) The statute must not cause excessive government entanglement with religion.

[159] At issue was also a similar Rhode Island law—one where 15% of a religious elementary schoolteacher's salary was paid by the state—but since the appellant is Mr. Lemon and the specifics not remotely as relevant as the outcome, the Rhode Island angle is mentioned only in this footnote.

The Lemon Test is ultimately useless, prongs two and three effectively compelling any court employing it to conduct an inherently-subjective detailed litigation of whether religion is being "advanced" or "inhibited" and/or whether the resulting entanglement rises to the level of "excessive." This is very likely why the Court, since deciding Lemon in 1971, has invoked it so infrequently. It is, interestingly, still good law; but it would appear that the test is either applicable only when the facts are very similar to those in Lemon—i.e., when government funds are given to non-secular entities, unless a chaplain, of course—or when the Court otherwise, on a whim, elects to employ it. Had Marsh v. Kurtzman been decided via the Lemon Test, however, the ruling would have surely spelt the end of legislative chaplaincies, as noted by dissenting Justice Brennan: "I have no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be Unconstitutional."[160]

So, for fear that it would compel a different result if the Lemon Test were applied, and otherwise apparently pro-chaplaincy, SCOTUS, in the form of a majority opinion authored by Chief Justice Burger, elevated custom over Constitutionality by declaring that, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[161] No sentence in any of the Supreme Court's dicta dating back to its inception in 1789[162] is more short-sighted, more backward, or more stupid.

How could it not dawn on the six Justices who voted in the majority that "part of the fabric of our society" was the very argument used by the slaveholding South to justify secession? Or

[160] 463 US 782, 800-801.
[161] 463 US 782, 792.
[162] Judiciary Act of 1789.

could have been used by those who opposed suffrage for women or the racial integration of schools? Indeed, "we've always done it this way" would seem to preclude literally all advancement, from medicine to technology to governance. Astutely noticed by Justice Brennan, "the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."[163] To grant such deference to either custom or the Founders' "original intent" is to warrant exclusion from the adult table of the here-and-now where discussed is the fusion of words-as-adopted and their applicability to modern times: how do we approach the Second Amendment in a musket-free world?, how do we charge income taxes (16th Amendment) to multinational corporations?, how do we protect our "persons, houses, papers, and effects" (4th Amendment) in the digital age?

The past is something one should learn from, not aspire to. Prayer belongs, if anywhere, in one's home. It does not belong on the floor of the Nebraska legislature, and especially if tax dollars are being used to pay someone to do it.

[163] 463 US 782, 816.

Case #8: Lynch v. Donnelly. 465 US 668 (1984).

Facts and History: Pawtucket, Rhode Island, had a 40-year history of erecting a Christmas-season display in its downtown shopping district. The display included notably-secular items such as a decorated tree, Santa Claus house, and a "Seasons Greetings" banner. Additionally, it included a nativity scene of a baby Jesus in a manger. Pawtucket citizen Daniel Donnelly sued the city (by way of its mayor, Dennis Lynch) claiming the nativity scene was an Unconstitutional Establishment of religion.

How SCOTUS Ruled: The nativity portion fits within the rest of the display as capturing the historic origin of the holiday and therefore had a "legitimate secular purpose."

How SCOTUS Got it Wrong: To begin with, claiming the crèche captures the historic origin of the holiday is only a half-truth. To actually capture this historic origin, the scene would need to depict the 4th-century Roman Emperor Constantine declaring December 25th as the haphazardly-chosen day to celebrate the birth of the potentially-not-even-real[164] travelling rabbi popularly called Jesus of Nazareth. This is because Jesus' birthdate, assuming he actually existed, is not known;[165] indeed, the early Christian father Bishop Clement of Rome set the date at November 18th and an anonymous document dated at or about 243 CE put the date in late March.[166]

[164] See, for instance, On the Historicity of Jesus: Why We Might Have Reason for Doubt by Richard Carrier (2014) or either of David Fitzgerald's Nailed: Ten Christian Myths that Show Jesus Never Existed at All (2010) or Jesus: Mything in Action (2017).

