



RELIGIOUS LIBERTY UNDER THREAT

THE CHRISTIAN NATIONALIST CAPTURE OF THE FEDERAL JUDICIARY

FREEDOM
FROM RELIGION
foundation

DECEMBER 2020

INTRODUCTION

Over the last four years, the federal courts have been taken over by ultraconservative judges who have radical views on religious liberty, and who are rapidly redefining the First Amendment in ways that expand Christian privilege and erode the wall of separation between state and church. “Proud Christian judges” and “conservative legal scholars” have been among the words of praise for Trump’s judicial appointments. One key qualification of nearly all of these judges is their commitment to Christian nationalism.

The First Amendment rights to religious liberty have long been understood as embodying the fundamental right to a secular government. The right of every American to freely exercise *any* religion *requires* a government free from religion. But the federal judges appointed by Trump have shown increasing hostility toward the principle of separation between state and church, while jumping at every chance to exempt conservative Christians from laws that protect the rest of us.

President Donald Trump, Vice President Mike Pence, Justice Neil Gorsuch, and others pray in the Green Room of the White House. Official White House Photo by Shealah Craighead



What is Christian Nationalism?

Christian nationalism has become a powerful political force that seeks to merge American and Christian identity, to frame government neutrality toward religion as hostility toward Christianity, and to exempt aggrieved conservative Christians from laws that protect the civil rights of others. Although “religious right” and “Christian right” are also used to refer to a conservative political ideology that sees America as a white Christian nation, “Christian nationalism” best captures the ideology that is re-making the federal judiciary and the worldview of the groups that are driving it. Data showed that in the 2016 presidential election, the most accurate predictor of a Trump voter was adherence to the belief that America is and was founded as a Christian nation.¹ The race to fill the federal bench with ultraconservative judges has been seen largely by these voters as essential to defend a supposed Christian American heritage. The Christian nationalist ideology is shared by evangelical ministries, fundamentalist churches, conservative Christian advocacy groups, and ultraconservative politicians.²



Who's celebrating?

Much attention was paid to the ceremony celebrating the nomination of Amy Coney Barrett to the U.S. Supreme Court, especially after the president and many other attendees contracted COVID-19 following the event. USA Today published a photo of the attendees in an attempt to identify all of the individuals who attended what was likely a “superspreader” event. It’s a powerful illustration of who is celebrating her elevation to the Supreme Court— the event was a who’s who of Christian activists. They included at least a dozen pastors or ministers, including televangelist and Trump advisor Paula White; leaders from several conservative Christian legal groups, including Alliance Defending Freedom — an anti-LGBTQ hate group according to the Southern Poverty Law Center³; presidents of the evangelical Liberty University and Catholic University of America; Franklin Graham of the Billy Graham Evangelistic Association and Tony Perkins, president of Family Research Council.⁴ This group of conservative Christian activists gathered to celebrate Amy Coney Barrett’s nomination to the Court because they know that she represents their interests and shares their vision of Christian supremacy enshrined in American law. Many of these groups have active legal teams working to bring cases before Trump-appointees like Barrett, knowing they will interpret the law in their favor.

Guests included:

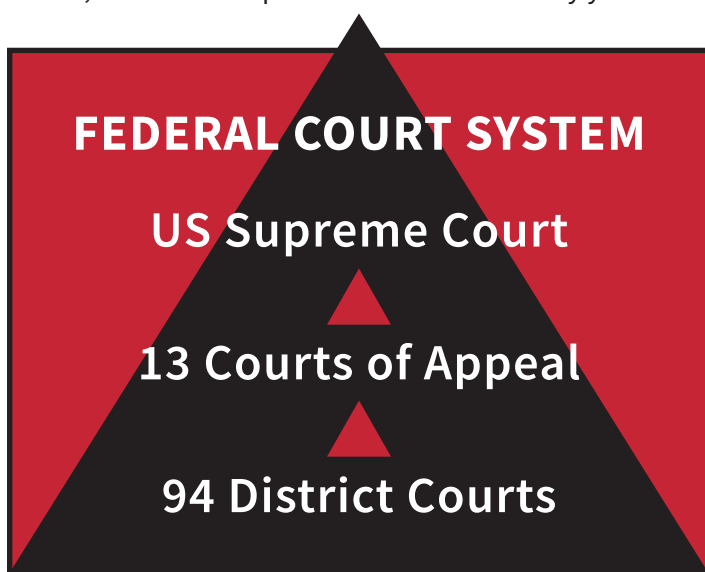
Michael Farris, president and CEO, Alliance Defending Freedom
Paula White, pastor and Trump spiritual advisor
Franklin Graham of the Billy Graham Evangelistic Association
Cissie Lynch, member of the president’s Faith Advisory Council
Greg Laurie, senior pastor, Harvest Christian Fellowship, California
Jack Graham, pastor of Prestonwood Baptist Church, Texas
Tony Perkins, president of Family Research Council
Harry Jackson, president, Harry Jackson Ministries
Andrew Brunson, pastor and author
Robert Morris, founding pastor, Gateway Church, Dallas
Jentezen Franklin, senior pastor, Free Chapel, Georgia
Jerry Prevo, acting president, Liberty University
Skip Heitzig, senior pastor of Calvary Church, Albuquerque
Ramiro Pena, senior pastor, Christ the King Church, Texas
Ralph Reed, chairman, Faith and Freedom Coalition
Kelly Shackelford, president and CEO, First Liberty Institute
John Garvey, Catholic University of America president

