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FROM WALL TO WINDOW: THE SUPREME COURT AND THE EROSION OF THE CHURCH-STATE WALL OF SEPARATION

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FROM WALL TO WINDOW: THE SUPREME COURT AND THE EROSION OF THE
CHURCH-STATE WALL OF SEPARATION

By

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ABSTRACT

The First Amendment and the Establishment and Free Exercise Clauses derived from it are the basis for what Thomas Jefferson coined as the “wall of separation.” As of 2020 however, the appointments to the Supreme Court made during the first Trump administration marked the creation of an unprecedented 6-3 conservative, catholic, “super” majority. This research project aims to examine not only the impacts of the current religious majority on the Supreme Court, but to argue that there has been a substantial erosion in the separation of church and state in recent decades. This study investigates how judicial decisions have increasingly accommodated religious influence within public institutions, particularly in areas such as education, reproductive rights, LGBTQ+ protections, and public funding of religious organizations. This project argues that this erosion is the product of gradual and calculated movements towards satisfying religious interests, and analyzes the shortcomings and rulings of the Supreme Court that have emboldened the mobilization of conservative religious movements and religious nationalism. This research examines Supreme Court decisions on both the merit and emergency docket, that impact the separation of church and state.

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HISTORICAL BACKGROUND AND THE LEMON TEST

The First Amendment, ratified in 1791, states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ This amendment, and the two clauses derived therefrom, protect against government establishment of religion and government interference with religious practice. This idea of a constitutional separation of church and state has a central, and long-established understanding, pivotal to the expression of the founding father’s intent.

The exact phrase “*separation of church and state*” was initially popularized in 1802 by Thomas Jefferson in a letter to the Danbury Baptist Association.² Here, Jefferson expressed his interpretation of the establishment clause as creating a “wall of separation between church and state.” Though this phrase that we have come to accept en masse is not explicitly stated in the constitution, it has nonetheless been instrumental in developing American legal thought going forward.³

For nearly a century following the ratification of the First Amendment however, the Supreme Court faced little need to cite the Establishment Clause in their rationale. Jefferson’s Danbury letter however, was referenced in *Reynolds v. United States* 98 U.S. 145 (1879) when the Supreme Court described it as “an authoritative declaration of the scope and effect of the [first] amendment”, when they upheld a conviction of a Mormon bigamist on the fact that his

¹ U.S. Constitution. Amend. I.

² “Religion and the Founding of the United States» the Danbury Letter and the US Supreme Court.” n.d. People.smu.edu.
<https://people.smu.edu/religionandfoundingusa/thomas-jeffersons-danbury-letter/the-danbury-letter-and-the-us-supreme-court/>.

³ Ryman, Hana, and Mark Alcorn. 2023. “Establishment Clause (Separation of Church and State).” The Free Speech Center. Middle Tennessee State University. October 17, 2023.
<https://firstamendment.mtsu.edu/article/establishment-clause-separation-of-church-and-state/>.

argument had a purely religious basis. The court's primary holding was that it is not a valid defense to a crime to cite a religious belief or religiously imposed duty, clearly outlining the presence of limits on the Free Exercise Clause; especially when concerning the violation of social duties or criminal laws.

However, the Supreme Court did not invoke the Establishment Clause itself until *Everson v. Board of Education* 330 U.S. 1 (1947). This case concerns a New Jersey statute permitting local school boards to reimburse parents for the cost of school transportation, controversially, including religious schools. While the 5-4 decision found that this law was not in violation of the Establishment Clause, Justice Hugo Black wrote for the majority opinion stating, "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."⁴ Here, Justice Black stressed the significance of maintaining the "wall of separation" and set a high standard regarding where the court lands concerning church-state separation.⁵

The Supreme Court further outlined the enforcement of the Establishment Clause in *Abington School District v. Schempp* 375 U.S. 203 (1963) where they struck down mandated prayer and Bible reading in public schools.⁶ This ruling displays the Supreme Court adhering to a separationist approach, holding that the government ought not to coerce participation in religious activities, nor endorse a particular religious sanction.

Despite the consistent application of the Establishment Clause from the Supreme Court from its ratification till the mid 1960s however, concerns surrounding public financial aid going towards religious institutions posed a challenge for the church-state issue. By the late 1960s, several states had enacted statutes to provide funding for private, often religiously affiliated

⁴ *Everson v. Board of Edu.* 330 U.S. 1 (1947)

⁵ *ibid*

⁶ *Abington School District v. Schempp* 375 U.S. 203 (1963)

schools. Plaintiffs challenged these statutes on the grounds that they were in violation of the Establishment Clause. In these cases, the Supreme Court did find that the constitutional violations regarding public funding for religious institutions were present. In 1971, the Court sought to address these challenging disputes in *Lemon v. Kurtzman* 403 U.S. 602 (1971). The case surrounds state statutes that authorized state aid for instructional materials and teachers' salaries at nonpublic, often religious, schools. The Supreme Court held that these laws were in violation of the Establishment Clause. In finding so, Chief Justice Burger wrote and articulated a new doctrinal framework otherwise known as the "Lemon test", which would be used to manage future church-state disputes. Under this three-pronged test:

1. The statute must have a secular legislative purpose;
2. Its principal effect must neither advance nor inhibit religion; and
3. It must not foster or result in excessive government entanglement with religion.

