

# White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom

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## INTRODUCTION

An increasing number of legal scholars and political scientists acknowledge that, in most cases, Supreme Court decision-making is based on neither pure law nor pure politics.<sup>1</sup> Rather, the Justices' votes

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<sup>1</sup> See MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 15–16, 65–66 (2011); CHARLES GARDNER

and the Court's decisions arise from an uncertain amalgam of law and politics—a law-politics dynamic, we might say.<sup>2</sup> Politics, though, is not static.<sup>3</sup> The conservative politics of 1990 is not the same as the conservative politics of 2021, including in relation to judicial decision-making. Hence, while a conservative majority has controlled the Court since 1991, when Clarence Thomas replaced Thurgood Marshall,<sup>4</sup> the ramifications of political conservatism for the Court's decision-making have significantly transformed over the years.

This Article traces the evolution of conservatism during the late twentieth and early twenty-first centuries and explores the implications of that history for the Court's recent religious freedom cases, with a focus on *Fulton v. City of Philadelphia*.<sup>5</sup> To be sure, changes in the Court's personnel affect the politics of the Court's decisions. Moving from a liberal icon, like Marshall, to an ultra-conservative, like Thomas, will inevitably change the politics of Supreme Court adjudication.<sup>6</sup> The same can be said about the more recent transition from Ruth Bader Ginsburg to Amy Coney Barrett. Yet, one should not overlook

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GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 4 (2016); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008 (2009); Lawrence Baum, *Law and Policy: More and Less Than a Dichotomy*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT AND WHAT'S AT STAKE 71 (Charles Gardner Geyh ed., 2011); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1492 (2001); Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 466 (2001). "Everyone ought to agree that decisions on highly contentious matters blend law and politics." MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 219 (2020). "[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day." James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 196 (2011).

<sup>2</sup> See generally STEPHEN M. FELDMAN, PACK THE COURT!: A DEFENSE OF SUPREME COURT EXPANSION 67–93 (2021).

<sup>3</sup> See DONALD T. CRITCHLOW, AMERICAN POLITICAL HISTORY: A VERY SHORT INTRODUCTION 1–6 (2015).

<sup>4</sup> *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Oct. 3, 2022).

<sup>5</sup> See generally 141 S. Ct. 1868 (2021).

<sup>6</sup> For rankings of Supreme Court Justices based on political ideology, see LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 106–16 (2013) (data drawn from Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557–65 (1989)).

the importance of less extreme transitions, such as the replacement of the moderately conservative Sandra Day O'Connor with the arch-conservative Samuel Alito. Regardless, given that a conservative bloc has controlled the Court for thirty years, this Article is less concerned with the politics of individual Justices and more concerned with broader trends in conservative politics.<sup>7</sup>

For instance, before 1991, conservatives often advocated for judicial restraint: the Justices, according to this viewpoint, should have been deferring to the democratic process.<sup>8</sup> If the Court was reviewing

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<sup>7</sup> For useful sources on conservatism in general during the latter half of the twentieth century and the early twenty-first century, see generally SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* (1995); LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (1st ed. 2001); GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (3d ed. 2006); DANIEL T. RODGERS, *AGE OF FRACTURE* (2011); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960s* (1st ed. 2012); SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974-2008* (2008); Peter Berkowitz, *Introduction* to RANDY E. BARNETT ET AL., *VARIETIES OF CONSERVATISM IN AMERICA* xiii (Peter Berkowitz ed., 2004); Adam Wolfson, *Conservatives and Neoconservatives*, reprinted in *THE NEOCON READER* (Irwin Stelzer ed., 2004). For useful sources on neoliberalism, which has influenced conservatism for decades, see generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2012) [hereinafter JONES, *MASTERS*]. For useful sources on white Christian nationalism, whether emphasizing white supremacy or Christianity, see generally CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* (1st ed. 2016); KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* (2018); JOSEPH DARDA, *HOW WHITE MEN WON THE CULTURE WARS: A HISTORY OF VETERAN AMERICA* (2021); ASHLEY JARDINA, *WHITE IDENTITY POLITICS* (1st ed. 2019); ROBERT P. JONES, *WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY* (2020) [hereinafter JONES, *TOO LONG*]; ROBERT P. JONES, *THE END OF WHITE CHRISTIAN AMERICA* (1st ed. 2016) [hereinafter JONES, *END*]; KHYATI Y. JOSHI, *WHITE CHRISTIAN PRIVILEGE: THE ILLUSION OF RELIGIOUS EQUALITY IN AMERICA* (1st ed. 2020); SARAH POSNER, *UNHOLY: WHY WHITE EVANGELICALS WORSHIP AT THE ALTAR OF DONALD TRUMP* (2d ed. 2021); KATHERINE STEWART, *THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* (2d ed. 2022); JEMAR TISBY, *THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM* (2019); ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* (2020); LEONARD ZESKIND, *BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM* (1st ed. 2009).

<sup>8</sup> See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 25–28 (1975); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695 (1979) (arguing against a right to welfare as being neither a specified right nor a secondary right necessary to government processes); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6–11 (1971) (arguing that the judiciary should not choose fundamental values).

the constitutionality of a congressional action, to take one example, the Justices should refrain from substituting their own values for those of Congress. After 1991 and the establishment of conservative control of the Court, conservatives quickly lost interest in judicial restraint and instead began advocating for “judicial engagement.”<sup>9</sup> Conservatives, in other words, encouraged the Court to articulate and implement conservative values rather than deferring to the democratic process.<sup>10</sup> Still, though, what values were the Justices to articulate and implement? In short, what did (and does) conservatism mean for the Court?

Part I of this Article explores how political conservatism developed during the late twentieth and early twenty-first centuries. This Part of the Article does not comprehensively explain the complex and multi-faceted history of conservatism during this era. Rather, it draws on historical threads that intertwine in ways that are especially important for understanding the Court. It discusses an intellectual movement, neoliberalism, and a grass-roots movement, white Christian nationalism. Aspects of the latter movement appeared initially on the conservative fringes, but the movement would eventually progress into the mainstream, where it would intersect with neoliberalism in recent Republican politics. Part II begins by analyzing how political conservatism was manifested in the Court’s landmark 1990 free exercise decision, *Employment Division, Department of Human Resources v. Smith*.<sup>11</sup> This Part then explores how changes in political conservatism have affected the Roberts Court’s religious freedom cases—with religious freedom (or religious liberty) encompassing issues under both the Establishment and Free Exercise Clauses. Part II then focuses on the Court’s recent free exercise decision, *Fulton*, and how Chief Justice John Roberts’s majority opinion and Justice Samuel Alito’s concurring opinion (concurring in the judgment) illustrate not

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<sup>9</sup> CLARK M. NEELY, III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* 2 (1st ed. 2013); Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 *TEX. L. REV.* 215, 255 (2019).

<sup>10</sup> *E.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring in the judgment) (suggesting the Court should overrule decisions inconsistent with original meaning); Douglas H. Ginsburg, *Delegation Running Riot*, 1 *REGUL.* 83, 84 (1995) (arguing to restore the “Constitution-in-Exile,” or in other words, to return to pre-1937 conceptions of the Constitution); *see* Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 608–09 (2004).

<sup>11</sup> *See generally* 494 U.S. 872 (1990).

only current conservative politics but also the future of free exercise jurisprudence. Part III is a conclusion.

The basic story is as follows: when the Court decided *Smith*, political conservatism was manifested in a constitutional jurisprudence of judicial restraint, which demanded that courts defer to democracy. The Roberts Court Justices, though, inhabit a different world of conservative politics. Many conservatives today believe Christianity is under siege due (partly) to the nation's growing secularism and religious pluralism. From this perspective, democracy is fraught with danger, so conservatives demand strong judicial protection of religious freedom—especially for white Christians. The Court's recent religious freedom decisions reflect these politics of white Christian grievance and anxiety. In *Fulton*, Roberts and Alito disagreed about whether the Court needed to overrule *Smith* explicitly, but despite their disagreement, both of their opinions effectively repudiated *Smith* and articulated a jurisprudence of free exercise corresponding with current political conservatism.

Of course, the jurisprudence of religious freedom did not first emerge in the late twentieth and early twenty-first centuries. Significantly, for many decades after the Revolution and the framing, the American population was overwhelmingly Protestant.<sup>12</sup> Despite the First Amendment religion clauses, back then the nation was de facto Protestant-Christian,<sup>13</sup> which was manifested in unofficial and official ways.<sup>14</sup> Thus, in 1811, the famed nineteenth-century judge,

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<sup>12</sup> See WINTHROP S. HUDSON & JOHN CORRIGAN, *RELIGION IN AMERICA: AN HISTORICAL ACCOUNT OF THE DEVELOPMENT OF AMERICAN RELIGIOUS LIFE* (5th ed. 1992) (discussing church membership in early nineteenth century); MARTIN E. MARTY, *PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE* 40–41, 67 (2d ed. 1986) (discussing de facto establishment of Protestantism in the early republic).

<sup>13</sup> See WINTHROP & CORRIGAN, *supra* note 12; MARTY, *supra* note 12, at 67.

<sup>14</sup> Protestant anti-Catholicism influenced the American understanding of religious freedom for much of the nation's history. See STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 119–20, 190, 201, 203, 207, 223–24 (1997) [hereinafter FELDMAN, *PLEASE DON'T*]; see generally PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 193 (2002). One can consequently depict the nation as de facto Protestant, at least throughout the nineteenth century. During the twentieth century, Protestant-Catholic tensions eased, and the nation became de facto Christian, encompassing both Protestantism and Catholicism. For discussions of Protestant-Catholic relations and their implications for the Court's religious freedom decisions, see generally Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279 (2001).

James Kent, wrote: “[W]e are a christian people, and the morality of the country is deeply ingrafted upon christianity and not upon the doctrines or worship of [non-Christian] imposters.”<sup>15</sup> Similarly, Supreme Court Justice Joseph Story, the leading legal scholar of the antebellum period, emphasized religious freedom<sup>16</sup> yet simultaneously stressed that “it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects.”<sup>17</sup> The First Amendment, according to Story, did not require equal treatment for Christian and non-Christian religions: “The real object of the 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.”<sup>18</sup> In fact, the Court rarely decided religious freedom cases before World War II, and in those cases, the Justices largely protected and bolstered de facto Christianity.<sup>19</sup> After World War II, though, the Court responded to the nation’s burgeoning religious pluralism by recognizing stronger constitutional protections for religious freedom and equality.<sup>20</sup>

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<sup>15</sup> *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811), reprinted in 5 THE FOUNDERS’ CONSTITUTION 101, 101 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>16</sup> Story stressed “the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one’s conscience.” JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 628 (Melville M. Bigelow ed., 5th ed. 1891); see *id.* at 631 (emphasizing freedom of conscience).