THE POWER OF THE FEDERAL COURTS

The capture of the courts is alarming given the power the courts hold over the interpretation of the Constitution and its impact on our rights. The federal courts have complete power to interpret the First Amendment — they determine what it means and how it is enforced, whether government action that favors religion is unconstitutional, what legal test will be used to analyze such government action, and whether or not citizens can even get through the courthouse door to challenge such government action. The judges on the federal bench are appointed for life, which could be four or five decades. Their influence often lasts even longer.

The federal court system is made up of three levels — the district courts, the circuit courts of appeals, and the Supreme Court. Most people are familiar with the Supreme Court and its nine justices, but few realize the influence of the lower federal courts. There are 94 district courts— trial courts where nearly all federal cases are heard. Those 94 courts are organized into 12 geographic regions known as circuits. Each circuit has a court of appeal. There is also a Court of Appeals for the Federal Circuit that has nationwide jurisdiction to hear appeals in specialized cases, making a total of 13 appellate courts.⁵

These courts do not retry cases or hear new evidence or witness testimony; they only review the decisions of the district courts to ensure the law was applied correctly. Finally, after cases are reviewed by the circuit courts, the losing party can petition the U.S. Supreme Court to review the case. However, the Supreme Court decides to hear oral arguments in only about 80 out of more than 7,000 cases it is petitioned to review every year.⁶



Since they are the final arbiter in tens of thousands of cases each year, the circuit courts of appeal and the district courts have enormous power and influence over our constitutional rights.

THE ESTABLISHMENT CLAUSE: HISTORY AND REDEFINITION

Our founders sought to secure individual religious liberty by separating state and church. The interplay of the religion clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause—is at the heart of nearly all state/church litigation.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

The precursor for the religion clauses found in the First Amendment to the U.S. Constitution came from a statute in colonial Virginia, where the Anglican Church was the official tax-supported state church. Thomas Jefferson, with help from James Madison, changed that with his 1786 Virginia Statute of Religious Freedom, which disestablished the state church and by doing so guaranteed religious freedom for all citizens.

The weak rejoinder, “the phrase ‘separation of church and state’ is not in the Constitution,” is true only in the literal sense. The exact phrase was coined by Thomas Jefferson. The “wall of separation of church and state” metaphor comes from a letter Jefferson wrote on New Year’s Day, 1802. Congregationalism was the official state religion of Connecticut. The Baptists of Danbury, as nonadherents of that official state religion, wrote to President Jefferson expressing their hope that his stance on religious freedom would be adopted by their state. Jefferson responded on Jan. 1, 1802:

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

Jefferson did not believe that separation of state and church was a function of one of the religion clauses, but a central outcome of both.

This understanding of the First Amendment was adopted by the Supreme Court in its first religion clause cases. First, in *Reynolds v. United States* (1879), the Court cited Jefferson's writing and held that it "may be accepted almost as an authoritative declaration of the scope and effect of the [First] amendment."⁷

In the 1947 case, *Everson v. Bd. of Educ.*, the Court explained the meaning of the Establishment Clause and applied the clause to the states (through the Fourteenth Amendment in a process referred to as "incorporation"). The Court stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"⁸

To assist lower courts in applying these principles, the Supreme Court adopted a three-prong test in the 1971 case, *Lemon v. Kurtzman*. This decision synthesized the principles from previous religion clause cases into a simple test. The Court said that the Establishment Clause required any government action 1) must have a secular purpose; 2) must have a primary effect that neither advances nor inhibits religion; and 3) must not cause excessive government entanglement with religion.⁹

Over the years, the Court expounded on the Establishment Clause, analyzing its essential principles, at times using an endorsement test, a neutrality test, and a coercion test. The endorsement test was described in the 1980s and focused on the second prong of *Lemon*—stating that any government action that endorses or disparages religion is unconstitutional. Under the principles of neutrality, the government cannot favor one religion over another religion or religion over nonreligion.

The coercion test analyzes whether a government action coerces people to support or participate in religion against their will. Proof of coercion is sufficient to find government action unconstitutional but it has never been deemed necessary.

The Court has always applied the Establishment Clause broadly in the public school context, noting that school-sponsored religious activity inevitably has a coercive effect on children.