[165] Overdeep, Meghan. "The Reason we Celebrate Christmas on December 25." Southern Living Online (Date Unknown). Do note, however, this citation is merely provided for citation sake. It is effectively well known—and therefore not in need of citing—that December 25 was chosen to match the already-existent pagan holiday(s) tied to the winter solstice.

[166] "Biblical Evidence Shows Jesus Christ Wasn't Born on Dec. 25." Beyond Today Online. December 3, 2004, citing Sheler, Jeffery. "In Search of Christmas." US News & World Report. December 23, 1996, page 58.

Setting aside this historical-roots argument, however, for even if the date chosen was arbitrary, it has nonetheless been set at December 25th for a certainly-lengthy seventeen centuries, SCOTUS' error was its failure to see that Pawtucket, Rhode Island, had preferenced Christianity over any number of similarly-celebratory December religious holidays such as Hanukkah (Jewish and older than Christianity), Saturnalia (pagan and also older than Christianity), or Kwanzaa (an African-American celebration of life first introduced in 1966[167]). This, of course, sits right at the heart of what happens when government does not elect to be "hostile" to religion: it effectively compels its legislatures or judiciaries to decide which of the thousands of religions have an ample enough history to warrant public dollars be spent on them as a means of celebrating their cultural contributions…as opposed to the far-more-simple approach of exempting itself altogether from getting involved in said decision-making and relegating the celebration of a religion's history to its adherents while the government instead chooses its seasonal décor from a broad and diverse menu of secular options like lights, bells, snowflakes, reindeer, sleds, shiny red bulbs, gifts with bows, wreaths, candy canes, etc.

Five years later the Court had a chance to fully right itself but instead opted to muddy the religious-displays-on-government-grounds jurisprudence in County of Allegheny v. ACLU.[168] In this case—though officially a conglomeration of three separate cases—the Court declared Unconstitutional a crèche display *within* the Allegheny, Pennsylvania County Courthouse but permitted to stand an 18-foot menorah located just *outside* the county building and abutting a 45-foot decorated Christmas tree and a sign that said "salute to liberty." Sadly, the crèche display

[167] Officialkwanzawebsite.org.
[168] 492 US 573 (1989).

within the Allegheny County Courthouse was so obviously an Establishment of religion that it did not necessitate a wholesale rethinking of the crèche display in Pawtucket, Rhode Island—the Court finding it easy enough to draw a bright-line distinction between the two (thereby adding mud to the water). That is, on the master staircase within the Allegheny Courthouse was not only the nativity scene itself but a sign that read, "Glory to God for the Birth of Jesus Christ." Had this been permitted to stand, it would not have been long before the stars on the American flag would be replaced with a cross and schoolchildren nationwide would be compelled to pray daily for the health of the President (the Dear Leader). SCOTUS therefore gets no credit for getting this one right.

Far more legally interesting is the approach SCOTUS took to the menorah. Specifically, the Court deemed that, "By including the menorah with the tree, however, and with the sign saluting liberty, the city conveyed a message of pluralism and freedom of belief during the holiday season, which, in this particular physical setting, could not be interpreted by a reasonable observer as an endorsement of Judaism or Christianity or disapproval of alternative beliefs."[169] Thus, the Court is somehow saying that location matters when government forays into religion-based displays—as if a roof somehow diminishes meaning—and, more important, if included is an all-American slogan like "liberty" or "justice," then the religious nature of the installation transforms into one celebrating multiculturalism rather than what the images actually mean. This is absurd.

Hate speech is still hate speech whether the racist plants a burning cross on a black family's lawn or breaks into the house to spray-paint vile language on a bathroom mirror.[170]

[169] 492 US 573, 575-576 (1989).

