



What's at Stake with the Next Supreme Court Justice? The Separation of Church and State

The separation of church and state is the linchpin of religious freedom. President Trump, however, has shown that he has little respect for this fundamental American value, so it is no surprise that he has chosen Brett Kavanaugh as his Supreme Court nominee. Kavanaugh believes that the “wall of separation” metaphor, long used to explain the protections guaranteed to us by the Establishment Clause of the First Amendment, “was wrong as a matter of law and history.”

It is important to ask whether Kavanaugh will uphold the Establishment Clause, which guarantees the separation of church and state, because we cannot afford to have a Supreme Court that won't. Religious freedom for all Americans hangs in the balance.

The separation of church and state ensures that religious exemptions are not used to harm others.

Over the past several years, the Supreme Court has been asked to consider whether businesses and institutions can use religion to violate or obtain exemptions from laws that protect and provide benefits to others, particularly women and LGBTQ people. In *Burwell v. Hobby Lobby*, the Court held that businesses could cite religion to refuse to follow a law requiring them to provide employees with insurance coverage for birth control. And *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, decided just a few weeks ago, involved a business that violated a state antidiscrimination law when it refused to serve a same-sex couple. In *Masterpiece Cakeshop*, Justice Kennedy said:

[I]t is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

More cases like these will make their way to the Court. The Court could hear cases involving businesses that seek religious exemptions that would allow them to fire employees who do not live according to certain religious tenets, or refuse to sell goods to LGBTQ customers. Other cases may challenge Trump Administration rules that create religious exemptions that put people's access to basic healthcare at risk, or state laws that allow adoption and foster care agencies to use religion to deny kids loving homes and vital services.

A long line of Establishment Clause cases prohibits religious exemptions that result in harm to others, but the balance of the Court could turn against this critical constitutional protection.

The separation of church and state ensures that taxpayer dollars aren't used to build houses of worship or fund religious activities.

In 2017, the Supreme Court ruled in *Trinity Lutheran Church of Columbia v. Comer* that the state of Missouri could not exclude a church from a taxpayer-funded grant program that pays to resurface playgrounds. This decision was unprecedented, as it held that a state *must* cut a check to a church under certain conditions. This upends the bedrock constitutional principle that we each get to decide for ourselves whether and how our money goes to support religion.

The decision was explicitly limited to the facts of the case and applies only to playground resurfacing. Some concurring Justices, however, would have broadly extended the decision. And since the ruling, the case has been used to argue that the government should provide funding to rebuild houses of worship; that state constitutional provisions prohibiting private school vouchers should be nullified; and that the government must be required to give grants to foster care providers that discriminate against Jewish, Catholic, and LGBTQ families. The Supreme Court will likely hear a case in the coming years about the scope of *Trinity Lutheran*, and the constitutional limits on the use of taxpayer dollars hang in the balance.

The separation of church and state ensures that public school students should not be forced to pray in school.

Because students in the public schools are impressionable and a captive audience, the Supreme Court has for more than five decades held that public schools must not sponsor prayer, promote religion, or coerce students to participate in religious activities. Yet public schools across the country continue to violate the Constitution: there are currently cases brought by students and parents challenging the actions of public school teachers who recite prayers in the classroom, public school officials who lead prayer at school events, and coaches at public schools who tell players to pray in the locker room. In the last two school prayer cases considered by the Supreme Court, *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, Justice Kennedy sided with students and their families who objected to school-sponsored prayer. This core constitutional protection is now on the line. Students and their parents—not public schools—should determine whether and how to participate in religious activities. And no students should be made to feel like outsiders in their own public schools for not participating.

The separation of church and state ensures that public schools teach science and not religion in science classrooms.

In *Edwards v. Aguillard*, the Supreme Court struck down a law that required public schools to teach creationism if they also taught evolution. The Court has changed entirely since that ruling, and the balance of the Court could now reverse this fundamental protection for religious freedom. The Court could be required to rule on whether to allow teaching creationism or intelligent design in science class, teaching the Bible in a devotional manner, or teaching history classes that present America as a Christian nation. To protect the religious freedom of all students and their parents, public schools must be neutral toward religion—neither promoting religion nor disparaging it.

The separation of church and state ensures that people of all faiths and people who are nonreligious are treated equally.

The government may not favor the practice and values of a particular religion over other religions, or religion in general over nonreligion. Nor may the state show hostility to or disparage a particular religion, religion in general, or nonreligion. In *Masterpiece Cakeshop*, the Supreme Court ruled that the government must not make policy based on hostility to a religion. In that case, which involved perceived hostility to Christianity, the Court explained that we cannot tolerate “even ‘subtle departures’” from religious neutrality. Yet, a few weeks later in *Hawai’i v. Trump*, the Court was willing to ignore the blatant religious animus behind President Trump’s Muslim Ban. The divergence between the two cases—one going out of its way to label behavior as hostile to Christians, and the other going out of its way to dismiss Trump’s hostility to Muslims—is troubling.

People should be able to go to court to challenge laws that violate the separation of church and state.

The protections provided by the Constitution don’t mean much if you can’t get into court to enforce them. Over the last several decades, the Supreme Court has been chipping away at “taxpayer standing”—the rule that taxpayers can challenge government expenditures that support religion and violate the Establishment Clause. In *Hein v. Freedom From Religion Foundation*, Justice Kennedy wrote a concurrence rejecting arguments that taxpayer standing in Establishment Clause cases should be entirely abolished. A future Court without Justice Kennedy could rule differently.