The "entanglement" prong was a particularly significant aspect of the Lemon test. In their ruling on *Lemon v. Kurtzman*, the Court reasoned that ongoing government supervision to ensure funds were not put towards religious institutions would create an "excessive governmental entanglement" between church and state.⁷

For decades following the *Lemon v. Kurtzman* ruling, the Lemon test became the dominant standard for evaluating Establishment Clause issues; especially when public aid was concerned. Despite this dominant and consistent invocation of the Lemon test however, it was not an absolute model to be adhered to. In *Committee for Public Education v. Regan* 444 U.S. 646 (1980), the court stated that adherence to the Lemon test "sacrifices clarity and predictability

⁷ *Lemon v. Kurtzman* 403 U.S. 602 (1971)

for flexibility”⁸, and felt that future cases may clarify and build on the approach for interpreting the Establishment Clause.

Another approach that had been proposed is known as the coercion test, commonly attributed to Justice Kennedy’s majority opinion in *Lee v. Weisman* 505 U.S. 577 (1992) where the court struck down a school policy permitting a rabbi to deliver prayers at graduation ceremonies. Justice Kenedy emphasized the potential for social and psychological pressures students may face when essentially making a declaration regarding their religious affiliation by deciding to stand, or remain respectfully silent during prayer. He described this pressure as being perhaps “subtle and indirect” coercion, but coercion nonetheless by compelling students to outwardly practice in religious exercise.⁹

In sum, what began as a guiding metaphor articulated by Jefferson to guide religious freedom in our early republic, evolved over time into the more structured, three-pronged test in *Lemon v. Kurtzman*. This test reflected the effort to translate constitutional language into a more manageable legal standard for issues pertaining to church-state separation, and was consistently used by the Supreme Court for decades to come. However, following the appointments to the Supreme Court that created the Conservative super majority, the Lemon test would be effectively “killed” in 2022 (as will be discussed later in this paper).

TRUMP APPOINTMENTS AND DOCTRINAL SHIFTS

Presidential control over judicial nominations provides one of the most powerful mechanisms in shaping long-term constitutional policy. During the first Administration of Donald Trump however, this power was used to deliberately reshape the federal judiciary to align with the interests of conservative legal, and religious-right groups. Legal scholars and political

⁸ *Committee for Public Education v. Regan* 444 U.S. 646 (1980)

⁹ *Lee v. Weisman* 505 U.S. 577 (1992)

experts argue that the Justices selected by Trump: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barret, created a 6-3 conservative, catholic majority needed to appease his allies.¹⁰ The resulting ideological shift in the Court has had dramatic real-world consequences, including the reversal and overturning of decades of precedent, and a blurring of the boundaries between religion and government.

In “The Legacy of Trump’s Judicial Appointments” by Thomas F. X. Varacalli, he articulates:

The judges whom Trump appointed are dedicated originalists. Originalism affirms that “the provisions of the Constitution have a fixed meaning, which does not change.” Originalists are generally skeptical about the jurisprudence underlying many progressive judicial precedents, such as the legalization of abortion and the Chevron Doctrine. Trump’s White House Counsel and conservative advocacy groups, such as the Federalist Society, vetted prospective candidates with an eye to overturn these precedents. Consequently, Trump’s judicial appointments pose an existential threat to progressive jurisprudence.¹¹

The Judicial selection process under the Trump administration was heavily influenced by conservative legal organizations, to whom he publicly promised they would play a role in compiling his judicial nominees.¹² Of these organizations, the Federalist Society and Heritage Foundation were central figures in the process of identifying potential nominees that would reliably support conservative legal priorities. These priorities focused especially on religious issues such as the removal of reproductive rights, a key point of what Trump ran on throughout his campaign.

¹⁰ Catherine Halley, “Religious Identity and Supreme Court Justices,” JSTOR Daily, October 22, 2020, <https://daily.jstor.org/religious-identity-supreme-court-justices-amy-coney-barrett/>.

¹¹ Thomas F. X. Varacalli, “The Legacy of Trump’s Judicial Appointments,” *Catholic Social Science Review* 26 (2021): 117–23, <https://doi.org/10.5840/cssr20212614>.

¹² “THE GORSUCH RECORD” (Alliance for Justice), accessed August 25, 2024, <https://afj.org/wp-content/uploads/2019/12/The-Gorsuch-Record-2.pdf>.

This strategy was part of a broader effort within the conservative movement to reshape the judiciary in a lasting way. Legal scholars note that the Federalist Society and other allied organizations have been increasingly drawing their focus towards judicial appointments as a means of advancing their ideological goals.¹³ Agendas that were otherwise difficult to achieve and maintain through legislation could be brought about instead through the will of the executive, and control of the judicial branch. “Trump set a high bar for future Republican presidents. They will be expected to appoint originalist judges and, quite possibly, rely upon advocacy groups, such as the Federalist Society and the Heritage Foundation. If this holds true, Trump’s legacy may remain with us for quite some time” (Varacalli 122)

The scale and concerning indicators of success this transformation has produced, have extended far beyond just the Supreme Court however. During Trump’s first presidency, he appointed more than 200 judges to the federal bench, entrenching far-reaching judicial support for his policy goals. The First Liberty Institute, another Christian conservative legal organization, featured their founder Kelly Shackelford, discussing how they “poured millions of dollars into [judicial nominations], to make sure the President has good information, he picks the best judges.”¹⁴ Examples such as these highlight the looming concern that judges both in and out of the Supreme court are not appointed on their ability to uphold the law and precedent, but rather to serve as a tool to the executive branch in furthering ideological policy making.