[170] Independent is the criminality of trespass on a lawn and breaking-and-entering as in the latter illustration.

Location is irrelevant: the religious display is either on public grounds or it is not. As argued above, the appropriate approach for government to take is to exempt itself *in toto* from having to engage in such a pedantic discrimination of facts. Hostility—as defined herein—is the pluralism-promoting act. Similarly, if next to the burning cross is a sign that says "freedom!," this would not render the act less criminal because it could be argued by the bigoted defendant as celebrating the diversity of worldviews held by Americans regarding race relations in the modern world. There is, simply, three separate items: a decorated tree, a sign that says "salute to liberty," and a relevant-only-to-Judaism menorah. Two of these are appropriate for public grounds, one is not.

Case #9: Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC. 565 US ___ (2012).

Facts and History: Cheryl Perich was an employee of Hosanna-Tabor Church who led children in prayer and taught primarily secular subjects to students. After returning to work following medical leave, Hosanna-Tabor fired her since they had replaced her during her absence. Ms. Perich sued under the Americans With Disabilities Act (hereinafter, "ADA"), claiming that the law protects an employee from termination for medical reasons (provided the disability is a recognized one, which her narcolepsy was). Hosanna-Tabor responded that a "ministerial exemption" provides them safe harbor from the application of civil rights within the employer-employee relationship where the employer is a religious one.

How SCOTUS Ruled: The Court agreed with Hosanna-Tabor and applied the ministerial exemption, permitting their termination of Ms. Perich's employment (and denying her legal recourse to sue under the ADA).

How SCOTUS Got it Wrong: While the ministerial exemption makes sense when applied to the Catholic Church not wanting to hire a woman priest[171] or the First Baptist Church of Main Street refusing to consider an openly-gay man as its youth pastor,[172] the ministerial exemption was far too broadly applied here. To wit, Hosanna-Tabor's primary objection to retaining Ms. Perich was not that Ms. Perich was somehow no longer amply Lutheran on account of her narcolepsy, but rather that they had simply hired a replacement in her absence. It is worth noting, though, that

[171] I Corinthians 14:34-35 being one justification therefor.

[172] The rationale here is that some English translations of the Bible identify homosexuality as a sin. See, for instance, 1 Corinthians 6:9-10. The International Standard Version translation is, "Sexually immoral people, idolaters, adulterers, male prostitutes, homosexuals…will not inherit the kingdom of God." Other versions are less explicit, however ("effeminate" (King James Version) or "men who practice homosexuality (English Standard Version), emphasizing the act, not the disposition). Biblegateway.com

the ADA does not preclude an employer from hiring a replacement during an employee's medical absence; instead, it requires that the employee, when well, be accommodated, either—and most easily—by reassuming their former position or, if not applicable, as here, by providing the employee with alternate, similar work (or providing compensating if an accommodation is unavailable). Here, then, the situation is the latter, and it is a blatant violation of the ADA. Even SCOTUS acknowledges that. For the Court, however, the violation is beyond recompense because of the shield the ministerial exemption affords the employer. The issue therefore comes down to a balancing test. No reasonable person could deny that an employer, in a context where a certain affirmation—or even lifestyle—is part and parcel to a job, should have some discretion in its hiring process. That said, it is also of great import to protect an employee from losing their income as a result of a disability, especially when the law governing this ethic is neutrally-passed and applied to both public and private employers. Were Ms. Perich a vital cog in the church's operations—i.e., an actual minister!—then replacing her and providing no accommodation would have been fine; the church should simply have been required to compensate her as they bid her adieu. But that is not what happened here: the church instead—as well as any religious employer that comes after[173]—was gifted a broad applicability of the ministerial exemption to assert that anyone, even the doer of the most menial church tasks, can usurp the law under the cover of religion. Had not the Court in denying unemployment compensation to peyote-using counselors employed at a drug rehabilitation center in Smith in 1990 addressed this by declaring that neutrally-written, generally-applicable laws trump the power of religion to operate independent from the very society which allows it to exist in the first place? And had not the ban on Mormon polygamy in the Reynolds case in 1897 worried about someone or something

[173] Somewhat tangentially but still relevant, see DeMarco v. Holy Cross High School, 4 F.3d 166 (2nd Cir. 1993), and Geary v. Visitation of Blessed Virgin Mary School, 7 F.3d 324 (3rd Cir. 1993). Neither was taken up by SCOTUS.