<sup>17</sup> *Id.* at 628.

<sup>18</sup> *Id.* at 631–32. Story, therefore, believed state establishments were acceptable.

<sup>19</sup> *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 167–68 (1878) (upholding federal conviction for polygamy); see generally FELDMAN, PLEASE DON’T, *supra* note 14, at 175–217 (discussing religious freedom in the late nineteenth and early twentieth centuries).

<sup>20</sup> *E.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (holding posting of the Ten Commandments in public school classrooms is unconstitutional); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 307 (1963) (holding unconstitutional the recitation of the Lord’s prayer in public schools); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (holding that the reciting of an ostensibly nondenominational prayer in public school classrooms violated the Establishment Clause). I am not suggesting, however, that the nation’s de facto Protestant background no longer had any influence on the Justices. See generally FELDMAN, PLEASE DON’T, *supra* note 14, at 218–54 (discussing post-World War II developments in religious freedom).

## I. THE DEVELOPMENT OF POLITICAL CONSERVATISM

Two main forms of political conservatism emerged after the New Deal and World War II. Libertarians, influenced by Friedrich Hayek's *Road to Serfdom*, published in 1944, emphasized the protection of individual liberties, especially economic liberties.<sup>21</sup> Above all else, they wanted minimal government.<sup>22</sup> Traditionalists, led by Russell Kirk, expressed a Burkean reverence for tradition and religion as sources of values.<sup>23</sup> They, too, preferred minimal or restrained government, particularly in foreign affairs, but unlike libertarians, they worried that individuals would abuse liberty and become licentious. Moral clarity was crucial.<sup>24</sup>

These two forms of conservatism, one emphasizing liberty and the other emphasizing moral clarity, sometimes clashed,<sup>25</sup> but they would both remain prominent through the late twentieth and early twenty-first centuries. Some theorists, such as the neoconservatives, and some politicians, notably Ronald Reagan, tried to harmonize libertarianism and traditionalism, or at least bring them together under a big tent.<sup>26</sup> Yet, distinct variations of each form would develop and eventually gain a stranglehold on the Republican Party.<sup>27</sup> Specifically, neoliberalism became a dominant form of libertarianism, while white Christian nationalism—as it began to emerge in the 1960s and 1970s—was a virulent manifestation (or perversion) of traditionalism. For many years, commentators have discussed the influence of neoliberalism on Republican politics—and on the Democrats as well, particularly in the

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<sup>21</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 17–18 (1944); Wolfson, *supra* note 7, at 38.

<sup>22</sup> Berkowitz, *supra* note 7, at xvii–xviii.

<sup>23</sup> RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 7–8 (1953); NASH, *supra* note 7, at 104–15; Wolfson, *supra* note 7, at 217.

<sup>24</sup> See Berkowitz, *supra* note 7, at xiv–xvi.

<sup>25</sup> See NASH, *supra* note 7, at 197–98, 236.

<sup>26</sup> See generally STEPHEN M. FELDMAN, *NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY* 47–92 (2013) [hereinafter FELDMAN, *NEOCONSERVATISM*] (discussing neoconservatism); MCGIRR, *supra* note 7, at 260 (explaining that Reagan brought together economic and Christian conservatives); George H. Nash, *The Uneasy Future of American Conservatism*, in *THE FUTURE OF CONSERVATISM* 1, 9–11 (Charles W. Dunn ed., 2007) (discussing Reagan).

<sup>27</sup> See SELF, *supra* note 7, at 414 (emphasizing conservative success in combining moral clarity and neoliberalism).

1990s—but recognition of the influence of white Christian nationalism on mainstream conservatism is relatively recent.<sup>28</sup>

#### A. *Neoliberalism*

Neoliberalism is best understood in relation to laissez-faire ideology. Laissez-faire, which first emerged in the United States after the Civil War, celebrates the wonders of the economic marketplace.<sup>29</sup> Neoliberalism, taking its name from the classical liberalism of Adam Smith, is laissez-faire on steroids.<sup>30</sup> It celebrates the wonders of the marketplace while simultaneously denigrating democratic government.

Neoliberalism initially developed as an intellectual movement after World War II but gained political clout in the 1970s and 1980s.<sup>31</sup> It promotes a deeply individualist ethos and questions the group decision-making entailed by democratic government,<sup>32</sup> though the earliest postwar neoliberal writings tended to be less hostile to democracy. In a 1951 essay, for example, Milton Friedman contrasted collectivism against individualism.<sup>33</sup> The problem with collectivists, he argued, was not with their goals. “[C]ollectivists have wanted to do good,” he acknowledged, “to maintain and extend freedom and democracy, and at the same time to improve the material welfare of the great masses of the people.”<sup>34</sup> Problems, however, arose from “the

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<sup>28</sup> For instance, outstanding books on neoliberalism and its influence were published in 2005 and 2012. See generally JONES, MASTERS, *supra* note 7; HARVEY, *supra* note 7. The leading book on the emergence of the white power movement was only published in 2018. See generally BELEW, *supra* note 7. There are many ways to organize and categorize various right-wing or conservative movements of the latter twentieth century. Sara Diamond identifies a New Right, which emphasized anticommunism, a racist Right, a Christian Right, and a neoconservative movement, which initially arose from former liberals. DIAMOND, *supra* note 7, at 9–10.

<sup>29</sup> STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 89–96 (2017) [hereinafter FELDMAN, NEW] (explaining the development of laissez-faire ideology in the late nineteenth century).

<sup>30</sup> FELDMAN, NEW, *supra* note 29, at 167; 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

<sup>31</sup> See RODGERS, *supra* note 7, at 7–8 (emphasizing the importance of ideas to conservative movement).

<sup>32</sup> See *id.* at 4–6 (emphasizing individualism of conservative movement).

<sup>33</sup> Milton Friedman, *Neo-Liberalism and its Prospects*, FARMAND, Feb. 17, 1951, at 89, reprinted in HOOVER INSTITUTION LIBRARY & ARCHIVES, THE COLLECTED WORKS OF MILTON FRIEDMAN, 1 (Robert Leeson & Charles G. Palm, eds., Nov. 4, 2013), <https://miltonfriedman.hoover.org/internal/media/dispatcher/214957/full>.

<sup>34</sup> *Id.* at 2.



means.”<sup>35</sup> Collectivists failed to recognize how difficult it was to coordinate efficiently “the activities of millions of people,” a coordination that could naturally occur in the economic marketplace of an individualist system.<sup>36</sup> Hence, at this time, shortly after World War II, Friedman believed that maintaining democracy was a worthy goal. A democratic state could contribute in important ways within an individualist system—for instance, by promoting competition and preventing monopolies.<sup>37</sup>

Before long, though, neoliberals were expressing greater hostility to all forms of government, including democracy. Hayek explained in 1960 that government attempts at rational planning for society inevitably undermined individual liberty.<sup>38</sup> The world was too complex to be mastered by human reason, despite humanity’s hubristic belief otherwise.<sup>39</sup> “Human reason can neither predict nor deliberately shape its own future. . . . Progress by its very nature cannot be planned.”<sup>40</sup> Friedman described an invisible hand that generated rational and efficient outcomes in the economic marketplace while simultaneously producing irrationality in democratic government. To be clear, for Friedman, the invisible hand in the marketplace generated the best results not only for individuals but also for society as a whole. “The market, with each individual going his own way, with no central authority setting social priorities, avoiding duplication, and coordinating activities, looks like chaos to the naked eye,” Friedman wrote in 1976.<sup>41</sup>

Yet through [Adam] Smith’s eyes we see that it is a finely ordered and delicately tuned system, one which arises out of man’s actions, yet is not deliberately created by man. It is a system which enables the dispersed knowledge and skill of millions of people to be coordinated for a common purpose.<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 3.

<sup>38</sup> See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960), reprinted in 17 *THE COLLECTED WORKS OF F.A. HAYEK* 94–95, 122 (Ronald Hamowy ed., definitive ed. 2011).

<sup>39</sup> See JONES, *MASTERS*, *supra* note 7, at 109 (on hubris).

<sup>40</sup> HAYEK, *supra* note 38, at 94–95.

<sup>41</sup> Milton Friedman, *Adam Smith’s Relevance for 1976*, Selected Papers No. 50, *CHI. BOOTH REV.*, at 15–16.

<sup>42</sup> *Id.* at 16.

Friedman's praise of the marketplace starkly contrasted with his description of the invisible hand in government. In fact, he wrote that "an invisible hand in politics . . . is the precise reverse of the invisible hand in the market."<sup>43</sup> Even government officials who have the best of intentions inevitably pursue harmful goals. "The invisible hand in politics is as potent a force for harm as the invisible hand in economics is for good."<sup>44</sup> The government cannot consistently or systematically pursue rational and efficient goals; it necessarily falls prey to the desires of "special interests."<sup>45</sup>

Public choice theorists, following fundamental economic principles, elaborated this neoliberal attack on democratic government.<sup>46</sup> Just as economists assume that individuals in the economic marketplace pursue their own self-interest, public choice theorists assume that government officials do the same.<sup>47</sup> For example, members of Congress vote for or against a legislative bill based on whatever they believe will maximize their chances of reelection; they do not act in pursuit of a common good or public interest.<sup>48</sup> Given this, legislative decisions do not arise from a rational calculation of social utility—the costs and benefits for the group (or society). Rather, they arise from legislators' self-interested calculations and the attempts of interest groups to manipulate the legislators (as they seek reelection).<sup>49</sup> Consequently, from the public choice perspective, majority voting—the crux of democratic government—frequently leads to irrational group (legislative) decisions. When Congress or another legislature enacts a statute, we should not even assume that

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<sup>43</sup> *Id.* at 18.

<sup>44</sup> *Id.*

<sup>45</sup> *See generally id.*

<sup>46</sup> *See generally* Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (criticizing public choice).

<sup>47</sup> Kenneth Arrow did seminal work in public choice theory. *See generally* KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

<sup>48</sup> DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1–11 (1991) (summarizing public choice theory); JONES, MASTERS, *supra* note 7, at 126–32 (discussing public choice and rational choice theories).