Judicial nominations to the Supreme Court also served the political function of appealing to religious groups and voters who were receptive to Trump’s proposed policy goals. During his

¹³ Ashley Tjhung and Phi Nguyen, “The case for Supreme Court Reform: An Analysis of The Court” (DEMOS, 2023),

<https://www.demos.org/sites/default/files/2024-08/The%20Case%20for%20Supreme%20Court%20Reform.pdf>.

¹⁴ Anne Nelson, “Texas Judge Who Ruled on Mifepristone Was Handpicked by the Same Network That Brought the Lawsuit,” Washington Spectator, April 18, 2023,

<https://washingtonspectator.org/texas-judge-who-ruled-on-mifepristone-was-handpicked-by-same-network-that-brought-lawsuit/>.

2016 presidential campaign Trump promised that his judicial nominees would satisfy evangelical and christian constituents by supporting their policy goals.¹⁵ Religious groups eager to see these promises fulfilled, have been welcomed alongside organizations such as the Heritage Foundation and Federalist Society to nominate and advocate for Trump’s potential judicial appointees. They were given opportunities to present a judiciary “wish-list”, which featured potential judges selected for their religious backgrounds.¹⁶ Amy Coney Barret was one of these such nominations, initially made by Phillip Jauregui of Judicial Action Group in 2018, claiming she was God's chosen candidate for the Supreme Court.¹⁷ This relationship between religious political movements and judicial appointments showcases the disturbing extent to which the judicial branch has become an arena for advancing religiously motivated policy objectives.

While judicial decisions cannot be reduced solely to a matter of personal background, the experiences and ideologies of the Justices nonetheless contribute to an interpretive framework that prioritizes religious accommodation. Ultimately, the personal histories of the justices and their perceptions of jurisprudence are intertwined, and inseparable. As Zane McNeill wrote in "Stacking the Courts against Mifepristone" for Political Research Associates, “Right-wing actors are banking on a decades-long campaign eroding judicial neutrality to work in their favor—and it seems like they’re winning right now.”¹⁸

¹⁵ Lawrence Baum and Neal Devins, “How the Federalist Society Became the de Facto Selector of Republican Supreme Court Justices,” Slate Magazine, January 31, 2017, <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html>.

¹⁶ Peter Montgomery, “Christian Nationalists vs. the Constitution: Religious Right Demands ‘Biblical Worldview’ Test for Supreme Court,” People For, October 7, 2024, <https://www.peoplefor.org/rightwingwatch/christian-nationalists-vs-constitution-religious-right-demands-biblical-worldview>.

¹⁷ Peter Montgomery, “JAG’s Phillip Jauregui: Barrett Is God’s Anointed, Kavanaugh a ‘Usurper’ out to Steal God’s SCOTUS Seat,” People For, July 6, 2018, <https://www.peoplefor.org/rightwingwatch/post/jags-phillip-jauregui-barrett-is-gods-anointed-kavanaugh-a-usurper-out-to-steal-gods-scotus-seat>.

¹⁸ Zane McNeill, “Stacking the Courts against Mifepristone,” Political Research Associates, February 12, 2025, <https://politicalresearch.org/2025/02/12/stacking-courts-against-mifepristone>.

CONTEMPORARY CASES ERODING CHURCH-STATE SEPARATION

The doctrinal transformation of the Supreme Court following the appointments of Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett has unfortunately not remained abstract. Rather, it has manifested in a series of recent decisions that collectively signal a reconfiguration and redefinition of the constitutional boundary between church and state. Following the establishment of a prospectively long-lasting 6-3 conservative super majority, the Court has increasingly prioritized Free Exercise claims while narrowing the scope of Establishment Clause constraints. Recent lower and Supreme Court decisions have demonstrated a concerning and consistent doctrinal shift, where policies once widely accepted as being necessary to preserve the wall of separation are now often ruled against if they are perceived to disadvantage religious actors. This has manifested as a restructuring in the legal boundaries between religion and government in areas such as public funding, education, and anti-discrimination laws. Legal scholars have argued that the Court's recent trajectory risks creating systemic advantages for religious actors under inauthentic guises of neutrality, leading to erosion in the wall of separation between church and state.¹⁹

One of the most consequential developments following the Court's evolving ideological majority is their approach to public funding and religious institutions. In *Carson v. Makin* 596 U.S. 767 (2022), the court addressed a Maine tuition assistance program designed to provide educational access to students in rural areas lacking public secondary schools. Although the program allowed students to attend private schools utilizing public funds, it explicitly excluded institutions that provided religious instruction. The state defended this exclusion of religious institutions as a reasonable effort to avoid violating the Establishment Clause by not funding

¹⁹ Micah Schwartzman, Richard Schragger, and Nelson Tebbe, "The Structure of Religious Preference," *The Harvard Law Review*, 2025, <https://doi.org/10.2139/ssrn.5765302>.