"becoming a law unto himself"? The Court in Hosanna-Tabor has not just avoided hostility towards religion, it has lit the fireplace, grabbed a blanket, and cozied up with it.

Case #10: Town of Greece v. Galloway. 572 US ___ (2014).

Facts and History: Greece, New York, conducts monthly city council meeting, at the start of which a local clergy member gives an invocation. While the policy is devoid of any mandate of who leads the prayer, the practice overwhelmingly saw Christians deliver the invocation. Susan Galloway sued, alleging the practice was an Unconstitutional Establishment. The Circuit Court sided with the town but that decision was overturned by the Appeals Court for the Second District, holding that the practice showed a clear preference for Christian prayers.

How SCOTUS Ruled: Overruled again: the prayer is permissible in that it sets the appropriate "solemn and deliberative"[174] tone for the legislators. Further, since the legislative body did not set terms to the language the invoking clergy member could or could not say, or which religious institutions were welcomed to participate, the government was not specifically advancing any position. Finally, the prayers are ostensibly for the legislators themselves, and therefore does not ingress into the public sphere.

How SCOTUS Got it Wrong: One, while a solemn and deliberative tone seems a nice vibe with which to conduct city business, the existence of such a tone is not mandated by the city's ordinances. Such a tone is merely assumed to be the right one. A mutiny to oust a dangerous captain is not made wrong by the fact it may have come on the heels of loud or even violent argument below deck. What matters are the resulting actions taken by the governing body and whether such actions occurred within the bounds of whatever rules were established to decide

[174] Specific page not yet published by the Reporter of Decisions of the Supreme Court of the United States. Nonetheless, see Part I, paragraph 1 of Justice Kennedy's opinion.

them. Since no "solemn and deliberative" mood was required to be set—though one must assume basic Parliamentary procedures were required—this argument by SCOTUS is moot.

Two, American jurisprudence permits the consideration of how a law is implemented independent of the strict language of said law. In other words, a law may be declared Unconstitutional if, despite its neutral language, it nonetheless results in disparate implementation. For instance, if California were to pass a seemingly-neutral law mandating that all catalytic converters in cars sold in the state be 75% efficient but Honda was using a dual-filtering system with a 50% efficient catalytic converter and a second exhaust-scrubbing device, Honda would have a good case to make that the California law specifically targets it, the only manufacturer still using a converter at less than 75%—regardless of whether Honda's net exhaust was actually superior to that of Buick. Another illustration can easily be imagined in college admissions: applicants with the best grades get in, period. Where an applicant comes from, say, an inner-city school more concerned with security and retaining quality teachers, the middling grades of an inner-city applicant may not appropriately reflect her academic acumen compared to a student from an affluent area. The law seems fair, but when put in practice, it clearly would not be.

In Town of Greece v. Galloway, the fact that any church of any denomination could participate in the invocation does not matter if the end result is that only Christian faiths ever did. This was specifically addressed in Justice Breyer's dissent wherein he criticized Greece for making so little effort to inform non-Christian clergy of the invocation opportunity and again in Justice Kagan's separate dissent—less specific but certainly more poetic—where she writes that, "the Town of Greece's prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the

Buddhist or Hindu than to the Methodist or Episcopalian."[175] The claim, then, in the majority decision that the law is Constitutional partly because of Greece's hand-off policy of what could be said or who could participate holds no water. The policy manifest as overwhelmingly Christian. If a state cannot backhandedly prefer Buick to Honda, or the average-but-wealthy student over the poor-but-gifted student, it similarly cannot prefer Christianity to Zoroastrianism.

