A Delicate Balance
Reconciling Religious Freedom with other Values
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Slide 1

1. This is the last presentation in this series, looking at the idea that individuals have the right to determine their own religious beliefs and actions based on those beliefs.

2. It has taken a long time to get to our current understanding.

3. During the Middle Ages, no one thought that individuals were capable of forming their own religious beliefs – the battle for control of those beliefs was between the Catholic Church and the secular rulers – the Church won.

4. The Protestant Reformation in Germany and Switzerland managed to wrest control of what people believed from the Church, but gave it to secular authorities.

5. Government control of religious beliefs was transferred to the American colonies, where church-dominated governments killed and banished people they considered heretics.

6. The idea that the government should not be in the business of controlling beliefs and practices was reflected in the First Amendment to the United States Constitution.

7. As we will see today, the vision of religious freedom reflected in the First Amendment lay dormant for about 100 years.

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1. The First Amendment provides: **"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**

2. Despite the Great Awakening that we talked about last week, by the late eighteenth century church membership was only between 10 and 20 percent. Sehat, *The Myth of American Religious Freedom* at 51.

3. Many of the authors of the founding documents of the United States, including Thomas Jefferson, Benjamin Franklin and James Madison, were Deists, who rejected many of the tenets of Christianity, including the divinity of Jesus.

4. As a result, the Constitution contains no reference to God, which one author notes was **abnormal, historic, radical, and not accidental."** Waldman, *Founding Faith* at 131.

5. Fearing that the states would continue to deny religious freedom to their citizens, Madison had tried unsuccessfully to get language in the Constitution requiring the states to provide religious freedom.

6. After the First Amendment, the states then began adopting their own religious freedom provisions.

7. Today, we will look at how courts have interpreted the rights of religious freedom under the First Amendment and similar state provisions.

8. We will see that the interpretation has been uncertain and inconsistent, eventually leading to the Religious Freedom Restoration Act by the federal government in 1993.

9. We will look briefly at Indiana's adoption of its own Religious Freedom Restoration Act and some of the issues raised by that Act.

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1. Like Jefferson and Madison, John Adams was a student of John Locke and **"came to reject major parts of orthodox Christian theology."** Waldman, *Founding* Faith at 35.

2. In 1797, President Adams presented to the Senate, and the Senate ratified, a treaty with Tripoli seeking to bring an end to battles with the Barbary pirates.

3. Article 11 provided: **"As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen and as the said States never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries."**

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1. In 1802, President Jefferson wrote a letter to Baptists in Danbury, Connecticut.

2. The letter had been reviewed by his attorney general because it was to be released to the public.

3. Jefferson wrote: **"I contemplate with sovereign reverence that act of the whole American people which declared that the legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."**

4. This letter became important in the twentieth century as the Supreme Court tried to determine the meaning of the First Amendment.

5. **"Yet for most of the [nineteenth] century, the 'wall of separation' was more of an illusion than a reality"** as the country experienced a new wave of Christian renewal. Green, *The Second Disestablishment* at 9.

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1. **"[B]eginning in the 1790s, urban church construction exploded, signaling the beginning of a religious expansion that intensified throughout the first half of the nineteenth century."** Sehat, *The Myth of American Religious Freedom* at 51.

2. Between 1800 and 1840, the proportion of Americans who were church members doubled.

3. Methodist and Baptist evangelists were particularly successful in attacking the rationalist and Deist views of the Enlightenment.

4. The effects of this so-called "Second Great Awakening" surfaced in the Presidential election of 1800, in which Jefferson was attacked for his Deist views.

5. Jefferson's opponents, fearing the wrath of God if he were elected, pointed to the **"lack of an acknowledgement of God in the federal Constitution."** Green, *The Second Disestablishment* at 88.

6. As one author notes: **"The issue of whether the nation had a religious or secular character, apparently unimportant ten years earlier, was now of utmost consequence . . . ."** *Id.*

7. **"Despite an earlier consensus about the nation's secular founding,"** the country's renewed sense of Christian identity was reflected in decisions coming from the state courts. *Id.* at 91.