<sup>49</sup> *See* FARBER & FRICKEY, *supra* note 48, at 38–62 (explaining Arrow's Theorem); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 1–3 (Waveland Press ed. 1988) (1982) (arguing social choice theory calls democracy into question). The economist Mancur Olson was a leader in exploring collective action problems in government. *See, e.g.*, MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMICS, STAGFLATION AND SOCIAL RIGHTS* (1982); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971).

there exists a coherent and rational goal or purpose behind the action.<sup>50</sup> Public choice theory underscores how neoliberalism pushes beyond laissez-faire. Laissez-faire celebrates the free economic marketplace, so laissez-faire theorists criticize government regulations that interfere with the market. In theory, though, other government regulations can be rational and worthwhile.<sup>51</sup> But public choice and neoliberal theorists demonize democracy: for them, government regulations are inherently irrational and harmful.<sup>52</sup>

Oddly, neoliberalism and its celebration of the economic marketplace gained prominence in the 1970s when the actual marketplace was in crisis.<sup>53</sup> High inflation and high unemployment plagued the United States and other western industrialized nations.<sup>54</sup> But neoliberals had a ready response for these difficulties: the market was failing precisely because of government regulations that interfered with free market operations.<sup>55</sup> Friedman, for example, said, “[i]nflation is entirely made in Washington—and nowhere else.”<sup>56</sup> And when Friedman’s own theories seemingly failed to pan out in application, he claimed that they were not properly executed. The government could always be blamed for market failures.<sup>57</sup>

In any event, neoliberal theory has been extensively incorporated into government policies starting with President Ronald Reagan’s administration in the 1980s (1981-1989). He famously proclaimed in his first inaugural address that “government is not the solution to our

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<sup>50</sup> *E.g.*, Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing courts should not presume that legislative decisions are rational); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971) (discussing regulatory capture).

<sup>51</sup> The crux of pluralist democratic theory, which developed after World War II, was to defend democratic government by elucidating democratic processes. *E.g.*, WILFRED E. BINKLEY & MALCOLM C. MOOS, *A GRAMMAR OF AMERICAN POLITICS* (3d ed. 1958); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* (1942); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (11th prtng. 1965).

<sup>52</sup> *See* JEREMY WALDRON, *LAW AND DISAGREEMENT* 89–90 (1999) (diminishing the significance of Arrow’s Impossibility Theorem).

<sup>53</sup> RODGERS, *supra* note 7, at 42–44.

<sup>54</sup> JEFFRY A. FRIEDEN, *GLOBAL CAPITALISM* 363 (2006) (on so-called stagflation); ROBERT B. HORWITZ, *AMERICA’S RIGHT: ANTI-ESTABLISHMENT CONSERVATISM FROM GOLDWATER TO THE TEA PARTY* 16 (2013).

<sup>55</sup> For criticisms of Keynesian theory, which gained dominance during the New Deal, see Paul Craig Roberts, *The Breakdown of the Keynesian Model*, reprinted in *SUPPLY-SIDE ECONOMICS: A CRITICAL APPRAISAL 1* (Richard H. Fink ed., 1982).

<sup>56</sup> RODGERS, *supra* note 7, at 52 (quoting Friedman).

<sup>57</sup> *See id.* at 55 (explaining Friedman’s rationalization of apparent mistakes).

problem; government is the problem.”<sup>58</sup> Reagan attacked labor unions, started deregulation, and relaxed antitrust policies, thus facilitating corporate mergers.<sup>59</sup> Cutting the top marginal tax rate from 70 to 28 percent, Reagan insisted that “trickle-down” (supply-side) economics would generate more revenue for the government and greater prosperity for all—the rich and poor alike.<sup>60</sup> Nevertheless, the Reagan tax cuts, when combined with those of the next President, another Republican, George H.W. Bush, more than quadrupled the national debt over a twelve-year period while contributing to growing income and wealth disparities.<sup>61</sup> Such empirical realities did not slow the neoliberal freight train. Citibank’s Walter Wriston explained in 1992 how markets are better than democracy: “Markets are voting machines; they function by taking referenda. . . . [They give] power to the people.”<sup>62</sup>

#### B. *White Christian Nationalism*

While neoliberalism developed initially as an intellectual movement, white Christian nationalism emerged as a grassroots movement in the 1960s and 1970s.<sup>63</sup> To be clear, in analyzing this movement, some historians and commentators emphasize race—white supremacy and privilege<sup>64</sup>—while others emphasize religion—Christian privilege and power.<sup>65</sup> Yet, as many recognize, whiteness and Christianity are integrally intertwined in American history and society. One cannot fully comprehend white supremacy and privilege without accounting for the role of Christianity, and vice versa, one cannot

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<sup>58</sup> Ronald Reagan, President, First Inaugural Address (Jan. 20, 1981).

<sup>59</sup> JONES, MASTERS, *supra* note 7, at 19, 263–69; WILENTZ, *supra* note 7, at 194–203; WYATT WELLS, AMERICAN CAPITALISM, 1945-2000, at 129–35 (2003).

<sup>60</sup> JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 8–9, 89 (2013 ed.); George Gilder, *The Supply-Side*, in SUPPLY-SIDE ECONOMICS: A CRITICAL APPRAISAL 14 (Richard H. Fink ed., 1982).

<sup>61</sup> FRIEDEN, *supra* note 54, at 378–79; STIGLITZ, *supra* note 60, at 8–9, 89, 277; WILENTZ, *supra* note 7, at 144–50. Income distribution started to change dramatically in America in the 1980s. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 31 fig. 1.1 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (Figure: Income Inequality in the United States, 1910-2010).

<sup>62</sup> RODGERS, *supra* note 7, at 75 (quoting Wriston).

<sup>63</sup> BELEW, *supra* note 7, at 10–11, 23–24.

<sup>64</sup> *E.g.*, ANDERSON, *supra* note 7; BELEW, *supra* note 7, at 1–2; DARDA, *supra* note 7, at 1–3; JARDINA, *supra* note 7, at 2–3.

<sup>65</sup> *E.g.*, JONES, END, *supra* note 7; STEWART, *supra* note 7; WHITEHEAD & PERRY, *supra* note 7, at ix–xi.

comprehend the role of Christian privilege and power without accounting for the role of race in America.<sup>66</sup>

### 1. Origins

White Christian movements and organizations, such as the Ku Klux Klan (KKK), had of course existed before the 1960s, but the movement that emerged in the latter twentieth century eventually moved from the margins to the mainstream and became broader than prior movements and organizations.<sup>67</sup> This broader white Christian nationalism had its origins in the Vietnam War and its aftermath.<sup>68</sup> Numerous American soldiers returned home after the war feeling alienated from fellow citizens and betrayed by the government.<sup>69</sup> They believed the war had been winnable, but the American people and government had failed to provide the necessary support for the soldiers' efforts.<sup>70</sup>

This sense of government betrayal combined with a conservative cultural backlash against the 1960s social movements. While many viewed the 1950s as an age of consensus, multiple social and protest movements marked the 1960s: the civil rights movement morphed into the Black Power movement; an environmental movement started; and a new women's movement emerged.<sup>71</sup> And, of course, a peace movement opposed the Vietnam War.<sup>72</sup> New civil rights statutes enacted in the 1960s, such as the Civil Rights Act of 1964, rendered it

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<sup>66</sup> "White Christian supremacy in America is the product of a centuries-long project in which notions of White racial superiority and Christian religious superiority have augmented and magnified each other." JOSHI, *supra* note 7, at 5. "White supremacy lives on today not just in explicitly and consciously held attitudes among white Christians; it has become deeply integrated into the DNA of white Christianity itself." JONES, TOO LONG, *supra* note 7, at 187.

<sup>67</sup> JONES, TOO LONG, *supra* note 7, at 8–9; *see* ZESKIND, *supra* note 7, at 123–128 (emphasizing the entrance of the white nationalist movement into the mainstream).

<sup>68</sup> This broad white Christian nationalism would eventually encompass smaller movements and organizations (including the KKK, neo-Nazis, and others). BELEW, *supra* note 7, at 6–7.

<sup>69</sup> *Id.* at 10, 23–24; JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 769–70 (1996) [hereinafter PATTERSON, GRAND].

<sup>70</sup> To be sure, some soldiers themselves turned against the war effort. BELEW, *supra* note 7, at 22–24.

<sup>71</sup> STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 341, 442–44, 448–49, 462 (2008) [hereinafter FELDMAN, FREE EXPRESSION]; PATTERSON, GRAND, *supra* note 69, at 442–57.

<sup>72</sup> FELDMAN, FREE EXPRESSION, *supra* note 71, at 450–61; PATTERSON, GRAND, *supra* note 69, at 620–29.

more difficult to discriminate against and to deny benefits and opportunities to people of color—which had been consistently and legally done in prior decades—thus preserving white privilege.<sup>73</sup> For some of the angry white soldiers returning from Vietnam, their sense of alienation and resentment—toward other Americans and especially toward the government—only intensified.<sup>74</sup> The introduction of race-based affirmative action programs in the 1960s and 1970s further fueled this white resentment.<sup>75</sup> From the perspective of these alienated white Christian men, the government had become “a menace to morality and prosperity.”<sup>76</sup>

Christianity played a central role in this conservative cultural backlash. After the Supreme Court decided *Brown v. Board of Education* in 1954 and then ordered desegregation “with all deliberate speed” in 1955, many southern school districts began implementing schemes to

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<sup>73</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. The Social Security Act, passed in the 1930s, had loopholes denying benefits for jobs typically held by Black Americans. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 22, 43–46 (2005). After World War II, racial discrimination in housing and banking practices prevented most Black Americans from accruing wealth in family-owned homes despite the benefits widely flowing to veterans. See LIZABETH COHEN, A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 169–71 (2003); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 38, 43–44 (2008).

<sup>74</sup> See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 508–10 (7th ed. 1994) (describing the backlash against civil rights advances); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 384–90 (2016) (describing reactions to the Civil Rights Act); BELEW, *supra* note 7, at 10–11.

<sup>75</sup> NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 168–95 (1978 ed.) (on white resentment); PATTERSON, GRAND, *supra* note 69, at 642, 723–24 (on early race-based affirmative action programs helping people of color).