anything that can be perceived as religious indoctrination. However, in a 6-3 decision, the Court held that the exclusion was unconstitutional. Chief Justice Roberts, writing for the majority, reasoned that once a state elects to subsidize private education, it cannot disqualify other private institutions solely for the fact that they are religious. The majority framed the Maine policy as discriminatory, concluding that it imposed a penalty on the free exercise of religion.²⁰

The Court's reasoning in *Carson* builds upon earlier decisions such as *Espinoza v. Montana Department of Revenue* 591 U.S. 464 (2020) and *Trinity Lutheran Church v. Comer* 582 U.S. 449 (2017), which similarly held that states may not exclude religious entities from public benefits solely on the basis of their religious status. However, *Carson* extends this principle further by applying it not only to religious status, but to religious use as well. This means that states cannot exclude institutions even when public funds would directly support religious instruction.

Perhaps predictably, Justices Gorsuch, Kavanaugh, and Barrett joined the majority, delivering on the central role of the Court's originalist block in advancing this doctrinal shift. In contrast, the dissenting opinions in *Carson* harshly criticized the approach of the majority.²¹ Justice Breyer emphasized the historical importance of maintaining a balance between the Free Exercise and Establishment Clauses, arguing that the Maine policy reflected a legitimate effort to avoid government entanglement with religion as precedent regarding public funding tends to support. In a separate dissent, Justice Sotomayor warned that the Court's decision "continues to dismantle the wall of separation between church and state."²² Her dissent highlights perhaps the most central concern that the Court's current trajectory is favoring religious accommodation over the maintenance of precedent in addition to the wall of separation.

²⁰ *Carson v. Makin* 596 U.S. 767 (2022)

²¹ "Supreme Court of the United States," 2021, https://www.supremecourt.gov/opinions/21pdf/20-1088_dbfi.pdf.

²² *ibid*

Recent decisions such as *Carson* effectively dismantle the long standing precedent that prevents public funds from being directed to religious institutions. Consequently, this dramatic doctrinal change has forced states to reassess policies that were designed with the intention of not directing public funds to areas that would pose a problem for Establishment Clause constraints. In this way, *Carson* drastically blurs the line between public and religious spheres, all while undermining separationist principles that have historically guided Establishment Clause jurisprudence.

Another major area in which the Court has recently reshaped church-state relations concerns religious expression in public institutions (specifically focusing on public schools as well). In *Kennedy v. Bremerton School District* 597 U.S. 507 (2022), where the Lemon test was overturned, the Court considered whether a public high school violated the First Amendment's Free Exercise and Establishment Clauses when they disciplined a football coach who engaged in post-game prayer on the field.²³ The factual record shows that while the coach's prayers initially began as a private, personal expression, it evolved into a larger and more public spectacle including students and community members. The school district, feeling concerned about potential Establishment Clause violations, directed the football coach to cease this conduct. Upon his refusal, the district placed him on administrative leave. (*ibid*)

It ought to be noted that this case echoes a familiar ringing to the issue discussed in *Lee v. Weisman*, where it was found that clergy delivering prayer at graduation ceremonies could cause students to feel social or public pressure to engage or not engage in religious expression. Similarly, it is reasonable to conceive that members of the football team or other students may feel a coercive pressure to perform religious expressions; especially as it grew into a larger spectacle observed by the greater community, and was led by an authority figure..

²³ *Kennedy v. Bremerton School District* 597 U.S. 507 (2022)

However, despite the similarity to a preceding case, the Court sided with the coach, in a perhaps again predictable, 6-3 decision. Justice Gorsuch, writing for the majority, characterized the coach's conduct as private religious expression protected by the Free Exercise and Free Speech Clauses. The Catholic super-majority also rejected the argument that the school's actions were necessary to avoid an Establishment Clause Violation. They instead emphasized that the Constitution does not explicitly require the suppression of religious expression in public settings. Justice Gorsuch stated "Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor" (*ibid*).

The dissent in *Kennedy*, written by Justice Sotomayor, presented a starkly different argument from the majority, yet adhered more closely to the decisions and rationales of past cases. Justice Sotomayor emphasized the coercive pressures that are inherent features of public school environments, and argued that students may feel compelled to participate in religious activities led by authority figures, strongly echoing Justice Kennedy's majority opinion in *Lee v. Weisman*. Justice Sotomayor found that by ignoring these dynamics, the majority undermined the very purpose of the Establishment Clause in allowing government endorsement of religion and failing to adequately protect religious minorities from potential coercion.