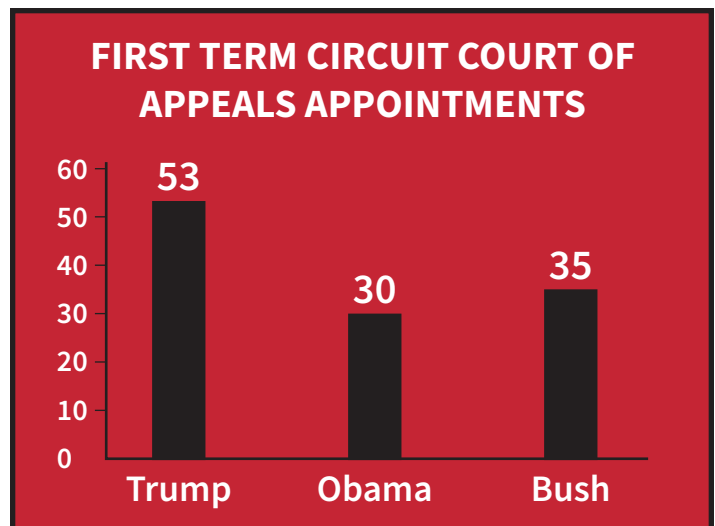
Ever since the *Lemon* test, the Court has modified and deviated from it, at times refusing to apply the test at all. Many conservative justices have shown open hostility toward applying the test.¹⁰ The Court sometimes used

a "historical context" analysis in order to let stand longstanding government practices that are clearly religious.

Beginning in the 1980s, the Court began to ease away from a clear separation between religion and government. That slow drift began to accelerate rapidly when John Roberts became chief justice in 2005 and is now proceeding at breakneck speed with Trump's appointees, who have moved the legal inquiry even farther away from the simple principles of state/church separation embodied in all the relevant case law. In fact, a 2019 Supreme Court decision, *American Legion v. American Humanist Association*, struck a devastating blow to the Establishment Clause and the constitutional principles it has always represented. In his concurring opinion, Justice Neil Gorsuch celebrated the limiting of *Lemon* and the fact that it will make it increasingly difficult for plaintiffs to even challenge unconstitutional government action: "[w]ith *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing."¹¹ State/church boundaries that have been safely settled since the American founding are now jeopardized or ignored by radical judges.

TAKEOVER OF THE FEDERAL COURTS

At the time of publication, President Trump has made three Supreme Court appointments, 53 appellate court appointments, and 170 district court appointments. His appointments have drastically outpaced his predecessors. Obama in his *entire* eight years in office appointed 55 judges to the courts of appeals, and only 30 of those were confirmed during his first term; George W. Bush in eight years appointed 62 courts of



appeals judges, with only 35 of those confirmed in his first term. Trump is poised to notch 54 courts of appeals appointments by the end of his single term in office.¹² Obama only made 143 district court appointments in his first four years in office. By contrast, Trump has already made 170 district court appointments, and that number will rise, since Senate Majority Leader Mitch McConnell has vowed to violate Senate norms to continue confirming nominated judges through the end of the lame duck 116th congressional session.

As of July 2020, Trump had already appointed almost a quarter of *all* active federal court judges, and by the end of this congressional term, Trump-appointed judges could account for more than one-third of all federal circuit court judges and a quarter of all district court judges.

Of the judges appointed by Trump as of July 2020, 85 percent are white and 75 percent are male.¹³ In addition to being overwhelmingly white and male, they are younger and less experienced than previous judicial appointees, with a median age of only 48.2 for individuals filling lifetime positions.¹⁴ Many of these appointees have zero judicial experience or law practice experience. Ten nominees were rated as “not qualified” for their positions by the nonpartisan American Bar Association. Rather, they were members of rightwing organizations, clerked for conservative judges, or have written articles or advocated for ultraconservative political positions. The only essential criteria for their selection has been their devotion to an ultraconservative Christian nationalist political ideology. The Freedom From Religion Foundation has been working to mobilize its members to oppose the many judicial nominees who are both unqualified and radically theocratic, but most nominees have been rammed through the confirmation process despite objections.

THE U.S. SUPREME COURT

Donald Trump has been used by Christian nationalist organizations to nominate judges whose ideologies are extreme on issues of religious freedom and the Establishment Clause. This impact is most obvious at the Supreme Court level. The Trump administration had the rare opportunity to fill three Supreme Court seats in one term, and Trump’s choices were all religious extremists pushed by Christian nationalist lobbying outfits because of their reactionary views. Their pre-Supreme Court records on the Establishment Clause were alarming, and now that they are sitting on the Court, we are already seeing the disastrous results.



Jeff Mateer

One of the only nominees who was successfully opposed, Jeff Mateer, was prevented from taking a lifetime appointment in 2017. One of many groups opposing Mateer, FFRF compiled the definitive record of Mateer’s unfitness for office. It submitted a full report to Senate Judiciary Committee members cataloging Mateer’s alarming disqualifications and voiced these concerns to Senate staffers during the confirmation process. Mateer previously worked for the Christian legal ministry, First Liberty Institute, an organization dedicated to redefining religious liberty to favor Christian nationalists. He termed the constitutional principle of separation between state and church a myth because it is not in the U.S. Constitution “verbatim.” Mateer also claimed that adultery, homosexuality and no-fault divorce are against God’s law. He called LGBTQ citizens “disgusting,” “sinful,” and prone to “debauchery” intent on bringing about “the complete destruction of marriage” and deemed transgenderism to be “part of Satan’s plan.”