<sup>76</sup> BELEW, *supra* note 7, at 10; see KENDI, *supra* note 74, at 430 (emphasizing the growth of the Klan in the 1970s). Lisa McGirr describes the development of the New Right from the 1960s to the 1980s, culminating with the presidency of Ronald Reagan. MCGIRR, *supra* note 7, at 185–86, 273. According to McGirr, the New Right rejected older conservative tenets related to “anti-Semitism, biological racism, and anti-Catholicism[.]” *Id.* at 18; see *id.* at 272–73 (explaining changes in conservatism). Yet, to make an obvious point, those biases did not disappear, and they remained powerful and central to the developing white power movement (with the exception of anti-Catholicism). Moreover, as I explain in this Article, racism and antisemitism will reemerge in subsequent decades as significant forces within conservatism and the Republican party.

resist racial desegregation.<sup>77</sup> These schemes were generally successful, as desegregation barely advanced for many years, yet many white families nonetheless sought to exit the public schools. These families moved their children into racially segregated private schools, many of which were religiously affiliated—in fact, “hundreds of private Protestant segregationist academies opened in the South.”<sup>78</sup> Initially, these schools enjoyed tax exempt status because they were non-profit, but in 1970, the IRS began denying that exemption.<sup>79</sup> Largely in reaction to this government action, Christian conservatives started to mobilize politically after several decades of quietude.<sup>80</sup> Eventually, the constitutionality of denying tax exemptions made it to the Supreme Court.<sup>81</sup> Bob Jones University discriminated against Black Americans ostensibly in accord with the school’s fundamentalist Christian tenets.<sup>82</sup> When the IRS in 1976 refused to continue granting the University tax advantages, the University sued, claiming that the denial violated its free exercise rights under the First Amendment.<sup>83</sup> The Court held that the IRS had acted constitutionally: The denial of a tax exemption was narrowly tailored to achieve a compelling purpose, “eradicating racial discrimination in education[.]”<sup>84</sup>

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<sup>77</sup> *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294, 301 (1955); *Brown v. Bd. of Educ. of Topeka (Brown I)*, 347 U.S. 483 (1954); KENDI, *supra* note 74, at 365–77 (describing massive white resistance to desegregation).

<sup>78</sup> Michael J. Klarman, *Foreword to The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 128 (2020); see STEWART, *supra* note 7, at 190–91 (discussing segregation academies).

<sup>79</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 577–78 (1983); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 340 (2001).

<sup>80</sup> STEWART, *supra* note 7, at 54–77; Zahid Shahab Ahmed & Galib Bashirov, *Religious Fundamentalism and Violent Extremism*, in THE DIFFICULT TASK OF PEACE 245, 251–52 (Francisco Rojas Aravena ed., 2020); see generally Jane Dailey, *Sex, Segregation, and the Sacred After Brown*, 91 J. AM. HIST. 119 (2004).

<sup>81</sup> A statutory issue made it to the Court first. Without opinion, the Court upheld a lower court’s decision finding that the tax code did not entitle racially discriminatory private schools to exemptions. *Green v. Connally*, 330 F. Supp. 1150, 1179–80 (D.D.C. 1971), *aff’d mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

<sup>82</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983). “The [University] sponsors . . . genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race.” *Id.* (citation omitted). Bob Jones, Sr., was an “ardent segregationist.” STEWART, *supra* note 7, at 61.

<sup>83</sup> *Bob Jones Univ.*, 461 U.S. at 582, 602–03.

<sup>84</sup> *Id.* at 604.

By the time the Court decided *Bob Jones University*, in 1983, Christian conservative leaders had already realized they needed a political issue more palatable than racial discrimination (and school segregation) to rally around. Abortion was seized upon.<sup>85</sup> Many conservative leaders—including Ronald Reagan, Barry Goldwater, Billy Graham, and Betty Ford—had initially supported a right to choose, so when the Court decided *Roe v. Wade* in 1973, it did not immediately provoke a widespread conservative reaction.<sup>86</sup> Nevertheless, by the end of the decade, white Christian leaders were emphasizing opposition to abortion, and they successfully used that political wedge to deepen and widen the Christian conservative movement.<sup>87</sup>

## 2. Two Threads

While the white Christian conservative movement grew in the 1980s, it also split into two threads during that decade. From one perspective, Reagan's presidency not only demonstrated the growing political power of Christian conservatives but also was largely a boon for conservatism in general.<sup>88</sup> The grievances of white Vietnam veterans were diluted and popularized through movies and music. For instance, the first two Rambo movies—*First Blood* and *First Blood Part II*—were released in 1982 and 1985, respectively.<sup>89</sup> They starred Sylvester Stallone as a brooding and vengeful Vietnam vet, John Rambo, who became an icon for many white Christian men even if they had never been anywhere near southeast Asia or the war.<sup>90</sup> Like Rambo and actual veterans, these men saw themselves as justifiably resentful. They had given their all, sacrificing for the nation, but now they were being blamed for the nation's shortcomings, especially for

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<sup>85</sup> POSNER, *supra* note 7, at 100–22; Klarman, *supra* note 78, at 127–28. “As recently as 1984, abortion was not a deeply partisan issue.” Thomas B. Edsall, *Abortion Has Never Been Just About Abortion*, N.Y. TIMES (Sept. 15, 2021).

<sup>86</sup> *Roe v. Wade*, 410 U.S. 113 (1973); STEWART, *supra* note 7, at 66–68; *see* Klarman, *supra* note 78, at 127 (the Catholic Church had been strongly opposing abortion).

<sup>87</sup> POSNER, *supra* note 7, at 100–24; STEWART, *supra* note 7, at 54–77; *see, e.g.*, Neil A. O’Brian, *Before Reagan: The Development of Abortion’s Partisan Divide*, 18 PERSP. ON POL. 1031 (2020) (describing complex interactions among voters, activists, and elites that led the Republican party to oppose abortion).

<sup>88</sup> *See, e.g.*, WILENTZ, *supra* note 7, at 186 (emphasizing the importance of the Christian right).

<sup>89</sup> JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE 206* (2005) [hereinafter PATTERSON, *GIANT*].

<sup>90</sup> DARDA, *supra* note 7, at 121–26.



the failures and weaknesses of people of color and non-Christians—hence, for example, the need for affirmative action.<sup>91</sup> White Christian men believed they were entitled to fight back.<sup>92</sup> Meanwhile, Bruce Springsteen’s hit song, *Born in the U.S.A.*, about a Vietnam veteran, served as a patriotic anthem for these aggrieved white Christian men, even if Springsteen had not written it for that reason.<sup>93</sup> White Christian men now could readily see themselves as innocent victims.<sup>94</sup>

Indeed, one might have expected Reagan’s presidency to have mostly ameliorated the grievances of white Christian conservatives in general, including actual Vietnam veterans. After all, Reagan himself came to office spouting neoliberal anti-government rhetoric and then implemented multiple anti-government policies, as already discussed.<sup>95</sup> Yet, many conservatives, including the alienated white Christian veterans, quickly grew disenchanted with Reagan. To them, his actions did not fulfill his promises on multiple issues—for instance, he did not fight vigorously enough against abortion.<sup>96</sup> Because of this disappointment with Reagan, his presidency not only failed to dissipate conservative resentment but also provoked some white Christians, in effect, to declare “war against the federal government[.]”<sup>97</sup> To be sure, before that point, alienated Vietnam War veterans were angry with the government, but many other white Christian activists, including Klansmen and neo-Nazis, “had justified their violent actions by claiming to serve state and country.”<sup>98</sup> During Reagan’s presidency, however, some white Christian nationalists transformed and solidified their movement: “Rather than fighting on behalf of the state, white power activists now fought for a white homeland, attempted to

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<sup>91</sup> See GLAZER, *supra* note 75, at 168–95 (discussing white resentment of affirmative action).

<sup>92</sup> *Id.* at 2, 190–91.

<sup>93</sup> Steve Inskeep et al., *What Does ‘Born In The U.S.A.’ Really Mean?*, NPR MORNING EDITION (Mar. 26, 2019, 5:03 AM), <https://www.npr.org/2019/03/26/706566556/bruce-springsteen-born-in-the-usa-american-anthem>; see DARDA, *supra* note 7, at 102–11 (discussing Springsteen).

<sup>94</sup> White Christians perceive themselves as “alternatively—and sometimes simultaneously—the noble protagonists and the blameless victims.” JONES, TOO LONG, *supra* note 7, at 21.

<sup>95</sup> JONES, MASTERS, *supra* note 7, at 19, 263–69; WILENTZ, *supra* note 7, at 194–203; WELLS, *supra* note 59, at 129–35.

<sup>96</sup> SELF, *supra* note 7, at 402–03.

<sup>97</sup> BELEW, *supra* note 7, at 3. Reagan “failed to check the popular political alienation born of the Vietnam War and Watergate.” WILENTZ, *supra* note 7, at 457.

<sup>98</sup> BELEW, *supra* note 7, at 104.

destabilize the federal government, and waged revolutionary race war.”<sup>99</sup>

Hence, if Reagan represented mainstream conservatism, this second thread of white Christian nationalism trafficked (and traffics) in extremes, endorsing separatism and violence.<sup>100</sup> Not content merely listening to Springsteen or watching Rambo (and voting for Reagan and other Republicans), participants in this second thread would undertake bombings, assassinations, robberies, and, of course, stealing and trafficking in weapons.<sup>101</sup> While many of these white Christian nationalists would have undoubtedly welcomed a legally enforced caste system reminiscent of the Jim Crow era—with white, Christian men at the top; white, Christian women in the next tier; and then all people of color and non-Christians at the bottom<sup>102</sup>—the movement ultimately sought a “territory free entirely of [B]lack people, Jews, and a host of others they regard as undesirable. If they must burn the entire house down in order to rebuild it from the basement up, they will.”<sup>103</sup> Fusing together multiple white supremacist, xenophobic, racist, antisemitic, and sexist organizations, this thread of white Christian nationalism targeted people of color, especially Black Americans; non-Christians, especially Jews; and other outsiders. The movement’s sexism was perhaps less virulent than its other xenophobicisms, because white Christian women were welcomed into the movement but primarily to fill traditional gender roles as wives and mothers—white, Christian men were to protect the bodies of white, Christian women.<sup>104</sup> White Christian women, in other words, were to be subservient, but they were not considered inherently sub-human and therefore not subject to expulsion or death.

Just as neoliberalism can be understood as *laissez faire* on steroids, white Christian nationalism can be understood as traditionalism on steroids. The movement’s demands for moral clarity centered, of course, around Christianity. And just as some Vietnam veterans adopted extreme positions, some Christian leaders did the same. Rousas John (RJ) Rushdoony was a key early figure in what would later

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 3–5.

<sup>101</sup> *See, e.g., id.* at 122–26, 135–36, 196–97, 219–23 (detailing various crimes).

<sup>102</sup> For an extensive discussion of caste systems in the United States, Nazi Germany, and India, see ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

<sup>103</sup> ZESKIND, *supra* note 7, at xvii.