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1. In 1810, a New Yorker named John Ruggles had too much to drink and shouted in a tavern: **"Jesus Christ was a bastard and his mother must be a whore."** *People v. Ruggles*, 8 Johns 290 (N.Y. 1811)

2. He was convicted of blasphemy, sentenced to three months in prison and fined $500, which would be about $10,000 today.

3. Ruggles appealed, contending his conviction violated the New York Constitution, which guaranteed that **"the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind."**

4. The New York Supreme Court, in a decision written by Chief Judge James Kent, rejected the religious freedom argument, saying: **"The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order."**

5. In other words, denying the truth of orthodox Christian religious beliefs could be banned because it threatened **"decency and good order."**

6. The court reached this result even though no law in New York made blasphemy a crime, finding that New York had inherited the common law of England and **"writings and actions which go to vilify those gospels, continue, as at common law, to be an offence against the public peace and safety."**

7. The *Ruggles* decision **"was a precedent that other courts received with eagerness in their own efforts to constrain what they saw as the pernicious side of individualism."** Sehat, *The Myth of American Religious Freedom* at 61.

8. For example, in Pennsylvania, a member of a debating society was convicted of blasphemy for arguing that **"the Holy Scriptures were a mere fable, that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies."** *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394 (Pa. 1824).

9. The Pennsylvania Supreme Court, citing the *Ruggles* decision, rejected the claim that the conviction violated Pennsylvania's religious freedom mandates because the statement was an insult to **"the popular religion of the country . . . directly tending to disturb the public peace."**

10. The court specifically held that **"the Christianity of the common law [is] incorporated into the great law of Pennsylvania."**

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1. Also in Pennsylvania, a Jewish worker was convicted of working on Sunday, in violation of a law prohibiting work on **"the Lord's day, commonly called Sunday."** *Commonwealth v. Wolf*, 3 Serg. & R. 48 (1817).

2. The Pennsylvania Supreme Court rejected his argument that the law violated his right to religious freedom because the **"breach of the sabbath as a crime injurious to society"** trumped the **"technical niceties"** of religious freedom.

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1. The court decisions of the early nineteenth century, punishing the views of non-Christians, were a departure from the ideals of religious freedom that underlay the First Amendment, as articulated by Jefferson and Madison.

2. As one author writes: **"As the legal opinions kept coming, the slippage between the proclamation of disestablishment and its continuation in another form became even clearer."** Sehat, *The Myth of American Religious Freedom* at 65.

3. **"Religiously derived moral standards assumed a legal standing that was applicable to believers and unbelievers alike. Moral law became the mechanism of religious control."** *Id.* at 69.

4. These court decisions were of great concern to an aging Thomas Jefferson.

5. In his autobiography, written in 1821, Jefferson wrote that the Virginia Statute for Religious Freedom, which he considered the model for both the First Amendment and the religious freedom provisions in state constitutions, **"comprehended within the mantle of its protection the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination."** Jefferson, *Autobiography* (1821).

6. Also in 1821, Jefferson wrote a letter to John Adams, in which he said: **"This country, which has given to the world the example of physical liberty, owes to it that of moral emancipation also, for, as yet, it is but nominal with us. The inquisition of public opinion overwhelms in practice the freedom asserted by the laws in theory."** http://founders.archives.gov/documents/Jefferson/98-01-02-1789

7. In a passage commenting on the need for religious freedom laws in other countries, he remarked to Adams: **"You see, my dear Sir, how easily we prescribe for others a cure for their difficulties, while we cannot cure our own."**

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1. Jefferson was particularly critical of state court decisions declaring that Christian doctrines had been inherited from England via the common law.

2. In 1824, Jefferson wrote a long letter congratulating John Cartwright, an English reformer, on his conclusion that **"judges have usurped in their repeated decisions, that Christianity is a part of the common law."**
http://www.constitution.org/tj/ltr/1824/ltr_18240604_cartwright.htm

3. Jefferson set out a lengthy legal analysis of why Christianity was never part of the common law, saying: **"[T]he common law existed while the Anglo-Saxons were yet pagans, at a time when they had never yet heard the name of Christ pronounced, or knew that such a character had ever existed."**

4. As one author notes: **"Of course, the United States was not supposed to have an established religion, so the entire debate begged the question of how England's common law could be relevant to the United States."** Sehat, *The Myth of American Religious Freedom* at 65.