While at the First Liberty Institute, Mateer apparently advised clients to violate the law when it furthered its religious agenda, in some cases costing local governments tens of thousands of dollars. One of the greatest dangers of Mateer’s appointment would have been serving as one of two district court judges in the jurisdiction where First Liberty Institute is located. And under the federal rules, he would have had no obligation to recuse himself from the Institute’s cases. That means that he could have decided every major case in the institute’s favor.

Jeff Mateer would have been a disaster for state/church separation, and his defeat was a great success. But his nomination shows just how far the Trump administration was willing to go to appoint radical judges to the federal bench for life.

Justice Neil Gorsuch

Justice Gorsuch has long cultivated his Christian nationalist legal ideology, landing him at the top of the list when Trump made his first Supreme Court appointment. According to the Peabody-winning SCOTUSblog, Gorsuch “is skeptical of efforts to purge religious expression from public spaces (like Scalia).”¹⁵ This antagonism was evident before Gorsuch joined the Supreme Court in two of his dissents. In each instance, the Tenth Circuit decided not to rehear a case that a three-judge panel had decided.

Gorsuch dissented when the Tenth Circuit decided not to rehear a case that ruled that roadside crosses on public land violated the Establishment Clause. He wrote that it was a “biased presumption” to assume that roadside crosses erected by the government and bearing government insignia are unconstitutional endorsements of religion.¹⁶ Gorsuch thinks the quintessential symbol of Christianity, the cross, stamped with state symbols, is not a religious endorsement, a view he put into a Supreme Court majority opinion in 2019¹⁷.

He also dissented when the Tenth Circuit decided not to rehear a case that removed a Ten Commandments monument from a county courthouse in Oklahoma. In that decision, Gorsuch wrote, “public displays focusing on the ideals and history of a locality do not run afoul of the Establishment Clause just because they include the Ten Commandments.” Gorsuch opined, “the Ten Commandments can convey a ‘secular moral message’ about the primacy and authority of law, as well as the ‘history and moral ideals’ of our society and legal tradition.” Gorsuch goes on to list a number of other Ten Commandments displays to conclude: “the upshot . . . is that this reality does not violate the First Amendment.”¹⁸

Gorsuch’s record reveals that he cannot be trusted to abide by even well-established legal principles within Establishment Clause law. Federal courts, including the Supreme Court, had long recognized that the Latin cross is an exclusively Christian symbol. Yet Gorsuch sought to uphold government displays of Latin crosses and the Ten Commandments — which begin, “I AM the LORD thy God, you shall have no other gods before me” — as not endorsing religion or Christianity. Unfortunately, he got his chance after his appointment to the Supreme Court.

Since his confirmation in 2017, Gorsuch has consistently voted to expand religious privilege and to limit the application of the Establishment Clause. He voted with a majority to require taxpayers to fund religious schools.¹⁹



Justice Neil Gorsuch

The Court majority in 2018 held that Colorado violated a bakery owner’s free exercise rights when state civil rights enforcement officials criticized the baker’s practice of refusing to sell wedding cakes to same-sex couples. But Gorsuch would have gone further and found that requiring the baker to sell wedding cakes on equal terms to same-sex couples violates his free speech rights.²⁰ Not one month after *Masterpiece Cakeshop*, Gorsuch joined a majority in upholding the Muslim travel ban, which Trump’s statements clearly showed was motivated by discrimination against Muslims.²¹ Gorsuch has also voted with a majority to expand the “ministerial exception,” which allows religious organizations to fire so-called “ministerial” employees for any reason — even because of race, sex, religion, age, national origin, etc. with legal impunity. Gorsuch would have gone further than the Court and deferred to religious organizations in designating any employee they wish as a “ministerial” employee.²²

In the 2019 ruling to uphold a giant Latin cross displayed on public land,²³ Gorsuch wrote separately to express his more extreme views that citizens should not even be allowed to challenge religious displays. He insisted that sectarian symbols on public land are constitutional whether or not they are longstanding or newly erected. “[A] practice consistent with our nation’s traditions is just as permissible whether undertaken today or 94 years ago.”

Justice Brett Kavanaugh

Justice Kavanaugh also signaled his disdain for the Establishment Clause and his desire to use religious liberty to privilege Christianity during his time on the D.C. Circuit Court of Appeals and when he was in private practice. In two years on the high court, he has already had several opportunities to push his Christian nationalist agenda.

As a judge on the D.C. Circuit Court of Appeals, when the Court dismissed on procedural grounds a case challenging the addition of “so help me God” to the presidential oath and inaugural prayers, Kavanaugh wrote separately to say that the challengers should have lost on the merits “because those longstanding practices do not violate the Establishment Clause.”