In addition to the alarming roll-back of Establishment Clause boundaries in favor of ever expansive Free Exercise interpretations, *Kennedy* is also a significant case in the sense that it is widely considered to be the end of the standard of the previously discussed Lemon Test. In its place, the Court has adopted an approach grounded in "history and tradition", instructing that

lower courts evaluate Establishment Clause issues by referencing historical practices rather than a structured doctrinal criteria like Lemon provided. In the syllabus of *Kennedy*, it is stated that:

In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “reference to historical practices and understandings.” *Town of Greece v. Galloway*, 572 U. S. 565, 576. A natural reading of the First Amendment suggests that the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail over the others. *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 13, 15. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “exception” within the “Court’s Establishment Clause jurisprudence.” *Town of Greece*, at 575. The District and the Ninth Circuit erred by failing to heed this guidance. Pp. 19–30 (*Kennedy v. Bremerton School District Syllabus* pg. 4)

This abandonment of the Lemon test paints a concerning picture regarding the ease at which the “history and tradition” approach can be utilized to privilege dominant (and historically dominant) religious practices at the expense of minority rights. This, again, becomes especially problematic when we recall that the Justices appointed by Trump were, in part, selected for their agreeable historical worldviews in the eyes of right-wing religious organizations. The abandonment of Lemon only provides an easier route to allow these conservative “wishlist” Justices to utilize these perspectives in their rulings so long as they are framed as being consistent with historical norms according to said Justices.

In her dissent, Justice Sotomayor was not oblivious to this conspicuous move away from Lemon, writing:

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, “one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools.” *Santa Fe*, 530 U. S., at 308 (internal quotation marks omitted). The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in Lemon, 403 U. S. 602. Ante, at 22–24. Both of these moves are erroneous and, despite the Court’s assurances, novel. (*Kennedy v. Bremerton School District Syllabus* pg. 25)

THE OVERTURING OF ROE V. WADE

Perhaps the most salient case since the ideological shift in the Supreme Court however, have concerned the overturning of reproductive rights precedents and the role of religion in the Court's jurisprudence. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022) represents one of the most controversial constitutional rulings in recent American history. By overturning nearly fifty years of precedent first established in *Roe v. Wade* 410 U.S. 113 (1973) that had additionally been reaffirmed in *Planned Parenthood v. Casey* 505 U.S. 833 (1992), the Court fundamentally altered the legal landscape surrounding reproductive rights. Beyond its immediate policy consequences however, *Dobbs* also displays a deeper and concerning shift in constitutional interpretation, judicial selection, and the ability of religious ideology to shape constitutional outcomes. In particular, the decision demonstrates how the Court's abandonment of doctrinal frameworks in tandem with the strategic appointment of Justices aligned with conservative religious movements has contributed to the erosion of the separation between church and state.

The majority in *Dobbs*, authored by Justice Samuel Alito, rests heavily on the "history and tradition" approach the court moved towards after abandoning the Lemon test. According to the Court, the Constitution only protects those rights which are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."²⁴ Applying this framework, the majority (consisting of many Justices selected specifically for their known historical views) concluded that a constitutional right to abortion does not exist because such a right was not historically recognized. This reasoning marked a decisive departure from the substantive due process framework that had previously governed reproductive rights jurisprudence for decades,

²⁴ *Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022)

and guided the Court to recognize certain fundamental rights as evolving with modern understandings of liberty and autonomy.

The Supreme Court's reliance on history and tradition invites the injection of subjective judgement into constitutional analysis. Historical inquiry is inherently selective, often reflecting dominant social and moral norms of earlier periods. Furthermore, in the past, many of these dominating norms were themselves shaped by religious beliefs that may now be largely discredited by the modern public. Yet, by privileging these historical practices, the Court invites embedding historically contingent and religiously influenced moral judgements into constitutional law. The "history and tradition" approach lacks clear limiting principles, and can be used to justify a wide range of outcomes depending on how the historical record is framed. In this approach, liberties such as same-sex marriage, women's rights, LGBTQ+ protections, and many other equal protection cases may be endangered on the basis that they have not enjoyed a historically long duration of legal acceptance; and are, historically modern protections. Without clear analytical constraints that doctrines such as *Lemon* provided, justices are afforded greater discretion to interpret constitutional provisions in ways that align with their own interpretive philosophies and personal ideological commitments.

This concern is particularly salient in the context of abortion and reproductive health care access, as it is an issue that has long been intertwined with religious belief. Opposition to abortion in the United States is strongly associated with religious movements, particularly with white, evangelicals. Among this group, ~74% of them oppose abortion compared to ~82% of religiously unaffiliated groups believing it should not be legally restricted.²⁵ Scholars such as Mary Ziegler have discussed how the anti-abortion movement has evolved into a central

²⁵ Pew Research Center, "Public Opinion on Abortion," Pew Research Center's Religion & Public Life Project (Pew Research Center, May 13, 2024), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>.

component of the broader religious right, consistently seeking to influence judicial appointments as a means of achieving policy objectives.²⁶

Thus, the connection between judicial selection and the outcome in *Dobbs* is difficult to ignore. In addition to claiming he would make appointments the evangelicals would be satisfied with, Trump explicitly promised to appoint Supreme Court justices who would overturn *Roe v. Wade*.²⁷ This is an unusually direct linkage between ideologically religious policy goals and judicial appointments, seemingly solidifying the concerns about the strategic politicization of the Supreme Court. The process through which Trump (or any president) can select judicial nominees to further particular policies creates a dangerous pathway by which the judiciary may be corrupted to appease certain religious ideologies.²⁸ This also leads to the concern that justices are selected on the knowledge of how they would likely rule on certain issues, and tasked with devising backwards reasoning to support their ruling; rather than authentic constitutional interpretation.