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1. Joseph Story, at the time an associate justice of the Supreme Court, wrote a letter rejecting Jefferson's assertions, saying that it was **"inconceivable"** that Christianity was not part of the common law. Sehat, *The Myth of American Religious Freedom* at 65.

2. In 1833, Story published the influential *Commentaries on the Constitution of the United States*, in which he wrote**: "The real object of the First Amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."**

3. It would be more than 100 years before the Supreme Court decided that Thomas Jefferson was correct about the meaning of the First Amendment.

4. Also in 1833, the United States Supreme Court unanimously held that the Bill of Rights, including the First Amendment, did **not** apply to the states. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

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1. In 1837, Jefferson's arguments that Christianity was not part of the common law were presented by the defendant in a Delaware blasphemy case, in which a person

ironically named Thomas Jefferson Chandler was convicted of blasphemy for denying the virgin birth. *State v. Chandler*, 2 Del. 553 (1837).

2. The court rejected Jefferson's arguments, saying: **"It appears to have been long perfectly settled by the common law, that blasphemy against the Deity in general, or a malicious and wanton attack against the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offence."**

3. The court also curiously stated that the religious freedom provisions of the Delaware Constitution did not prohibit its citizens from adopting Christianity as their preferred religion and punishing those who disparaged it because they were equally free to make any other religion the favored religion and prohibit statements that disparaged it.

4. As the court stated: **"Thus it may be said that the Christian himself may live to see the day when he shall not dare to proclaim publicly that the religion of Mahomet, or the impostures of Joe Smith, are the just topics of his ridicule and contempt."**

5. So, by the middle of the nineteenth century, the original motivation for religious freedom provisions – preventing state sanctioned religious beliefs – had been construed by state courts to allow exactly that so long as the electorate selected the preferred religion, with judges being certain that the electorate would choose Christianity.

6. Courts also drew distinctions between laws that forced people to **believe** a certain way and laws that governed how they acted on those beliefs.

7. For example, in 1838 the Massachusetts Supreme Court upheld a blasphemy conviction because laws against blasphemy were **"not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the peace."** *Commonwealth v. Kneeland*, 37 Mass. 206 (1838).

8. So long as people kept their non-Christian beliefs to themselves, they were okay, but could be punished if they uttered them because the statements might lead Christians to violence.

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1. The distinction between laws governing beliefs and those governing actions was at the heart of what became famous as the "Eliot School Rebellion." *Wall v. Cooke*, 7 Am. L. Reg. 7 (Boston Police Court 1859).

2. In 1859, the vice principal of the Eliot School in Boston insisted that 11-year-old Thomas Wall, whose family was Roman Catholic, recite the Ten Commandments from the Protestant translation of the *King James Bible*, as mandated by state law.

3. Young Wall refused, at the instruction of his father, an Irish immigrant, and was beaten repeatedly by the vice principal, leading to 300 students walking out of the school.

4. Wall's father sued the vice principal for excessive force, putting at issue the propriety of forcing Catholic children to recite a rendering of the Ten Commandments that was inconsistent with their religious beliefs.

5. The court ruled against the Walls, holding that a requirement of reading the Protestant version of the Ten Commandments was supported by **"the almost unanimous voice of the people"** and Wall's refusal to accept that determination threatened the **"granite foundation on which our republican form of government rests."**

6. The court based its decision on the fact that **"no scholar is requested to believe [the Protestant version of the Ten Commandments], none to receive it as the only true version of the laws of God."**

7. In other words, so long as the state did not somehow force people to change their beliefs, it was fine to force them to act contrary to those beliefs.

8. The court worried that if Wall could insist on reciting only from a Catholic Bible, Jews could insist on reciting from their own translations, and the ultimate result would be to remove Bible reading from the schools.

9. The court believed this was an outcome the framers of the religious freedom provisions of the Massachusetts Constitution **"could never have intended."**

10. As in the blasphemy cases, worries about threatening the religious views of the majority resulted in restricting the religious freedom of the minority, exactly the opposite of what Madison, Jefferson and the other proponents of religious freedom had originally intended.