In two cases Kavanaugh sided with the U.S. Navy chaplaincy and against plaintiffs alleging various forms of discrimination, including actions that favored Catholics over other chaplains.²⁴

Before his appointment to the D.C. Circuit Court of Appeals, while in private practice, Kavanaugh represented pro-voucher Florida Governor Jeb Bush in a constitutional challenge to Florida’s school voucher legislation. Florida plaintiffs — including a branch of the NAACP, the Florida Education Association, and the AFL-CIO — sued Bush and the Florida Department of Education over the allocation of public funds to private religious schools through a voucher system.²⁵ The Florida Supreme Court held unconstitutional the voucher system Kavanaugh had defended.

Also while in private practice, Kavanaugh wrote a friend of the court brief in the 2000 Supreme Court school prayer case, *Santa Fe Independent School District v. Doe*.²⁶ In that case, the Court ruled that it is unconstitutional for prayers, even if student-led, to be delivered over the school public address system at school-sponsored events. Kavanaugh filed the amicus brief on behalf of U.S. Rep. Steve Largent, a former football player, defending the imposition of prayers upon students. Throughout the brief, Kavanaugh argued that the case was about “banning” students’ religious speech. It was really about a public school with a tradition of school-sponsored prayer continuing its practice of using the public address system for imposing prayer on students pursuant to a school board policy. That distinction is crucial, and Kavanaugh’s inability to grasp it was disturbing.

In that same brief, Kavanaugh used inflated language to disparage advocates of the First Amendment’s state/



Justice Brett Kavanaugh

church separation as “absolutist[s],” “hostile to religion in any form,” advocating for an “Orwellian world,” and seeking “the full extermination of private religious speech from the public schools” and “to cleanse public schools throughout the country of private religious speech.” In an astonishing paragraph, he portrayed Christians as beleaguered and downtrodden folks “below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes.”²⁷

In one of the most foreboding passages in the brief, Kavanaugh signaled that he does not think the Supreme Court should even apply legal tests to the Establishment Clause. Kavanaugh wrote, “In Establishment Clause cases, the search for an overarching test is not always necessary, and can sometimes be counterproductive or even harmful.” In other words, it appeared he would happily overrule the critical rule of law laid out in *Lemon*. In his very first term on the Supreme Court, he got his chance and voted to do just that.

Since his appointment to the Supreme Court, Kavanaugh, like Gorsuch, has consistently ruled in line with Christian nationalist ideology. He voted with Gorsuch in 2019 to uphold an outsized Latin cross displayed on public property. Just as he had argued as a private lawyer,

Kavanaugh wrote separately that he would have gone further than the Court and held that the *Lemon* test does not apply to Establishment Clause cases. As he said of religious symbols on government property, “If the challenged government practice is not coercive and if it . . . is rooted in history and tradition . . .” there is no constitutional violation.²⁸ In his view, there is not much the government could do to violate the Establishment Clause.

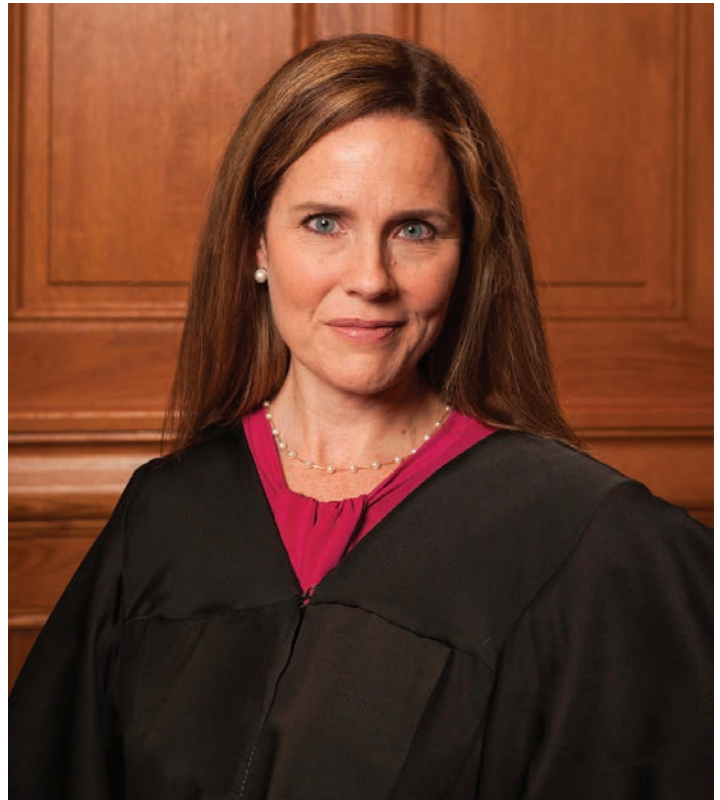
Also in line with Gorsuch, Kavanaugh has voted during his time on the Court to require taxpayers to fund religious schools and to expand the law that allows religious organizations to fire their “ministerial” employees on the basis of race, sex, religion, age, national origin, etc.²⁹

Justice Amy Coney Barrett

Amy Coney Barrett was a judge for less than three years before Trump elevated her to the Supreme Court in 2020, but her sparse record may be the most alarming of Trump’s justices.³⁰ Through her career and personal life, Barrett has made it clear that everything, including the law, is a means to promoting her personal religion and, as she once phrased it, the “Kingdom of God.” Supreme Court justices must take an oath of office to “support and defend the Constitution . . . and bear true faith and allegiance to the same,” not to church doctrine.