Three, that the prayers are more for the legislators than the public, and therefore is not an endorsement of religion writ large, is precisely akin to the State of the Union Address being only for members of Congress and not the citizenry. Indeed, Article II, Section 3, says quite explicitly, the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient…" There is no requirement that the speech be made public and disseminated to the whole of the American people. And yet it is; and who could say it should not be? The same applies to Greece, New York, population 97,000: what happens in its legislative body is relevant to all of its citizens. The public is permitted to attend; minutes are recorded for posterity; and city business immediately follows. In order to make it exclusively for the legislators themselves, these five elected officials would have to, on their own time and outside of public view in the assembly chamber, form their own opt-in prayer circle and have at it.

In sum, then, the law is Unconstitutional because a deliberative mood is not required, the policy favored one religion over others (in practice), and the prayer was not exclusive to the legislators.

[175] Again, this case has not yet been published within a complete bound volume of collected cases, but the language cited is from her second paragraph.

IN CLOSING

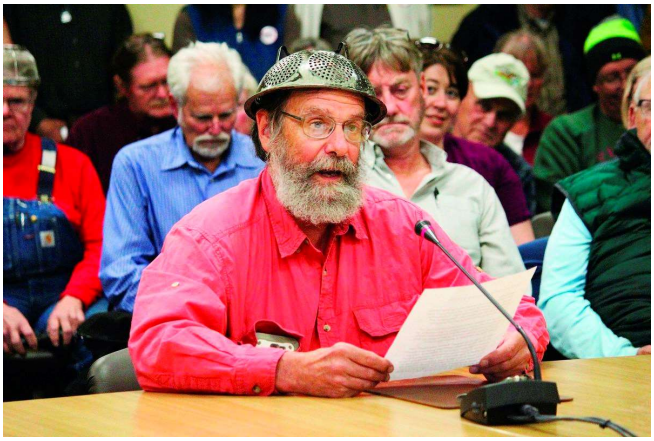
The above list is, of course, not at all exhaustive. The aim has been to select a diverse set of cases, from many, to maximally argue for the benefits of a high wall between church and state and to elucidate the errors within these cases made by the Supreme Court in abiding this ethic.

The only epistemological model people employ in their lives is a skeptical one, requiring proof which scales to the evidence before belief.[176] The one exception people make thereto is where religion is concerned.[177] No justification to exempt religion from skeptical epistemology exists.[178] Therefore, belief in religion ought to scale with the evidence. No evidence exists to rationally justify belief in religion.[179] A delusion is belief in the absence of evidence.[180] Belief in religion is therefore delusion. Delusion can cause social harm.[181] Society therefore has at least some incentive to cure delusion.[182] Hostility to religion, as defined herein, is one means of curing delusion.[183] The Supreme Court should therefore be hostile to religion.

This argument, or something like it, has incentivized advocates of the separation of church and state to usurp some of the arguments and tactics employed by the religious. The goal, of course, is to demonstrate, through satire and mockery, the needlessness, in a pluralistic

[176] For instance, if someone says they have a pet dog, a simple picture may be all that is required to warrant belief. If someone says they have a pet fire-breathing dragon, an in-person examination would be required. In a criminal court, we have selected "proof beyond a reasonable doubt" as the standard. In civil court, a lesser one.
[177] Given that the claim is an extraordinary one (like walking on water or rising from the dead to serve as a loophole to a rule the god himself created), extraordinary evidence would be required.
[178] All religions make some sort of claim. The burden of proof for any claim lies with the claimant. Therefore, religion has a burden of proof.
[179] If such justification existed, all would believe and there would be no more than one basic religion.
[180] "Delusion." Vocabulary.com.
[181] See above, but an easy example is the September 11, 2001, terrorist attacks on New York.
[182] For instance, society is improved when it prevents the loss of life of its citizens.
[183] Hostility in this context would create barriers to the propagation, and dissemination, of a delusion.