<sup>104</sup> BELEW, *supra* note 7, at 7, 156–84.

become known as Dominion theology.<sup>105</sup> Rushdoony articulated a program called Christian Reconstruction, which demanded that the United States follow biblical law.<sup>106</sup> Indeed, Rushdoony believed the nation was founded for that purpose: In his words, the First Amendment established freedom “not from religion but for religion.”<sup>107</sup> In his multi-volume treatise, *The Institutes of Biblical Law*, he argued that the “heresy of democracy has . . . worked havoc in church and state . . . Christianity and democracy are inevitably enemies.”<sup>108</sup> Christians, therefore, should not seek to bolster democratic government; rather they should “exercise absolute dominion over the earth and all of its inhabitants.”<sup>109</sup> Unsurprisingly, then, Rushdoony’s writings retroactively supported the Confederacy’s defense of slavery—similar to John C. Calhoun, Rushdoony maintained that slavery was, in effect, a positive good for Black Americans—and absolved Christians of responsibility for the persecution of Jews, even going so far as to deny the Holocaust.<sup>110</sup>

Among alienated Vietnam War veterans, Louis Beam was an important early leader of the white Christian nationalist movement. He emphasized the importance of a fundamentalist Christianity (belief in a plain and literal interpretation of the Protestant Bible generally opposed to a modern, scientific world view).<sup>111</sup> Beam himself was a

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<sup>105</sup> Virginia Garrard, *Hidden in Plain Sight: Dominion Theology, Spiritual Warfare, and Violence in Latin America*, 11 RELIGIONS 648, 649–50 (2020).

<sup>106</sup> STEWART, *supra* note 7, at 104, 112–14.

<sup>107</sup> ROUSAS JOHN RUSHDOONY, THE NATURE OF THE AMERICAN SYSTEM 8 (1965) (quoted in STEWART, *supra* note 7, at 113).

<sup>108</sup> ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 100 (1973) [hereinafter RUSHDOONY, INSTITUTES].

<sup>109</sup> STEWART, *supra* note 7, at 104.

<sup>110</sup> ROUSAS JOHN RUSHDOONY, THE POLITICS OF GUILT AND PITY 19–20 (1970); RUSHDOONY, INSTITUTES, *supra* note 108, at 586–88; STEWART, *supra* note 7, at 113–14; Molly Worthen, *The Chalcedon Problem: Rousas John Rushdoony and the Origins of Christian Reconstructionism*, 77 CHURCH HIST. 399, 417 (2008); Julie Ingersoll, *The Christian Reconstruction Movement in U.S. Politics*, OXFORD HANDBOOKS TOPICS IN RELIGION (Jan. 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935420.001.0001/oxfordhb-9780199935420-e-25?mediaType=Article>; see John C. Calhoun, *Speech on the Reception of Abolition Petitions, Delivered in the Senate* (Feb. 6, 1837), in 2 THE WORKS OF JOHN C. CALHOUN 625, 630–31 (D. Appleton & Co. 1851) (arguing that slavery was a positive good).

<sup>111</sup> The definition of fundamentalism is contested. Zahid Shahab Ahmed & Galib Bashirov, *Religious Fundamentalism and Violent Extremism*, in THE DIFFICULT TASK OF PEACE 245, 246–49 (Francisco Rojas Aravena ed., 2020); Douglas Pratt, *Religion and Terrorism: Christian Fundamentalism and Extremism*, 22 TERRORISM & POLITICAL VIOLENCE 438, 439–41 (2010); Margaret Bendroth, *Christian Fundamentalism in America*, OXFORD

proponent of Christian Identity ideology,<sup>112</sup> which originated in the United States during the mid-1940s and grew increasingly important later in the twentieth century. According to Christian Identity, Jews misinterpret the Bible when they claim to be the people of ancient Israel.<sup>113</sup> Instead, only white Europeans and their descendants are the true children of Israel.<sup>114</sup> The *Kingdom Identity Ministries Doctrinal Statement of Beliefs* states as follows:

WE BELIEVE the White, Anglo-Saxon, Germanic and kindred people to be God's true, literal Children of Israel. Only this race fulfills every detail of Biblical Prophecy and World History concerning Israel and continues in these latter days to be heirs and possessors of the Covenants, Prophecies, Promises and Blessings of YHVH God made to Israel. This chosen seedline making up the "Christian Nations" of the earth stands far superior to all other peoples in their call as God's servant race.<sup>115</sup>

Furthermore, the statement asserts that only white people were made in God's image and are descended from Adam and Eve.<sup>116</sup> People of color are "considered less-than-human, 'mud people.'"<sup>117</sup> Jews themselves are literally, according to the *Doctrinal Statement of Beliefs*, the "children of Satan."<sup>118</sup> From the Christian Identity viewpoint, then, Jews and people of color can and should be exterminated. Killing them is no different from killing animals "because only Whites are human."<sup>119</sup> Indeed, Christian Identity is a post-millennial movement:

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RESEARCH ENCYCLOPEDIAS: RELIGION 1–3 (Feb. 27, 2017), <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-419> (explaining contested definitions of fundamentalism and evangelicalism, while also emphasizing the historical background).

<sup>112</sup> BELEW, *supra* note 7, at 6, 26; DIAMOND, *supra* note 7, at 266; Tanya Telfair Sharpe, *The Identity Christian Movement: Ideology of Domestic Terrorism*, 30 J. BLACK STUD. 604, 617 (2000).

<sup>113</sup> LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* 77–78, 273–74 (1995); PAUL JOHNSON, *A HISTORY OF THE JEWS* 3–79 (1987).

<sup>114</sup> DEBORAH E. LIPSTADT, *ANTISEMITISM: HERE AND NOW* 32–33 (2019); Sharpe, *supra* note 112, at 607.

<sup>115</sup> *Kingdom Identity Ministries Doctrinal Statement of Beliefs* (1999) (quoted in Sharpe, *supra* note 112, at 607) (citations omitted).

<sup>116</sup> *Id.*

<sup>117</sup> Sharpe, *supra* note 112, at 610; *see* BELEW, *supra* note 7, at 6 (describing Christian Identity ideology).

<sup>118</sup> KINGDOM IDENTITY MINISTRIES, *KINGDOM IDENTITY MINISTRIES DOCTRINAL STATEMENT OF BELIEFS* (1999) (quoted in Sharpe, *supra* note 112, at 611).

<sup>119</sup> Sharpe, *supra* note 112, at 614.

Adherents believe that, to usher in Christ's return, they literally must "fight Christ's enemies during a period of 'tribulation.'"<sup>120</sup>

Christianity provided the white nationalist movement with a religious zeal as it aimed for an apocalyptic transformation of the United States—the elimination of all people of color, Jewish Americans, and other outsiders.<sup>121</sup> To be sure, most Christian fundamentalists do not explicitly subscribe to Christian Identity ideology; the same is true of evangelicals, who emphasize salvation by Christian faith alone and the preaching and spreading of that faith (most fundamentalists are evangelical, and vice versa).<sup>122</sup> Even so, fundamentalism is theologically close to Christian Identity, and those attracted to fundamentalism can easily slide into some derivative of Christian Identity.<sup>123</sup> In fact, during the 1980s, some leaders of the Christian right accepted post-millennialism and became associated with Christian Identity proponents.<sup>124</sup> Moreover, many Protestant fundamentalists who do not fully subscribe to Christian Identity ideology still display explicit and implicit racist and antisemitic attitudes. Given that more than 25 percent of the country identifies as evangelical Protestant—nearly another 15 percent identify as mainline Protestant—such attitudes are alarming.<sup>125</sup> As many commentators have observed, Christian fundamentalists and evangelicals have become deeply conservative, often aligning themselves with "nationalistic, and racist politics."<sup>126</sup>

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<sup>120</sup> DIAMOND, *supra* note 7, at 266; see JONES, TOO LONG, *supra* note 7, at 93–94 (comparing pre- and post-millennialism).

<sup>121</sup> BELEW, *supra* note 7, at 5–7, 26, 51.

<sup>122</sup> On the contested definitions of evangelicalism: Seth Dowland, *American Evangelicalism and the Politics of Whiteness*, CHRISTIAN CENTURY (June 19, 2018). It is worth noting that not all evangelicals are fundamentalists (believing in the literal interpretation of the Protestant Bible). On the relationship between fundamentalism and evangelicalism, see the following: Bendroth, *supra* note 111, at 2–5, 13–14; Steve Waldman & John Green, *Evangelicals v. Fundamentalists*, PBS FRONTLINE: THE JESUS FACTOR, <https://www.pbs.org/wgbh/pages/frontline/shows/jesus/evangelicals/vs.html> (last visited Oct. 26, 2022); *History of American Christian Movements: Evangelicals and Fundamentalists*, SACRED HEART UNIV. LIBR., <https://library.sacredheart.edu/c.php?g=29705&p=7013527> (last visited Feb. 1, 2021) (emphasizing contested nature of the definitions of evangelicalism and fundamentalism).

<sup>123</sup> Sharpe, *supra* note 112, at 619–20.

<sup>124</sup> DIAMOND, *supra* note 7, at 267.

<sup>125</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY, <https://www.pewforum.org/religious-landscape-study> (last visited Oct. 26, 2022).

<sup>126</sup> AHLSTROM, *supra* note 111, at 959 (discussing evangelicals); see SELF, *supra* note 7, at 351–58 (discussing fundamentalists); TISBY, *supra* note 7, at 153 (on racism and

In fact, hostility against Jews and other non-Christians, particularly Muslims, is not only widespread among Protestant fundamentalists but also definitive to the white Christian nationalist movement.<sup>127</sup> One manifestation of antisemitism lies in the proliferation of conspiracy theories, many of which claim that Jews orchestrate the widespread oppression and killing of white Christians. Such conspiracy theories are standard antisemitic fare and have been so for centuries. For instance, Christians have long condemned Jews for the notorious blood libel, which accuses Jews of killing Christian children and using their blood for Passover rituals.<sup>128</sup> Another standard antisemitic trope is that Jews control the world's banking and money supply.<sup>129</sup> Such antisemitic conspiracy theories provide narratives that help bind together the multiple strands of the white Christian nationalist movement. In the words of the historian, Kathleen Belew:

[W]hite power activists believed that the Jewish-led ZOG [the Zionist Occupational Government—later referred to as the New World Order] controlled the United Nations, the U.S. federal government, and the banks, and that ZOG used people of color, communists, liberals, journalists, [and] academics . . . as puppets in a conspiracy to eradicate the white race and its economic, social, and cultural accomplishments.<sup>130</sup>

As these conspiracy theories spotlight, the white Christian nationalist movement is not closely tied to facts and empirical reality. In fact, a primary inspirational source for the movement was, and is, a

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evangelicalism); Bendroth, *supra* note 111, at 14 (discussing fundamentalists and evangelicals). “American evangelicalism became virtually synonymous with the GOP and whiteness.” TISBY, *supra* note 7, at 153. Robert P. Jones argues that white supremacy is “embedded in the DNA of American Christianity.” JONES, TOO LONG, *supra* note 7, at 3.