Prior to her judgeship on the Seventh Circuit, she was a law professor. During that time in 2015, Barrett signed a letter from “Catholic women” to the “Synod Fathers in Christ,” in which the women “wish to express our love for Pope Francis, our fidelity to and gratitude for the doctrines of the Catholic Church, and our confidence in the Synod of Bishops as it strives to strengthen the Church’s evangelizing mission.”³¹

The letter expressed Barrett’s views, in thinly coded language, on a number of topics that are likely to come before the Supreme Court: “We give witness that the Church’s teachings — on the dignity of the human person and the value of human life from conception to natural death; on the meaning of human sexuality, the significance of sexual difference and the complementarity of men and women; on openness to life and the gift of motherhood; and on marriage and family founded on the indissoluble commitment of a man and a woman.” In other words, Barrett has publicly pledged to support Catholic teachings against death with dignity legislation, against contraception and abortion, against LGBTQ rights and marriage equality, and even against divorce.



Justice Amy Coney Barrett

Barrett and other signers indicated they “enthusiastically commit our distinctive insights and gifts, and our fervent prayers, in service to the Church’s evangelizing mission.” When that mission conflicts with her duties as a judge, it’s clear from her public statements where Barrett’s allegiance would lie.

In 1998, Barrett coauthored an article about the conflict of Catholic dogma and the law,³² which she wrote can put “Catholic judges in a bind. They are obliged by oath, professional commitment, and the demands of citizenship to enforce the death penalty. They are also obliged to adhere to their church’s teaching on moral matters.”

The article was couched in terms of judges recusing themselves from death penalty cases. But a closer reading reveals that the mindset would give it a broader application: “a more precise statement of the church’s teaching requires a few qualifications. The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.”

In this article, Barrett criticized Supreme Court Justice William Brennan’s response, during his 1957 confirmation hearings, to a question about keeping matters of faith separate from matters of law. Brennan gave the only answer a federal official should give:



The Barrett family bible at Amy Coney Barrett’s swearing-in ceremony. Official White House Photo by Andrea Hanks

“Senator, [I took my] oath just as unreservedly as I know you did . . . And . . . there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.”

Barrett and her coauthor attacked this exemplary answer: “We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.”

Instead of upholding her secular oath, when such a conflict arises, Barrett recommended that judges should “conform their own behavior to the [Catholic] Church’s standard.”

For Barrett, her “legal career is but a means to an end . . . and that end is building the Kingdom of God.”³³ This was not an off-the-cuff remark. She said it at the Notre Dame Law school commencement in 2006. This was the message she wanted new lawyers to carry into the profession — use your position to create a Kingdom of God.³⁴

In an unprecedented and rushed timeframe, Barrett was confirmed by the Senate during a presidential election. With that confirmation, the Christian nationalist takeover of the U.S. Supreme Court is complete. While she has only ruled on a few cases so far, she has already flipped the Court on an issue of life or death — public health restrictions during the COVID-19 pandemic.

The Supreme Court’s new era of Christian nationalism

In July 2020, in a 5-4 decision, the Supreme Court allowed public health restrictions on church services to stand in Nevada and California, which these states imposed to curb a deadly pandemic. Kavanaugh and Gorsuch both argued in dissent that the Court should exempt churches from these public health restrictions.³⁵ Just four months later, thanks to Barrett, the Court flipped on this issue. The Constitution did not change, just personnel. Despite the fact that the restrictions had already been lifted due to falling infection rates, the new majority, in a 5-4 decision the other way, broadcast their displeasure with the decisions of public health officials to characterize worship services as something less than “essential” during the pandemic closures. The justices characterized this classification of worship services as “religious discrimination” forbidden by the First Amendment.³⁶

Gorsuch wrote separately with sarcasm and disdain toward the government prioritizing secular needs over the desire of certain religions to worship in person. He repeatedly lashed out at New York public health officials for their decision to characterize worship services as less essential than secular business, “The only explanation for treating religious places differently, seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular places.”

This dangerous decision stripped the right of state public health officials to use a neutral metric — risk posed to the community — in deciding which public events and spaces



A man protests public health restrictions on church services in California. John Doukas / Shutterstock

to limit and close during a pandemic. The Court ignored the legitimate public health reasons for state and local governments to place restrictions on church services that are commensurate with restrictions placed on events posing similar risks (movie theaters, stage performances, lectures, etc.). But for the Christian nationalist justices, religion must occupy a place of privilege.

This ruling clearly signals that the new Christian nationalist majority is ready to move full steam ahead to weaponize and redefine religious liberty, with dangerous consequences.