Religious-right, anti-abortion organizations not only publicly advocated for nominees that would be “committed to life” (ideologically opposed to abortion rights), but celebrated the *Dobbs* decision as the culmination of decades of strategy to reshape the judiciary.²⁹ The voting alignment in *Dobbs* reflects the success of this strategy, as Trump's appointees: Justices Gorsuch, Kavanaugh and Barrett, all joined the majority opinions and served as the decisive votes to

²⁶ Mary Ziegler, “Abortion and the Law of Innocence” (Illinois Law Review, n.d.), <https://www.illinoislawreview.org/wp-content/uploads/2021/08/Ziegler.pdf>.

²⁷ Dan Mangan, “Trump: I’ll Appoint Supreme Court Justices to Overturn *Roe v. Wade* Abortion Case,” CNBC, October 20, 2016, <https://www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

²⁸ Martin Gold, “The Demise of *Roe v. Wade* Undermines Freedom of Religion | ACS,” American Constitution Society, August 30, 2022, <https://www.acslaw.org/expertforum/the-demise-of-ro-v-wade-undermines-freedom-of-religion/>.

²⁹ Anna Toniolo, “Corporate Participation in Social Debates | the University of Chicago Business Law Review,” University of Chicago Law School (The University of Chicago Business Law Review, n.d.), <https://businesslawreview.uchicago.edu/print-archive/corporate-participation-social-debates>.

overturn *Roe*.³⁰ Recognizing this, the dissent stressed the importance of *stare decisis*, arguing that the Court was abandoning long-standing precedent without sufficient justification, undermining constitutional stability in the process.

Importantly the dissent raises concerns about the role of moral and religious judgement in the majority's reasoning. By grounding their analysis in historical practices that reflected deeply rooted religious, moral opposition to abortion, the majority effectively incorporated those religious-based perspectives into constitutional law. This approach to ruling on cases that are sensitive to issues of religious and moral principles, therefore challenge the ability of the Supreme Court to maintain church-state separation.

THE SHADOW DOCKET

Not all developments in the Supreme Court's religion-clause jurisprudence unfold through the familiar, and highly visible process of full merits review however. While earlier discussed cases such as *Dobbs v. Jackson* and *Kennedy v. Bremerton School District* provided extensive briefings and detailed reasonings; other decisions with equally significant outcomes for church-state separation emerged through much less transparent means. In these instances, the Court is able to resolve disputes without oral arguments or articulated opinions, leading to challenges for lower courts, scholars, and the public in understanding the Supreme Court's rationale for their rulings. This alternate docket that can produce weighty outcomes without the otherwise expected explanations is the emergency docket; often referred to as the "shadow docket."

The distinction between the shadow docket and merits docket is significant. On the merits docket, cases are carefully selected through a structured process, fully briefed, and often supplemented by written arguments from interested organizations and scholars. Oral argument

³⁰ *Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022)

allows the justices to probe the issues in depth, and the resulting opinions typically provide detailed reasoning that can guide lower courts and explain the Court's rationale. By contrast, shadow docket decisions are often issued under tight time constraints (sometimes occurring in the middle of the night), with limited input from the parties, and little opportunity for public discourse over the issue. As a result, rulings issued from the shadow docket lack the transparency and deliberative rigor that traditionally occur in Supreme Court decision-making.

While the Court has always possessed this mechanism for issuing emergency decisions outside of the full merits process, the frequency, scale, and significance of rulings made on this emergency docket has ballooned in recent years. Historically regarded as being intended only for issuing time-sensitive rulings, the shadow docket's increasing use represents a dramatic change in the methods by which the Court can exercise its power at the cost of accountability and legitimacy. Stephen Vladeck, a legal scholar prominent in discussions on the shadow docket, has observed that the increased usage of the shadow docket seems to align with ideological preferences held by the Court's conservative majority, especially when it comes to religious issues.³¹ Vladeck stresses the concern surrounding the greater flexibility the Court possesses on the shadow docket, lacking the same standards for justifying rulings. This concern, again paired with the knowledge that Trump appointed Justices possessed particular ideologies and world views prior to their swearing-in, makes the shadow docket a potential tool in accommodating religious liberties for the religious-right block of the Court.

The rise in the shadow docket's utilization does not appear to be a broadly applying feature of all the most recent presidential administrations however. Data compiled by Brennan

³¹ Stephen Vladeck, *The Shadow Docket* (Basic Books, 2023).

Center for Justice in partnership with Stephen Vladek displays significant peaks of shadow docket usage during the first and second Trump terms.³²

Federal Government Applications to Supreme Court's Shadow Docket, 2001–Present

Executive branch requests for emergency relief have skyrocketed, especially during the Trump administrations.

Bush Administration

2001–2008 5

Obama Administration

2009–2016 3

First Trump Administration (41)

2017	8
2018	8
2019	6
2020	15
2021	4

Biden Administration (19)

2021	2
2022	4
2023	7
2024	6

Second Trump Administration (34)

2025	32
2026	2

Sources: Data collected by Georgetown Law Professor Steve Vladeck and the Brennan Center for Justice.

Figure 1

The COVID-19 pandemic did coincide with a spur in the frequency of shadow docket use, often in response to rapidly evolving policies issued by state and local governments to try and protect public health. However, many such policies led to disputes between public health interests and religious liberty, positioning the shadow docket to be a primary tool used to rule on church-state issues. The result was a major expansion of religious protections at the cost of weakening separationist principles throughout the pandemic.