society, of government's ties to religion. After-school Satanist clubs are popping up throughout the country,[184] including in Knoxville, Tennessee, where, in response to a city council vote on whether children should be allowed to be released one-hour early per week to attend a religious course of their choosing, the Satanic Children's Ministry of Knoxville applied for inclusion in the program,[185] and sparked heated debate in the city. In June 2019, Iris Fontana of the Temple of Satan, who along with the ACLU of Alaska had sued and won, delivered an invocation at the start of the Kenai Peninsula Borough assembly meeting. Her closing remark of, "It is done. Hail Satan." was not heard by the Mayor, his Chief of Staff, two assemblymen, and dozens of citizens as they had earlier walked out in protest.[186] Prayers at the Borough assemblies in the past had been by Christians, but the lawsuit caused a change in the invocation language and satirists went to work. Later, in September 2019, Barrett Spencer, a Pastafarian pastor donning a colander, led the opening prayer: "I'm called to invoke the power of the true inebriated creator of the universe,



the drunken tolerator (sic) of the all lesser and more recent gods, and maintainer of gravity here on earth. May the great Flying Spaghetti Monster rouse himself from his stupor and let his noodly appendages ground each assembly member in their seats."[187]

[184] CBN News. September 19, 2017. https://www1.cbn.com/cbnnews/us/2017/september/after-school-satan-club-fails-in-tacoma-district.
[185] Sheets, Megan. "Satanist 'Children's Ministry' Announces Plans to Teach the 'Tenets of Satanism' to Students at Tennessee Public Schools Who Don't Want to Take Part in the Government-Backed Bible Study." Daily Mail. November 5, 2019.
[186] Phifer, Donna. "Invocation Praising Satan Sparks Walkout Among Some Assembly Members, Mayor in Alaska." Newsweek. June 20, 2019.
[187] Associated Press. "Church of the Flying Spaghetti Monster Pastor Leads Invocation at Kenai Borough Assembly Meeting." Alaska Daily News. September 18, 2019.

Captured in the 2019 documentary *Hail Satan?*[188] is the tale of the Satanic Temple's response to a proposal by the Oklahoma legislature to commission and display a statue of the Ten Commandments at the Statehouse. The Satanic Temple hired an artist to build an eight-foot tall statute of Baphomet to serve as a counterpoint to the Biblical Decalogue iconography. Before the statues could be co-displayed, however, the bill was (correctly) deemed Unconstitutional.

This movement is only growing, presumably empowered by the ease of access to information in a world ever shrinking due to the advance of technology and coupled with the cessation of stigma of coming out as a non-believer. In 2007, religious "nones" were 16% of the population; in 2015 it was 23%.[189] That number should only grow with Millennials (born 1981-1996, per Pew Research Center) disbelieving at a rate of 35%.[190]

Religion had its place in history, its day in the sun. It was very much integral to the founding of the United States. That founding is now a mere relic of a time so dissimilar to the present, and more so the future, that holding on to all of its ideals can no longer be justified. Freedom, equality, justice: these are very much worth preserving. But religion, and the Supreme Court's all-too-often kowtowing towards it, is not. Indeed, the Court continues to get things wrong.[191] Fortunately, religion is in its death throes. But, like a wounded animal, it may yet have some bite. America's best defense, then, is to be hostile to it. In a time when Americans talk about building walls, this is the one we need.

---

[188] Magnolia Pictures. January 25, 2019. Directed by Penny Lane.
[189] Lipka, Michael. "A Closer Look at American's Rapidly Growing Religious 'Nones.'" Pew Research Center. May 13, 2015.
[190] *Ibid*.
[191] The American Legion v. The American Humanist Association. 588 US ___ (2019).