CIRCUIT COURTS OF APPEAL

Trump has packed the lower federal courts with 215 judges who may now feed cases to the new ultraconservative Christian majority on the Supreme Court. Christian nationalists are desperate to take religious freedom cases before the high court in order to reshape longstanding constitutional law.

However, since only a tiny fraction of the cases that are decided in the federal courts are reviewed by the Supreme Court, the impact of radical judges is greatest in the district and circuit courts of appeal. The vast majority of constitutional cases are settled in lower federal courts, and the Christian nationalist judges who have been elevated to these courts are eagerly deciding “religious liberty” cases. Often, it is lower court and appellate court judges who are doing the most damage on behalf of Christian nationalism.

The Circuit Courts of Appeal have enormous power over the lives of Americans, since they have the last word on most federal appeals, and because most Supreme Court justices are appointed from their ranks. By July of his fourth and last year in office, Trump had appointed 53 judges to the circuit courts, more than any other president since Jimmy Carter. Like their Supreme Court counterparts, these appointees have already been busy using their power to weaken the Establishment Clause and weaponize “religious liberty” to expand the rights of Christians while limiting the rights of others.

These Trump appointees to powerful courts of appeal include:

- **Judge Kevin Newsom**, an appointee to the Eleventh Circuit, who in September 2018 voted “reluctantly” to follow long-established case law and strike down a large cross maintained by the city on public property. His opinion dripped with disdain for the Establishment

Clause, calling Supreme Court case law on the subject a “hot mess” and a “wreck.” He openly urged the Supreme Court to overrule the opinion in favor of allowing crosses on public land since there is “lots of history underlying the practice.”³⁷ The Supreme Court took up his admonition the following year, eviscerating decades of federal court precedent and upholding a cross on public land (see *American Legion v. American Humanist Association*, above).

- Ninth Circuit **Judge Ryan Nelson**, who in December 2018 (joined by another Trump judge, Mark Bennett) wrote, “. . . [T]he Lemon ghouls³⁸ (while largely ignored by the Supreme Court), has stalked the lower courts, no longer just frightening little children but increasingly devouring religious expression in the public square.”³⁹ Nelson was dissenting from a ruling to deny rehearing a case that struck down school-sponsored prayer at board meetings.

- Eighth Circuit **Judge David Stras**, who wrote a majority opinion in 2019 holding that a wedding video company was likely to succeed in its claim that it has a constitutional right to deny service to same-sex couples in violation of Minnesota’s anti-discrimination laws. He argued that wedding videos produced for customers constitute the videographers’ speech, and forcing them to provide such services therefore violates their free speech rights, since they “do not want to make videos celebrating same-sex marriage, which they find objectionable. Instead, they wish to actively promote opposite-sex weddings through their videos . . . Compelling speech in this manner . . . ‘is always demeaning.’⁴⁰”

- **Judge James Ho**, an appointee to the Fifth Circuit, who wrote in dissent that religious objections could invalidate a fire department’s immunization policy. Ho argued that the free exercise clause demands more than neutrality under the law; it must accommodate the devoutly religious above others. “It would be of little solace to the person of faith that a nonbeliever might be equally inconvenienced. For it is the person of faith whose faith is uniquely burdened — the non-believer, by definition, suffers no such crisis of conscience.”⁴¹

- **Judges Barbara Lagoa and Britt Grant** of the Eleventh Circuit Court of Appeals, who formed the majority of a three-judge panel in November 2020, granting a preliminary injunction against an ordinance that bans conversion therapy of minors. Dismissing evidence of the harm conversion therapy causes to children, they said, “People have intense moral, religious, and spiritual views about these matters — on all sides. And that is exactly why the First Amendment does not allow communities to

determine how their neighbors may be counseled about matters of sexual orientation or gender.”⁴²

• **Judges Amul Thaper and Joan Larson**, on a Sixth Circuit panel, recently heard oral arguments on an appeal over dismissal of a professor’s lawsuit against a public university that disciplined him for intentionally misgendering a transgender student. During the hearing, Thaper posed the hypothetical of the university requiring a Jewish professor to refer to a student as “my Fuhrer” to illustrate the consequences of a ruling requiring professors to refer to trans students in class by their proper pronouns.⁴³

FEDERAL DISTRICT COURTS

Like circuit court judges and Supreme Court justices, district court judges enjoy lifetime appointments. District courts serve as the trial courts for the federal system, so they determine the facts of cases and are responsible for deciding the vast majority of federal cases. Trump has appointed 170 district court judges, as of the publish date of this report. Sadly, the year 2020 has given several of them their first chance to grandstand for Christian privilege, thanks to public health restrictions amid the COVID-19 pandemic.