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1. The distinction between laws coercing beliefs and laws coercing actions was used by the United States Supreme Court in two cases involving Mormons, who had been taught by Joseph Smith, the founder of their faith, that God required or at least allowed men to be polygamous.

2. Because of this teaching, Smith's followers practiced polygamy in the Utah Territory, which was controlled by the federal government.

3. Brigham Young, the successor to Joseph Smith, had at least 55 wives during his lifetime.

4. In 1862, Congress outlawed polygamy in the territories, but Mormons refused to obey the law because of what they considered their rights under the First Amendment.

5. A Mormon polygamist was convicted of violating the law and his case got to the United States Supreme Court, where he argued that the statute prohibiting polygamy was unconstitutional because he believed, like other Mormons, that failing to participate in polygamy would lead to **"damnation in the life to come."** *Reynolds v. United States*, 98 U. S. 145 (1879).

6. In the first case dealing with religious freedom under the First Amendment, the Supreme Court rejected the claim that being subjected to eternal damnation gave him a right to ignore federal law.

7. Relying on statements of Thomas Jefferson, the Court concluded that **"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."**

8. Harkening back to examples that Jefferson and John Locke had used to show the limits of religious freedom, the Court asked rhetorically: **"Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"**

9. The Court answered its question with a conclusion that remains relevant today: **"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his 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."**

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1. The decision that laws against polygamy could be enforced did not stop Mormons from disobeying the law, so in the 1880s Congress passed harsh laws directed at all Mormons, which supporters of the laws deemed a **"heretical faith"** and a threat to **"Christian culture."** Green, *The Second Disestablishment* at 343.

2. These laws were passed despite opposition from some members of Congress that the First Amendment prevented the government from destroying any religion, **"whether false or true."** *Id.*

3. In upholding these laws in 1890 against claims they violated the First Amendment, the Supreme Court stated: **"It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. *** However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."** *Davis v. Beason,* 133 U.S. 333 (1890).

4. As authority that encouraging polygamy was inimical to the **"peace, good order and morals of society,"** the Court cited **"the general consent of the Christian world in modern times."**

5. Under this view, any law passed to enforce the views the orthodox Christian majority could be enforced no matter what effect it had on the religious practices of others.

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1. In the nineteenth century, Mormons were not the only group facing prosecution for practices deemed inconsistent with **"Protestant Christian morals."** Sehat, *The Myth of American Religious Freedom* at 179.

2. In 1889, a Seventh Day Adventist farmer was convicted for working in his fields on Sunday, in violation of Tennessee law, with the prosecutor telling the jury that **"I do not want any of these Advent[ist] or Mormon churches."** Green, *The Second Disestablishment* at 353.

3. A federal court rejected the claim that the farmer's right to religious freedom was violated, saying that his real claim was that the Sunday law was **"distasteful to his own religious feeling or fanaticism."** *In re King*, 46 Fed. 905 (W.D. Tenn. 1891).

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1. In the years after the Civil War, the country grew more diverse and more tolerant of non-traditional religious beliefs as people moved around the country and encountered new ideas.

2. These new attitudes helped shape the elections of 1896 and 1900, in which William McKinley, supported by Eastern and Western business interests, defeated William Jennings Bryan, a Christian populist who later testified against the teaching of evolution in the famous "Scopes Monkey Trial."

3. These more inclusive views began being reflected in state court cases involving claims of religion freedom.

4. In 1894, a writer was charged with blasphemy under Kentucky law for ridiculing the Roman Catholic doctrine of the immaculate conception of Mary.

5. A judge dismissed the charge, saying: **"In the code of the laws of a country enjoying absolute religious freedom there is no place for the common law crime of blasphemy."** Green, *The Second Disestablishment* at 353.

6. In 1904, the North Carolina Supreme Court flatly rejected the claim that **"Christianity is part of the common law of the land"** because of constitutional provisions **"den[ying] religion any place in the supervision or control of secular affairs."** *Id.* at 389.

7. Sensing the changing attitude, a Christian group called the National Reform Association proposed an amendment to the United States Constitution to acknowledge the importance to the country of God and Jesus Christ – the effort failed.