One such case was the *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 U.S. 14 (2020). Here, the Court considered New York restrictions that inhibited attendance at religious

³² Ashleigh Maciolek and Alicia Bannon, “Supreme Court Abuse of the Shadow Docket under Trump,” Brennan Center for Justice, February 26, 2026, <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-abuse-shadow-docket-under-trump>.

services in areas experiencing high rates of COVID-19 transmission. The primary controversy arose from the fact that the state had imposed capacity limits on houses of worship while allowing certain “essential” businesses to operate with looser restrictions. Religious organizations challenged these measures, arguing that they violated the Free Exercise Clause by treating religious activity less favorably than comparable secular conduct.³³

Because practices or religious worship often occur on a weekly basis, the case was granted relief through the emergency (shadow) docket, where the Court granted an injunction against the state’s restrictions. The majority, including the recently appointed Justice Barrett, concluded that the regulations were not neutral or generally applicable because some secular activities (though deemed functionally essential) were afforded lighter restrictions than religious gatherings. This decision, being one of the first major rulings issued by Justice Barrett, reflects how her appointment in 2020 altered the ideological majority of the court in ways that marked a shift away from earlier church-state jurisprudence.

Similarly, another church-state pandemic era dispute arose the following year in *Tandon v. Newsom* 593 U.S. 61 (2021), involving California’s restrictions on in-home religious gatherings in the interest of preventing the spread of COVID-19. Religious plaintiffs argued that these restrictions were unconstitutional because they treated religious gatherings less favorably than certain secular activities.³⁴

Once again emerging from the shadow docket, the Court granted an injunction where they articulated that any government treating a comparable secular activity more favorably than religious exercise is subject to strict scrutiny. This ruling significantly lowered the threshold for triggering heightened levels of judicial scrutiny, making it more difficult for governments to

³³ *Roman Catholic Diocese of Brooklyn v. Cuomo* 592 U.S. 14 (2020)

³⁴ *Tandon v. Newsom* 593 U.S. 61 (2021)

regulate any and all religious conduct going forward. *Tandon* was a particularly consequential decision, not only because of the immediate impact of the ruling, but because it was conducted through the shadow docket. The expansion of strict scrutiny in Free Exercise cases risks creating a system in which religious actors are entitled to exemptions for what are otherwise generally applicable laws.³⁵

This concern has been echoed by advocacy groups such as the Freedom From Religion Foundation (FFRF), who argue that the Court's pandemic rulings and increasing willingness to utilize the shadow docket reflect a broader pattern of religious accommodations that undermines the wall of separation. Both *Roman Catholic Diocese v. Cuomo* and *Tandon v. Newsom* demonstrates an overall willingness to prioritize religious claims even when doing so impedes legitimate or even compelling public policy objectives.

ISSUES OUTSIDE RELIGION AND THE SUPREME COURT

The shadow docket's increased utilization was not limited to only the pandemic era. It should also be noted that, while concerningly prevalent, it has handled more than just religious and church-state disputes. Recently, the shadow docket has been used to allow the Trump administration to conduct immigration stops on the basis of perceived ethnicity, deport immigrants, strip legal immigration status from thousands, and fire civil servants. In each of these instances, the Supreme Court's shadow docket order overruled the findings of lower courts that deemed the administration's actions as unconstitutional or in violation of the law.

All these shadow docket rulings appear to feature the Supreme Court enabling the transfer of powers and authority once held by congress to the president, bolstering the executive branch while undermining the separation of powers.³⁶ The shadow docket and its lack of

³⁵ "Pandora's Box of Religious Exemptions" (Harvard Law Review, February 2023), <https://harvardlawreview.org/wp-content/uploads/2023/02/136-Harv.-L.-Rev.-1178.pdf>.

³⁶ *Trump v. Slaughter*, 606 U.S. ____ (2025) (Docket No. 25-332)

transparency, furthermore, removes the need for Justices' rationale that might provide insight into the reasoning behind their rulings beyond simply appeasing Trump and relevant interest groups. In her dissent in *Noem v. Perdomo*, 606 U. S. ____ (2025) (where the Court paused a lower court order barring racial profiling in immigration stops without explanation), Justice Sotomayor wrote "neither the District Court nor the parties will know whether the majority believed the key issue was standing, the merits, or the scope of the relief...It will be anyone's guess [what] the majority thought"³⁷, finding that the Fourteenth Amendment's protections simply did not apply to racial profiling was likely not the basis for the majority's findings.

Yet, the lack of any explanation on this shadow docket ruling leaves the plausible consideration that the Court's conservative majority is seeking to embolden the administration's authority. Recalling discussion in this paper about the Trump appointed Justices being selected for their known willingness to agree with the administration on key ideological issues, this claim becomes worth consideration. How do we prevent justices who were selected for their perceived agreeability with the executive branch and access to the shadow docket from acting on intrinsic or extrinsic loyalties that undermine the role of the Supreme Court? While the current Court has not ruled in Trump's favor in every instance, an overwhelming number of shadow docket cases have ruled to the benefit of the administration so far (Footnote 33).