In April 2020, Trump-appointed **Judge Justin Walker** of the U.S. District Court for the Western District of Kentucky, ruled to allow large Christian congregations to gather for Easter services in violation of a neutral statewide pandemic public health, Walker stated: “On Holy Thursday, an American mayor criminalized the communal celebration of Easter.” Walker’s opinion reads like the first draft of a Christian nationalist manifesto. “It was not long ago, for example, that the government told the Supreme Court it can prohibit a church from choosing its own minister; force religious business owners to buy pharmaceuticals they consider abortion-inducing; and conscript nuns to provide birth control.”⁴⁴ Despite being rated as not qualified for judicial office by the nonpartisan American Bar Association, Walker was nominated and confirmed shortly after this opinion to the D.C. Circuit Court of Appeals, which is thought of as the second most powerful court in the nation.

In October 2020, Trump appointee **Daniel D. Domenico** of the U.S. District Court for the District of Colorado granted in part a temporary restraining order barring enforcement of state public health orders against churches, writing, “And while the religious, like the irreligious or agnostic, must comply with neutral, generally applicable restrictions, the First Amendment does not allow

government officials, whether in the executive or judicial branch, to treat religious worship as any less critical or essential than other human endeavors.”⁴⁵

Also in October 2020, **Trevor N. McFadden**, a Trump appointee to the U.S. District Court for the District of Columbia, granted in part a temporary restraining order barring enforcement of a public health order restricting churches from holding outdoor worship services in excess of 100 congregants. He quoted scripture in his opinion, arguing, “It is for the Church, not the District or this Court, to define for itself the meaning of “not forsaking the assembling of ourselves together.” Hebrews 10:25.”⁴⁶

CONCLUSION

We are only seeing the early stages of the coming radical changes to how religious liberty is defined in America. As Trump appointees continue to decide cases in the decades to come, we will continue to see “religious liberty” used to undermine the laws that keep us all safe and protect us from discrimination. We will continue to see courts give their “blessings” to government favoritism of religion. Radical religious-right legal advocacy groups, like Alliance Defending Freedom and First Liberty Institute, are celebrating these judicial appointments with good reason. Knowing they have friendly federal judges, they are feverishly taking cases that seek to radically redefine religious liberty.

Government should not take sides on religious questions; it should neither endorse nor oppose any religious viewpoint. Anti-discrimination laws should be enforced without exception for religious actors. Workers employed by religious employers should have the same legal protections as all other workers.

Our godless Constitution separates church from state, and federal courts have long defended that founding American principle. Our nation has always understood religious freedom is a protection, not a weapon. The conservative Christian nationalists who’ve captured the courts have turned these and other hallowed principles on their head.

In 2016, 81 percent of white evangelical Christians voted for Donald Trump, and in return they’ve gotten a federal judiciary willing to codify religious privilege while stripping the rights of minorities. We must reclaim our federal courts from theocrats if the cherished constitutional principles of secular government and true religious freedom are going to survive. This can only be done through reforms to our federal court system.

ENDNOTES

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- 8 *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947)
- 9 *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)
- 10 Justice Thomas has repeatedly argued that the Establishment Clause is not rightfully incorporated against the states, and merely prohibits the federal government from passing laws that establish a national religion. E.g. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2102, 204 L. Ed. 2d 452 (2019) (Thomas, J., concurring).
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- 14 Wheeler, R. (January 28, 2020). *Judicial appointments in Trump's first three years: Myths and realities*. The Brookings Institution. Retrieved December 14, 2020 from <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/>
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- 22 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 207 L. Ed. 2d 870 (2020)
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- 24 *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008); *In re Navy Chaplaincy*, 738 F.3d 425 (D.C. Cir. 2013).
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ENDNOTES

- 34 Some commenters have shrugged off this “Kingdom of God” language, saying that it doesn’t really mean a religious takeover of the secular. But the official magazine for Barrett’s religious group, People of Praise, says differently. It ran an excerpt from a talk at the National Catholic Charismatic Renewal Conference at Notre Dame LINK that reads: “God is really interested not just in men’s souls but also in their whole life, work and enterprise. He wants all of it transformed into his kingdom. This means that what we often see as secular or worldly—jobs, career, economic programs, public and private education, health services, criminal justice and the courts, local, national, international politics and economics, questions of war, peace and justice, radio, TV, music and art—all are meant to be transformed into the kingdom of God in the earth.” See Ranaghan, K. (2017). *Renew the face of the Earth: How should we view the world?* People of Praise, 13. https://web.archive.org/web/20190107071327/https://peopleofpraise.org/media/pdf/V&B%20Late%20Spring%202017%20web%20_ZXr0eZb.pdf#page=13
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- 36 *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020) (5-4 decision) (Kavanaugh, J. & Gorsuch, J. concurring)
- 37 *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297, 1306 (9th Cir. 2018)
- 38 Nelson was latching onto a metaphor used in the past by Justice Scalia, who referred to Establishment Clause jurisprudence as a “late-night ghoul.” See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, 113 S. Ct. 2141, 2149, 124 L. Ed. 2d 352 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”)
- 39 *Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019)
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- 44 *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 907 (W.D. Ky. 2020)
- 45 *Denver Bible Church v. Azar*, No. 120CV02362DDDNRN, 2020 WL 6128994, at *1 (D. Colo. Oct. 15, 2020)
- 46 *Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020)

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