<sup>127</sup> “Christian fundamentalism is considered as by far the strongest predictor of hostility against gays, Jews, and Muslims.” Ahmed & Bashirov, *supra* note 111, at 251. Of course, the condemnation of Jews and Judaism has long been an integral “aspect of Christian self-identity.” ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 38 (1989); see WILLIAM NICHOLLS, CHRISTIAN ANTISEMITISM 355–56 (1993) (on evangelical antisemitism).

<sup>128</sup> See LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA XXII–XXIV, 166–68 (1994) (discussing the blood libel); FELDMAN, PLEASE DON’T, *supra* note 14, at 195 (discussing the blood libel).

<sup>129</sup> See FELDMAN, PLEASE DON’T, *supra* note 14, at 209–10 (describing the *Protocols of the Elders of Zion*); NICHOLLS, *supra* note 127, at 386–87 (on fantasies of Jewish financial control).

<sup>130</sup> BELEW, *supra* note 7, at 7.

novel, *The Turner Diaries*, first printed in serial form from 1974 to 1976 and then published as a book in 1978.<sup>131</sup> The novel sold approximately 500,000 copies in the first twenty years after its publication.<sup>132</sup> It describes a white-supremacist-militia uprising against the United States government, supposedly controlled by Jews who are assisted by Black Americans in a systematic effort to oppress the white race.<sup>133</sup> The book ends with the creation of a white Christian utopia where all Jews and Black Americans have been either killed or banished.<sup>134</sup> Inspired partly by *The Turner Diaries*, Louis Beam conceived of a guerrilla war against the federal government that would be carried on by “leaderless resistance factions” organized into largely independent cell structures.<sup>135</sup> Beam believed that this strategy would preserve and sustain the white power movement even if individual participants were arrested or killed: “[A]ny one cell can be infiltrated, exposed and destroyed,” he wrote,<sup>136</sup> “but this will have no effect on the others; in fact, the members of the other cells will be supporting that cell which is under attack . . . .”<sup>137</sup>

### 3. Relationship with Democracy

A conundrum at the heart of white Christian nationalism, particularly in its more extreme manifestations, was its violent targeting of democratic government in the name of democracy. In rhetoric and in action, white activists targeted the officials, institutions, and buildings of duly elected democratic governments. Yet, they were not anarchists. After cleansing the nation of all unacceptable people—non-whites and non-Christians—white Christian activists dreamed of

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<sup>131</sup> ANDREW MACDONALD, *THE TURNER DIARIES* (2d ed. 1996). Andrew Macdonald was a pseudonym for William Pierce. For information on *The Turner Diaries*, see the following: BELEW, *supra* note 7, at 110–13, 246 n.45, 281 n.37; DIAMOND, *supra* note 7, at 267; *The Turner Diaries*, 10 AMERICAN DECADES PRIMARY SOURCES 1990-1999, at 333, 334 (Cynthia Rose ed., 2004).

<sup>132</sup> BELEW, *supra* note 7, at 110.

<sup>133</sup> See generally MACDONALD, *supra* note 131 (citing the book itself); see BELEW, *supra* note 7, at 11, 110–11.

<sup>134</sup> See generally MACDONALD, *supra* note 131 (citing the book itself); see BELEW, *supra* note 7, at 110–11.

<sup>135</sup> BELEW, *supra* note 7, at 111; see *id.* at 4–5, 11, 108–13 (discussing the leaderless resistance strategy).

<sup>136</sup> Louis Beam, *Leaderless Resistance*, in INTER-KLAN NEWSLETTER AND SURVIVAL ALERT (1983) (quoted in BELEW, *supra* note 7, at 112).

<sup>137</sup> *Id.*

“the founding of a racial utopian nation,”<sup>138</sup> and of planting “the flag of an Aryans-only republic.”<sup>139</sup> The end goal was less the eradication of the United States than the creation of “a white America.”<sup>140</sup>

The white power movement’s paradoxical stance toward democracy was unsurprising. In fact, it harmonized with the history of vigilanteism in America. Vigilantes have often viewed themselves as instruments of justice representing the true people.<sup>141</sup> From this perspective, when the government falls into corruption, failing to fulfill the demands of justice and democracy, then the people themselves must respond with direct action. Vigilantes therefore typically claim that their use of violence is legitimate and even necessary to correct the government’s perpetration of an injustice.<sup>142</sup> They can even point to the Declaration of Independence and the American Revolution as setting a precedent for violent opposition to the government.<sup>143</sup> After all, the Declaration began by briefly proclaiming certain “truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>144</sup> But after that introduction, the Declaration delineated an exhaustive list of corrupt actions perpetrated by the British government that justified an armed insurrection.<sup>145</sup>

With the Declaration of Independence and Revolution as founding events for the nation, violent resistance to supposedly unjust or illegitimate government became part of the American persona and traditions.<sup>146</sup> In fact, many towns and cities celebrate and glorify prior vigilante actions by holding parades and reenactments.<sup>147</sup> In

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<sup>138</sup> BELEW, *supra* note 7, at 5.

<sup>139</sup> ZESKIND, *supra* note 7, at xviii.

<sup>140</sup> BELEW, *supra* note 7, at 113.

<sup>141</sup> LISA ARELLANO, VIGILANTES AND LYNCH MOBS 4, 8, 20–21, 39–44 (2012).

<sup>142</sup> *Id.* at 45–49 (explaining that vigilantes often view themselves as being valorous).

<sup>143</sup> The Declaration of Independence, *reprinted in* 2 GREAT ISSUES IN AMERICAN HISTORY 70 (Richard Hofstadter ed., 1958); *see* ARELLANO, *supra* note 141, at 21 (emphasizing the historical precedent of the revolutionary era).

<sup>144</sup> Declaration of Independence, *supra* note 143, at 71.

<sup>145</sup> *Id.* at 72–74.

<sup>146</sup> *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003) (arguing that vigilanteism is central to understanding American attitudes toward capital punishment); Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559 (2020) (emphasizing mob violence as part of American constitutional traditions).

<sup>147</sup> ARELLANO, *supra* note 141, at 137.



Wyoming, Charles Coutant was the state librarian and custodian of the historical society from 1901 to 1905.<sup>148</sup> He extolled numerous vigilante actions, particularly in the city of Cheyenne.<sup>149</sup> He wrote: “[Where] the authorities are powerless to act—[or] if they do so act with public enemies openly or covertly—then it sometimes happens that lynch law is the only apparently practicable way by which life and property can be protected.”<sup>150</sup> Despite such tributes, we should not forget that vigilante actions were frequently violent assertions of power over socially and culturally marginalized individuals and groups.<sup>151</sup> In the American South, where white lynchings of Black Americans were common occurrences for many decades after the Civil War, the threat and execution of lynchings were means for enforcing a racist and hierarchical social ordering.<sup>152</sup> “[A Black American] was lynched, on average, every four days from 1889 to 1929,” reports Ibram X. Kendi.<sup>153</sup> For the white mobs, these lynchings were often carnival-like gatherings worthy of memorialization: white participants and observers frequently collected souvenirs, such as body parts or pieces of rope.<sup>154</sup> Kendi adds that these “ritualistic slaughters [were often justified] on a false rumor that the victim had raped a White woman.”<sup>155</sup> Thus, resonating with the more recent white Christian nationalist movement, white men in the south frequently inflicted violence on Black men, supposedly to protect the bodies of white Christian women.

In sum, white Christian nationalism, in its extreme manifestations, has always stood against democratic government as it was (and is currently) constituted in the United States. White Christian activists would accept democracy, but only if the proper individuals and groups participate. In other words, “the People” should rule, but only white Christians can belong to “the People.”<sup>156</sup> From the white Christian nationalist perspective, “the People” cannot

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<sup>148</sup> *Id.* at 75.

<sup>149</sup> *Id.* at 75–78.

<sup>150</sup> *Id.* at 76 (quoting Coutant).

<sup>151</sup> *See id.* at 133.

<sup>152</sup> FRANKLIN & MOSS, *supra* note 74, at 312–17 (discussing violence against Black Americans); *see* ARELLANO, *supra* note 141, at 111–32 (discussing challenges to the dominant narratives of vigilante lynchings).

<sup>153</sup> KENDI, *supra* note 74, at 265.

<sup>154</sup> WILKERSON, *supra* note 102, at 92–95; *see* JONES, TOO LONG, *supra* note 7, at 33 (describing how whites gathered souvenirs after a lynching).

<sup>155</sup> KENDI, *supra* note 74, at 265.

<sup>156</sup> U.S. CONST. pmb.

be expanded to include Jews, other non-Christians, or people of color. Therefore, a non-Christian, a person of color, or even a white Christian who politically sympathizes and aligns with outsiders cannot legitimately win a democratic election. Even if that person seemingly garners more votes, those votes are illegitimate—fraudulent, we might say—because the true people cannot possibly choose an outsider for a leadership position. If only white Christian men can stand for and uphold the proper values, then only white Christian men can legitimately vote and be elected to office. Or, to put this in the converse, the inclusion of non-Christian or non-white people within the polity threatens the integrity of a white, Christian nation. Thus, white Christian men justifiably resent the intrusion of outsiders. White Christian men believe they are legitimately aggrieved by the participation and even mere presence of people of color, Jews, and other non-Christians.<sup>157</sup>

### C. *Deeper into the Political Mainstream*

Neoliberalism and white Christian nationalism appeared to be starkly separate and distinct. Neoliberalism was an intellectual movement supposedly developed from a commitment to economic principles. White Christian nationalism was a grassroots movement born from resentment and ostensible betrayals that, in its extreme forms, endorsed violence. Nevertheless, neoliberalism and white Christian nationalism shared a key component: a distrust of democratic government.