While this potential avenue for Justices to discreetly inject bias into their rulings introduces a major threat to many issues such as church-state relations, the wall of separation is experiencing a break-down stemming from beyond just the Supreme Court's direct rulings. Many civil rights and separationist groups such as the American Civil Liberties Union (ACLU) and FFRF have been handling and supporting numerous cases that strive to prevent the erosion of the separation of church and state. Many of these, often state-level cases, concern topics such

³⁷ *Noem v. Perdomo*, 606 U. S. ____ (2025)

as public funding for religious institutions, government displays of religious materials, and discrimination on religious moral principles.

An increasingly recognizable case is *Nathan v. Alamo Heights* ISD, No. 25-50695 (5th Cir. 2025), concerning Texas’ new state law (Senate Bill 10) which requires all public elementary and secondary schools to display the Ten Commandments in every classroom.³⁸ While as of current the law has been struck down by the lower courts and the Supreme Court has not intervened, this law was proposed in the first place due to actions the Supreme Court has taken to weaken church-state separation.

Notably, the Supreme Court had previously struck down a Kentucky statute requiring displays of the Ten Commandments in classrooms in *Stone v. Graham* 449 U.S. 36 (1980). Here, the Supreme Court reasoned that the law was in violation of the Establishment clause, and therefore unconstitutional.³⁹

So why the sudden movement to overturn the decades of precedent with a nearly identical statute in Texas? The reasoning brings us back to the recent actions of the Supreme Court discussed in this paper. In part, supporters of the statue hoped that the current Supreme Court and its more “religion-friendly” reputation might afford them enough fortune in overturning the precedent from *Stone*. However, an additional feature of their motivation stems from the Supreme Court’s abandonment of the Lemon Test in favor of the “history and tradition” approach in *Kennedy v. Bremerton School District*. The Lemon test, being a key element in the Court’s decision in *Stone*, presented an opportunity for groups to assess the strength of its standing as good law following the Lemon test’s end. Seeking to capitalize on this change in standards, some groups have tried to call upon the historical significance of the Ten

³⁸ *Nathan v. Alamo Heights* ISD, No. 25-50695 (5th Cir. 2025)

³⁹ *Stone v. Graham* 449 U.S. 36 (1980)

Commandments in American history and tradition; a gross misinterpretation of the history and tradition approach.⁴⁰

Regardless of the fact that these statutes have yet to see much success in the lower courts (as of April 2026), the actions of the Supreme Court have nevertheless opened the floodgates for many more disputes regarding the separation of church and state going forward.

Christian/Evangelical nationalists, religious-right extremists, and other religious nationalists are beginning to perceive the Supreme Court's ideological shift as sufficient cause for rechallenging issues that have previously been struck down. As religious nationals move to begin trying to implement statutes that challenge the Establishment Clause (even at a local level), it is only a matter of time before their relentless efforts begin chipping away at well-established separationist principles and precedent.

CONCLUSIONS

In sum, the current Supreme Court has advanced the erosion in the wall of separation either directly through their rulings, or through the new avenues of challenging Establishment and Free Exercise Clause the new standards they've implemented created. It is not certain that any Justices have outright abandoned their duty and commitment to upholding the Constitution, but there have been undeniable instances where the abandonment of doctrinal tests and the use of the shadow docket have weakened the principles of church-state separation.

While the Trump administration has played a substantial role not only in the appointments of some of the more controversial Justices and as an actor in many legal challenges brought to the Court, the seeming ease and success Trump has had in manipulating the Court is

⁴⁰ Charels Russo, "3 States Push to Put the Ten Commandments Back in School – Banking on New Guidance at the Supreme Court," The Free Speech Center, September 9, 2025, <https://firstamendment.mtsu.edu/post/3-states-push-to-put-the-ten-commandments-back-in-school-banking-on-new-guidance-at-the-supreme-court/#>.

largely due to preexisting faults in the Judicial system itself. By weaponizing politics, existing executive authority, and loyalty, Trump has been able utilize autocratic legalism to shift the separation of powers and seize authority. The stage was set with all the necessary tools and lack of sufficient safe guards for what we have seen today to have occurred. Regardless of whatever “strategic” effort has come from the administration however, the Supreme Court’s “supermajority” has still made itself a tool in dismantling the separation of church and state in favor of more permissive religious accommodation.

This backsliding does not have to be a permanent feature of Constitutional interpretation however. Organizations such as the ACLU and FFRE, states, legal scholars, and activists continue to work closely with litigants in challenging the threats to the wall of separation.⁴¹ Judicial reform concerning life-time appointments, requirements for recusal, and use of the shadow docket are all ways in which our current and future Supreme Courts can be safeguarded from illegitimacy and corruption. Reforming the Court would not only be likely to reverse some recent decisions, but would also preserve key aspects of maintaining the wall of separation from popular ideological movements that would otherwise damage it the way we have seen since the changes to the Supreme Court following the Trump administrations.

⁴¹ “Texas Families Sue to Block Law Requiring Ten Commandments in Every Public-School Classroom | American Civil Liberties Union,” American Civil Liberties Union, 2025, <https://www.aclu.org/press-releases/texas-families-sue-to-block-law-requiring-ten-commandments-in-every-public-school-classroom>.

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