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1. Reflecting the changing attitudes toward religious plurality, the United States Supreme Court began focusing on the Fourteenth Amendment as a way of imposing restrictions on state laws that interfered with non-traditional religious beliefs and practices.

2. Section 1 of the Fourteenth Amendment, enacted after the Civil War, states: **"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 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."**

3. Although this amendment was intended primarily to protect freed slaves, its broad language protecting "liberty" was not limited.

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1. In 1922, voters in Oregon passed a new law requiring that all students attend a public school.

2. The law was supported by the Ku Klux Klan and was directed primarily at closing Roman Catholic schools that were serving immigrants.

3. Sisters of the Holy Names, who operated a Catholic school, brought a legal action claiming that this new law violated the rights of Oregon students and parents.

4. The Supreme Court agreed with the Sisters, holding that the right to choose a religious school was a protected "liberty" under the Fourteenth Amendment that the states could not take away. *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

5. A few days later, the same Court decided that the "liberties" protected against state interference by the Fourteenth Amendment included the rights guaranteed by the First Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

6. By "incorporating" the First Amendment into the Fourteenth Amendment, which was applicable to the states, **"the Court duplicated Madison's long-ago scheme to modify the federal Constitution so that states would be prohibited from violating fundamental rights."** Sehat, *The Myth of American Religious Freedom* at 237.

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1. The Supreme Court's first opportunity to apply this idea came in a case in which two Jehovah's Witnesses had been convicted in Connecticut state courts of soliciting without obtaining the required permit. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

2. One had also been convicted of breaching the peace by playing a record attacking the beliefs of Roman Catholics.

3. The Court rejected nineteenth century ideas that the First Amendment, now applicable to the states, limited only efforts to coerce beliefs, stating: **"Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."**

4. But conduct required by religious beliefs could be prohibited only if it presented **"a clear and present danger to a substantial interest of the State."**

5. The Court decided the requirement to get a permit interfered with a person's freedom to act in accordance with his beliefs, saying**: "[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."**

6. The Court also reversed the conviction for disparaging Catholics, saying**: "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these**

liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

7. The crime of blasphemy, which had been used so effectively against minority religions in the nineteenth century, was now effectively rendered unconstitutional.

8. By imposing restrictions on government regulation of actions motivated by religious beliefs**, "the Court entered an entirely different intellectual world."** Sehat, *The Myth of American Religious Freedom* at 226.

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1. The next important case also involved Jehovah's Witnesses, who were involved in 23 First Amendment cases in the Supreme Court between 1938 and 1946.

2. Jehovah's Witnesses refuse to salute the flag, which they consider a forbidden "graven image."

3. When Jehovah's Witnesses students refused to salute the flag in violation of West Virginia law, they were expelled from school and their parents threatened with prosecutions for causing delinquency. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

4. In 1943, the Supreme Court ruled 6 to 3 that requiring students to salute the flag violated the students' First Amendment rights to freedom of religious and freedom of speech, saying: **"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."**

5. Rejecting the logic that had forced young Walls to recite the Ten Commandments in Biblical language he did not believe, the Court held that a person cannot be forced **"to utter what is not in his mind."**

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1. In 1947, in a case involving state support of transportation for students in parochial schools, **"all nine members of the Court accepted that the First Amendment required the complete separation of church and state."** Sehat, *The Myth of American Religious Freedom* at 237.

2. As a result, the government could not discriminate against **"Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it."** *Everson v. Board of Education*, 330 U.S. 855 (1947).

3. In reaching this conclusion, the Court cited Thomas Jefferson's letter to the Danbury Baptists as setting out the true meaning of the First Amendment.

4. The more than 100-year-old debate between Thomas Jefferson and Joseph Story over the meaning of the First Amendment had finally been resolved, with Jefferson's view the winner.

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1. The Supreme Court's decisions rejecting government interference with acts based on non-traditional religious beliefs coincided with, or perhaps precipitated, postwar public support for a greater acknowledgement of traditional Christianity in the government.