Even so, this overlap—the distrust of democratic government—might have been no more than happenstance, with little significance. After all, with its apparent grounding on economic principles, neoliberalism claimed to have universal appeal for all reasonable people.<sup>158</sup> White Christian nationalism was (and is) inherently exclusionary, purposively separating white Christians from all other people. Indeed, many observers have characterized white power activities, such as shootings and bombings, as actions of isolated

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<sup>157</sup> “While white power featured a diversity of views and an array of competing leaders, all corners of the movement were inspired by feelings of defeat, emasculation, and betrayal after the Vietnam War and by social and economic changes that seemed to threaten and victimize white men.” BELEW, *supra* note 7, at 10. A 2016 survey showed that while white evangelicals generally did not view race to be a problem in the United States, they nonetheless viewed themselves as victims of reverse discrimination. See TISBY, *supra* note 7, at 183.

<sup>158</sup> See, e.g., FARBER & FRICKEY, *supra* note 48, at 1–11 (summarizing public choice theory).

individuals.<sup>159</sup> For example, the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which killed 168 people, was often described as the work of one emotionally disturbed individual, Timothy McVeigh—or at most the action of two men, McVeigh and Terry Nichols.<sup>160</sup> But to attribute the Oklahoma City bombing and other similar violent actions to so-called lone wolves is a mistake.<sup>161</sup> These actions have arisen from a social movement—the white Christian nationalist movement—that has intentionally attempted to disguise its more violent actions as those of a few solitary men. That was the point of Beam’s leaderless resistance strategy: it disguised the interconnected movements of independent cells as the products of isolated individuals.<sup>162</sup> In fact, white power activists had targeted the Alfred P. Murrah Federal Building as early as 1983.<sup>163</sup> The public failure to recognize and understand such violent actions as the work of a white Christian nationalist movement has had significant consequences. Namely, this public failure has facilitated the continuing advancement of the movement, even in its extreme manifestations, thus allowing it to move from the margins of society deeper into the mainstream.<sup>164</sup>

Given this, the overlap between neoliberalism and white Christian nationalism—the distrust of democratic government—fostered an intertwining of the two under the umbrella of the Republican party. Four major events helped bring the movements together: the end of the Cold War; the September 11, 2001, terrorist attacks on the Twin Towers; the election of Barack Obama; and the election of Donald Trump.

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<sup>159</sup> See, e.g., Orlandrew E. Danzell & Lisandra M. Maisonet Montañez, *Understanding the Lone Wolf Terror Phenomena: Assessing Current Profiles*, 8 BEHAV. SCIS. TERRORISM & POL. AGGRESSION 135 (2016) (trying to understand lone wolves); Edwin Bakker & Beatrice de Graaf, *Preventing Lone Wolf Terrorism: Some CT Approaches Addressed*, 5 PERSPS. ON TERRORISM 43, 44 (2011) (acknowledging that lone wolves often identify with extremist movements).

<sup>160</sup> PAUL GILL, TRACING THE MOTIVATIONS AND ANTECEDENT BEHAVIORS OF LONE-ACTOR TERRORISM, at 16–22 (Pa. State Univ. 2012), [https://www.dhs.gov/sites/default/files/publications/OPSR\\_TP\\_ARC-Lone-Actor-Routine-Activity-Analysis-Report\\_Aug2012-508.pdf](https://www.dhs.gov/sites/default/files/publications/OPSR_TP_ARC-Lone-Actor-Routine-Activity-Analysis-Report_Aug2012-508.pdf).

<sup>161</sup> See BELEW, *supra* note 7, at 210–11.

<sup>162</sup> See *id.* at 3–5.

<sup>163</sup> *Id.* at 236.

<sup>164</sup> ZESKIND, *supra* note 7, at xi–xxiv (emphasizing the transition of the white power movement from the margins to the mainstream); see BELEW, *supra* note 7, at 237–39 (emphasizing how the mistaken understanding of white power actions has facilitated its spread).

### 1. The End of the Cold War

The first key event was the end of the Cold War in late 1991 and early 1992.<sup>165</sup> In one way, the Cold War had been a unifying force within the United States. It had provided a common enemy—communism as manifested in the Soviet Union—for diverse Americans across the political spectrum. Neoliberals, for example, celebrated the free economic marketplace of capitalism, so they could not accept a government-controlled communist economy. The white Christian nationalist movement had its roots in the anti-communist war in Vietnam. And, of course, Christian fundamentalists and evangelicals could not abide the godless communists.<sup>166</sup>

Consequently, for the vast majority of Americans, the end of the Cold War was a great victory. Democracy and capitalism had defeated communism and the Soviet Union. In the words of an influential neoconservative, Francis Fukuyama, the collapse of the Soviet Union marked the “end of history.”<sup>167</sup> Most observers at the time assumed that “capitalism and democracy would evolve along compatible lines and mutually reinforce each other . . . .”<sup>168</sup> But without communism to worry about, neoliberals increasingly focused on democratic government as an enemy. Furthermore, their influence continued to grow through Bill Clinton’s and George W. Bush’s presidential administrations.<sup>169</sup> Neoliberals pushed for the privatization of numerous government institutions, such as prisons, schools, policing, and even the military.<sup>170</sup> From the neoliberal perspective, “[e]fficiency

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<sup>165</sup> One can identify multiple events as marking the end of the Cold War: the destruction of the Berlin wall, the banning of the communist party in Russia, and a declaration by Russian president Boris Yeltsin that the Cold War had ended are all possibilities. See PATTERSON, *GIANT*, *supra* note 89, at 194–95; see also WILENTZ, *supra* note 7, at 313.

<sup>166</sup> See FELDMAN, *NEW*, *supra* note 29, at 134 (discussing how, during the Cold War, Congress took actions to underscore the importance of God and religion in the United States).

<sup>167</sup> Francis Fukuyama, *The End of History?*, 16 NAT’L INT. 3, 4 (1989).

<sup>168</sup> SHELDON S. WOLIN, *POLITICS AND VISION* 596 (Expanded ed., Princeton Univ. Press 2004).

<sup>169</sup> See SELF, *supra* note 7, at 411–12 (on Clinton’s shift rightward); HARVEY, *supra* note 7, at 5–7 (on Bush’s neoliberalism); JONES, *supra* note 7, at 334–35 (on Bush’s neoliberalism).

<sup>170</sup> E.g., RANDY BARNETT, *THE STRUCTURE OF LIBERTY* 179–80, 261 (1998) (supporting the privatization of prisons and law enforcement); see JOEL BAKAN, *THE CORPORATION* 113–38 (2004) (discussing privatization); Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1348 (2013) (explaining where privatization created problems).

can only be achieved through the incentives that are built into markets. . . . Incentive structures, profit and loss, and customer satisfaction are the values that should drive public service, just as they drive private enterprise.”<sup>171</sup> Corporations merged and went multinational, reaching into former communist countries that had been behind the Iron Curtain.<sup>172</sup> During the first decade after the end of the Cold War, the number of multinational corporations catapulted from approximately thirty-seven thousand to sixty-three thousand.<sup>173</sup> And corporations were not merely doing business; they were becoming increasingly involved in democratic processes. Corporations (and wealthy individuals) became so effective at manipulating elections and government for their own advantages that one can reasonably label this era, Democracy, Inc.<sup>174</sup> With ever-increasing proficiency, corporations used government power to benefit the respective corporations as well as corporate business in toto.<sup>175</sup> In 2012, the president of the conservative American Enterprise Institute, Arthur Brooks, echoed Ronald Reagan: “[T]he best government philosophy is one that starts every day with the question, ‘What can we do today to get out of Americans’ way?’”<sup>176</sup>

Meanwhile, the extremist thread of white Christian nationalism also transformed with the end of the Cold War. Given that Soviet communism no longer hovered portentously in the distance, white Christian nationalists intensified their targeting of the government, Jews, people of color, and other non-Christians.<sup>177</sup> The government’s violent siege of a white separatist compound in Ruby Ridge, Idaho, in

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<sup>171</sup> JONES, MASTERS, *supra* note 7, at 332.

<sup>172</sup> FRIEDEN, *supra* note 54, at 430–32; *see* WELLS, *supra* note 59, at 179 (discussing globalization in the 1990s).

<sup>173</sup> JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 173 (Mod. Libr. ed. 2003); Alfred D. Chandler, Jr. & Bruce Mazlish, *Introduction* to *LEVIATHANS* 1, 2 (Alfred D. Chandler, Jr. & Bruce Mazlish eds., 2005); Brian Roach, *A Primer on Multinational Corporations*, in *LEVIATHANS* 19, 24 (Alfred D. Chandler, Jr. & Bruce Mazlish eds., 2005).

<sup>174</sup> *See, e.g.*, DAVID S. ALLEN, *DEMOCRACY, INC.: THE PRESS AND LAW IN THE CORPORATE RATIONALIZATION OF THE PUBLIC SPHERE* (2005); SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* (2008).

<sup>175</sup> JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* 118–19 (2010) (on corporate political power); DARA Z. STROLOVITCH, *AFFIRMATIVE ADVOCACY* 209–10 (2007) (showing statistics of corporations and businesses dominating lobbying).

<sup>176</sup> Arthur C. Brooks, *Why the Stimulus Failed*, *NAT’L REV.* (Sept. 25, 2012, 8:00 AM), <https://www.nationalreview.com/2012/09/why-stimulus-failed-arthur-c-brooks>.

<sup>177</sup> FELDMAN, *NEW*, *supra* note 29, at 162–73.

1992 only reinforced the white Christian demonization of the federal government.<sup>178</sup> Fears of a coming apocalypse heightened even further when, in 1993, the government—suspecting the presence of illegal weapons and sexual abuse—attacked a fundamentalist sect’s (the Branch Davidians) compound in Waco, Texas.<sup>179</sup> Afterward, white Christian nationalists prepared for a government- and Jewish-led attack on white Christendom likely ending with a violent transformation of the nation.<sup>180</sup> Indeed, the Oklahoma City bombing can be understood, in part, as ostensible retribution for the Waco violence.<sup>181</sup>

In 1992, the fiery Pat Buchanan campaigned for the Republican presidential nomination and began a gradual interweaving of the two threads of white Christian nationalism. He would eventually drop out of the campaign—the mainstream Republican, President George H. W. Bush, was renominated—but Buchanan gave a prime-time speech at the Republican National Convention. In words that even extremist white Christian activists would have approved, he declared:

[T]his election is about more than who gets what. It is about who we are. It is about what we believe, and what we stand for as Americans. There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America.<sup>182</sup>

He attacked the Democratic nominee, Bill Clinton, and his wife, Hillary Rodham Clinton, for their stances on “abortion[,] . . . the Supreme Court, homosexual rights, discrimination against religious schools, [and] women in combat units.”<sup>183</sup> If Clinton were elected and empowered to change the nation, Buchanan warned, the United States would no longer be “God’s country.”<sup>184</sup>

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<sup>178</sup> BELEW, *supra* note 7, at 187–90, 196–200.