2. In 1954, the phrase "under God" was officially added to the Pledge of Allegiance, which, **"much like the Constitution did not acknowledge the existence of God."** Kruse, *One Nation Under God* at 100.

3. Two years later, "In God we Trust" became the official motto of the United States and was on all currency.

4. Previously, those words had appeared only on some coins.

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1. The public demand for more governmental acknowledgement of orthodox Christianity did not affect the Supreme Court's decisions protecting minorities from the dominant religion.

2. This became clear in a case involving a Seventh Day Adventist, who refused to work on Saturday, which she considered the Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963).

3. Because of her refusal to work on the days assigned to her, she was fired for cause and denied unemployment compensation.

4. The Supreme Court held that the government had imposed a burden on her ability to live according to her religious beliefs.

5. In what became known as the "*Sherbert* Test," the Court held that a burden on a person's religious beliefs can be justified only if the government (1) had a compelling interest justifying imposing that burden and (2) if no other form of regulation could satisfy the government's interest without imposing the burden..

6. Finding that the government's interest in requiring someone with a religious objection to work on Saturday was not compelling, the Court reversed the denial of benefits.

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1. In 1963, former President Harry Truman appealed to Christian beliefs to support laws banning inter-racial marriage, which were being tested in the courts.

2. He told a reporter: **"I don't believe in [inter-racial marriage.] The Lord created it that way. You read your Bible and you'll find out."**

3. In 1967, the Supreme Court unanimously held that anti-miscegenation laws violated the Fourteenth Amendment and the states could not prohibit inter-racial marriage despite the religious objections. *Loving v. Virginia,* 388 U.S. 1 (1967).

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1. In 1972, Old Order Amish parents claimed that state laws requiring that their children attend school after eighth grade would **"endanger their own salvation and that of their children."**

2. Citing the *Sherbert* case, the Supreme Court held that the First Amendment protects acts required by a person's belief **"even under regulations of general applicability."** *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

3. In holding that requiring the children to attend school past eighth grade violated their rights to religious freedom, the Court stated: **"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."**

4. Because most Amish students stayed on the farm, the Court held that requiring them to continue their education beyond eighth grade was not a state interest of the **"highest order"** and therefore could not justify interfering with their religious practices.

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1. In 1982, the Supreme Court applied the *Sherbet* test in upholding the government's rejection of tax exempt status of Bob Jones University for prohibiting inter-racial dating and marriage among its students. *Bob Jones University v. United States,* 461 U.S. 574 (1982).

2. In the words of the Court: **"The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."**

3. The Court held that the government's compelling interest in eliminating racial discrimination overcame any interference with the school's sincerely held religious beliefs that inter-racial dating and marriage were sins.

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1. Just eight years later, the Court abruptly changed directions.

2. Two members of the Native American Church had been fired from their jobs as drug rehabilitation counselors for ingesting peyote, a hallucinogenic drug, as part of their religious ceremonies. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

3. Because they were denied unemployment compensation, they sued, claiming that their religious freedom had been violated in the same way that the rights of the Seventh Day Adventists had been violated in the *Sherbert* case.

4. To the surprise of most observers, a divided Supreme Court rejected this claim, saying: **"We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."**

5. As the four dissenters pointed out, that statement simply ignored the 1972 case involving the Amish students, who had been excused from a valid law requiring school attendance.

6. To support its result, the Court's majority turned to its 1879 *Reynolds* decision, **"where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice."**

7. The Court repeated its earlier rhetorical question from that case: **"Can a man excuse his practices to the contrary [of generally applicable laws] 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."**

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1. The *Smith* decision, rejecting the *Sherbert* test and finding use of peyote in religious services illegal, was met with widespread and bipartisan opposition.

2. Liberals saw it as a threat to non-traditional religions, while conservatives saw it as a threat to Christianity in an increasing secular culture.

3. As a result, in 1993 Democratic Senator Charles Schumer introduced what became known as the Religious Freedom Restoration Act or "RFRA," seeking to restore the *Sherbert* Test to cases claiming that laws burdened a person's exercise of religion.

4. The Act unanimously passed the House of Representatives, passed the Senate with only three votes against, and was signed into law by President Clinton.

5. This is the text of the Act:

> **(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.**
>
> **(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—**
>
> > **(1) is in furtherance of a compelling governmental interest; and**
> >
> > **(2) is the least restrictive means of furthering that compelling governmental interest.**

6. According to the Act, **"'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."**

7. In 1997, the federal RFRA was held to be unconstitutional as applied to state laws, but remains effective in cases involving federal laws.

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1. At the time of enactment of the Religious Freedom Restoration Act, there is no evidence that anyone who supported the Act thought it would protect anyone but human beings exercising their own religious beliefs.

2. But companies objecting to providing birth control for their employees argued that the term "person" should be interpreted by the Dictionary Act, which says: **"In determining the meaning of any Act of Congress, unless the context indicates otherwise . . .the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."**

3. The Supreme Court accepted this argument, in part, in the *Hobby Lobby* case, holding that the Religious Freedom Restoration Act protects closely held for-profit corporations as well as individuals. *Burwell v. Hobby Lobby*, 573 U.S. ___ (2014).

Slide 30

1. The Indiana Religious Freedom Restoration Act was enacted in 2015.

2. Although it drew its name from the federal law, it differed from its federal counterpart in several ways that opponents found significant.

3. First, there was nothing to be restored – no Indiana case had rejected the application of the *Sherbert* Test to religious freedom claims.

4. Second, unlike the federal version, even as interpreted in the *Hobby Lobby* case, the Indiana Act applies to even the largest public corporations.

5. Finally, the Indiana version expressly allows people to assert claims that their rights have been violated, not just to defend claims against them.

6. These differences were all cited by opponents who claimed the law was not needed and, based on statements of its proponents, was intended to thwart laws against discrimination.

7. If that was the law's intent, the effort was probably doomed to fail.

8. Since the *Bob Jones* case, anti-discrimination laws have uniformly been held to reflect a compelling government interest that overrides religious views.

9. The so-called "fix," saying the Indiana RFRA could not be used to defend against claims of illegal discrimination, was essentially an acknowledgement of that fact.

Slide 31

1. The next session of the Indiana General Assembly will consider enacting laws prohibiting discrimination based on sexual orientation and gender identity, which would not be subject to Indiana's RFRA under the prior "fix."

2. Several pastors in this Church have signed public letters in support of those laws.

3. Some Christian groups are seeking to add religious exemptions to the anti-discrimination provisions, saying they should not be forced to act contrary to their religious beliefs by providing certain services to same sex couples.

4. Others see such exemptions as dangerous and unprecedented, pointing out that there has never been a religious exemption anywhere to any law prohibiting discrimination.

5. Why, they ask, if Bob Jones University can be penalized for refusing to accept inter-racial dating among its students should businesses not be penalized for refusing to accept business from same sex couples?

6. After all, they say, both base their claims of the right to discriminate on similar religious beliefs.

Slide 32

1. Like the debate last spring over Indiana's RFRA, the debates between supporters of anti-discrimination laws and people claiming the right to avoid being forced to violate their religious beliefs sometimes become nasty, with each side accusing the other of bigotry.

2. The rhetoric is unfortunate and not helpful.

Slide 33

1. The issues are difficult because they require balancing two conflicting rights Americans hold dear – the right to be free from discrimination and the right to act on sincerely-held religious beliefs.

2. Since John Locke and Thomas Jefferson, people of good will have struggled with how to resolve claims of religious freedom when they conflict with the right of a society to enact laws in the best interests of all the people.

3. The current issues cannot be resolved by name calling, but by thoughtful discussion and respect for opposing points of view.

4. I hope I have made a contribution to that discussion.

Resources:

Green, Steven, *The Second Disestablishment* (Oxford University Press 2010)

Holmes, David, *Faiths of the Founding Fathers* (Oxford University Press 2006)

Kruse, *One Nation Under God* (Basic Books 2015)

Rosten, Leo, *Religions of America* (Simon & Schuster 2005)

Sehat, David, *The Myth of American Religious Freedom* (Oxford University Press 2011)

Sullivan, Winnfred, *The Impossibility of Religious Freedom* (Princeton University Press 2005)

Waldman, Steven, *Founding Faith* (Random House 2008)