<sup>179</sup> THOMAS A. BAILEY ET AL., *THE AMERICAN PAGEANT* 1017 (Patricia A. Coryell et al. eds., 11th ed. 1998) [hereinafter *PAGEANT*]; BELEW, *supra* note 7, at 205–08.

<sup>180</sup> BELEW, *supra* note 7, at 6–7, 188.

<sup>181</sup> *PAGEANT*, *supra* note 179, at 1017; *see* BELEW, *supra* note 7, at 206–07.

<sup>182</sup> Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992), in *VOICES OF DEMOCRACY, THE U.S. ORATORY PROJECT* ¶ 39 [hereinafter Buchanan, Speech], <https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text>; *see* DARDA, *supra* note 7, at 20 (noting that Buchanan brought the concept of a culture war “to the national stage”).

<sup>183</sup> Buchanan, Speech, *supra* note 182, ¶ 23.

<sup>184</sup> *Id.*

Buchanan was a key figure in bringing the values of white Christian nationalism more deeply into the political mainstream.<sup>185</sup> Given that Buchanan was a traditionalist Catholic, his prominence demonstrated a perhaps surprising aspect of the white Christian nationalist movement. Although Protestants and Catholics have often been at odds through American (and world) history, white Christian nationalism has not been virulently anti-Catholic, despite the movement's close ties to Protestant fundamentalism.<sup>186</sup> Thus, in his run for the presidency, Buchanan drew strong support from the likes of David Duke, a national leader of the Ku Klux Klan (the KKK had traditionally been anti-Catholic).<sup>187</sup> Buchanan thundered about "moral absolutes"<sup>188</sup> in opposition to "shared citizenship."<sup>189</sup> From his perspective, compromise with opponents equaled betrayal, and victory was imperative, by any means necessary.<sup>190</sup>

Buchanan's strong showing in 1992 had significant ramifications for the Republican party. In the short term, Buchanan's candidacy pushed Bush's campaign to adopt increasingly conservative positions.<sup>191</sup> In the long term, Buchanan presaged the presidential candidacy of Donald Trump. Buchanan had been a TV talk-show host, proudly styled himself a "right-wing populist,"<sup>192</sup> and was an "uninhibited practitioner of the politics of resentment."<sup>193</sup> He did not shy from uttering racist and antisemitic statements.<sup>194</sup> For instance, in

<sup>185</sup> Buchanan was sometimes referred to as a paleoconservative. FELDMAN, *NEOCONSERVATISM*, *supra* note 26, at 3–4.

<sup>186</sup> See AHLSTROM, *supra* note 111, at 925; FELDMAN, *PLEASE DON'T*, *supra* note 14, at 119–20, 223–24.

<sup>187</sup> BELEW, *supra* note 7, at 35–36; ZESKIND, *supra* note 7, at xxi–xxii; see FELDMAN, *FREE EXPRESSION*, *supra* note 71, at 294–95 (discussing the Klan's anti-Catholicism).

<sup>188</sup> SELF, *supra* note 7, at 402.

<sup>189</sup> *Id.* at 402.

<sup>190</sup> *Id.* at 402–03.

<sup>191</sup> *Id.*; PATTERSON, *GIANT*, *supra* note 89, at 266–67.

<sup>192</sup> PATTERSON, *GIANT*, *supra* note 89, at 251.

<sup>193</sup> Daniel Schlozman & Sam Rosenfeld, *The Long New Right and the World It Made*, at 4 (Jan. 2019) (paper prepared for the 2018 American Political Science Association meetings), <https://static1.squarespace.com/static/540f1546e4b0ca60699c8f73/t/5c3e694321c67c3d28e992ba/1547594053027/Long+New+Right+Jan+2019.pdf>.

<sup>194</sup> See WILLIAM F. BUCKLEY, JR., *IN SEARCH OF ANTI-SEMITISM* 26–28 (1992) (finding that Buchanan could not be defended against charges of antisemitism); DIAMOND, *supra* note 7, at 293–94 (discussing Buchanan's antisemitism). One difference between Buchanan and Trump, however, was that Buchanan uttered anti-Israel statements. See Schlozman & Rosenfeld, *supra* note 193, at 66–67.

1992, Buchanan declared that “[t]he United States is now undergoing the greatest invasion in history, a mass immigration of millions of illegal aliens yearly from Mexico.”<sup>195</sup> He added that “[a] nation that cannot control its own borders can scarcely call itself a state any longer.”<sup>196</sup> Buchanan told his followers that “we must take back our cities, and take back our culture, and take back our country.”<sup>197</sup> His presidential campaign slogan was “America First,” and he sought to diminish the nation’s intervention abroad and involvement in international institutions, such as the United Nations.<sup>198</sup>

In the years after Buchanan’s candidacy, conservatives more frequently interweaved anti-government rhetoric with invocations of traditional Christian values.<sup>199</sup> Rather than arguing that government must enforce traditional values, conservatives began to suggest that government was degrading American values.<sup>200</sup> If the government stopped interfering in the private sphere, then “real” Americans could freely uphold their true moral values. From this perspective, it was government that promoted abortion, encouraged homosexuality, and fractured families.<sup>201</sup> Thus, in Oregon and Colorado, referenda on the respective state ballots, if approved, would have prohibited the governments from granting privileges or anti-discrimination protections to LGBTQ individuals.<sup>202</sup> The Oregon measure failed, but

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<sup>195</sup> John Dillin, *Buchanan Zeroes In on ‘Illegals’*, CHRISTIAN SCI. MONITOR (May 15, 1992), <https://www.proquest.com/docview/291201570?accountid=13793&parentSessionId=J9ca6xcfl%2Bn8hHuNyNDOiuz31LRM%2B2yXq6N7rGaXZEI%3D>.

<sup>196</sup> PATTERSON, *GIANT*, *supra* note 89, at 292.

<sup>197</sup> Buchanan, *Speech*, *supra* note 182, ¶ 49.

<sup>198</sup> DIAMOND, *supra* note 7, at 226, 293; Jonathan Alter, *Is Pat Buchanan Anti-Semitic?*, NEWSWEEK, Dec. 23, 1991, at 33.

<sup>199</sup> Newt Gingrich’s “Contract with America” emphasized economic rather than social issues. For instance, the Contract demanded lower taxes and fewer government regulations. SELF, *supra* note 7, at 404–05; WILENTZ, *supra* note 7, at 348–49.

<sup>200</sup> SELF, *supra* note 7, at 10–11, 400–01.

<sup>201</sup> For example, if not for the Supreme Court deciding *Roe v. Wade*, 410 U.S. 113 (1973), abortion would have largely remained illegal. McGirr describes the views of born-again Christians toward LGBTQ individuals as follows: “[B]orn-again Christians saw it as a challenge to biblical precepts of right and wrong, a threat to the traditional family, and one more sign of the moral corruption of American society.” MCGIRR, *supra* note 7, at 257.

<sup>202</sup> See *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (describing the Colorado referendum); SELF, *supra* note 7, at 403–04 (explaining the Oregon and Colorado measures).



Colorado voters approved their referendum—the Supreme Court, however, would ultimately invalidate the Colorado law in 1996.<sup>203</sup>

## 2. September 11 Terrorist Attacks on the Twin Towers

The next major event interweaving neoliberalism and white Christian nationalism was the terrorist destruction of the Twin Towers in New York City on September 11, 2001. This event spurred increased nativism and xenophobia, consonant with white Christian nationalism.<sup>204</sup> Neoliberalism, though, was already so deeply entrenched in Republican politics that conservatives readily incorporated a newfound fear of outsiders into their ongoing neoliberal, pro-marketplace, and anti-government rhetoric. To be sure, within days after 9/11, Republican President George W. Bush emphasized that Islam should not be equated with terrorism: “The face of terror is not the true faith of Islam. That’s not what Islam is all about. Islam is peace. These terrorists don’t represent peace. They represent evil and war.”<sup>205</sup> Yet, many Americans dismissed that message once Bush declared a “war on terror” and launched military attacks on Afghanistan and Iraq, both predominantly Muslim countries.<sup>206</sup> Bush himself emphasized the need for “moral clarity,”<sup>207</sup> “firm moral purpose,”<sup>208</sup> and aggressive “preemptive action”:<sup>209</sup> “We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”<sup>210</sup> With the Bush administration claiming that even torture of enemies was justified in a war on terror, many white Christian Americans readily blamed not only Muslims for the attacks, but also all people of color and Jews.<sup>211</sup>

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<sup>203</sup> *Romer*, 517 U.S. at 631–35 (holding that the Colorado law violated Equal Protection).

<sup>204</sup> See KENDI, *supra* note 74, at 477–78.

<sup>205</sup> President George W. Bush, Remarks at the Islamic Center of Washington, D.C. (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>.

<sup>206</sup> See WILENTZ, *supra* note 7, at 433–34.

<sup>207</sup> President George W. Bush, Commencement Address at West Point (June 1, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html>.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See KENDI, *supra* note 74, at 478; ZESKIND, *supra* note 7, at 516–20; FELDMAN, NEOCONSERVATISM, *supra* note 26, at 142–43 (discussing the defense of torture).

### 3. The Election of Barack Obama

The next key event was the presidential campaign and election of Barack Obama—or, more precisely, the reaction to President Obama. When Obama emerged as a serious candidate for the Democratic nomination in 2008, some white conservatives began to question whether he was truly born in the United States.<sup>212</sup> If he had been born elsewhere, he would have been ineligible to be President.<sup>213</sup> The so-called birthers demanded that Obama show his birth certificate to prove his qualification for the office.<sup>214</sup> But even after he publicized it, birthers remained doubtful.<sup>215</sup> Then, during the 2012 presidential campaign, none other than Donald Trump emerged to resurrect the birther movement, demanding that Obama produce a “long-form” birth certificate.<sup>216</sup> Moreover, soon after Obama was first elected, the so-called Tea Party emerged at the far right of the Republican party.<sup>217</sup> Tea Partiers focused on economic and fiscal issues rather than social ones—they were more neoliberal than white Christian nationalist—but they nonetheless infused their demands with a strong dose of populist, anti-establishment, and anti-government rage, resulting in strong resistance to Obama.<sup>218</sup> They were adamant opponents, for instance, of Obama’s signature Affordable Care Act (“Obamacare”).<sup>219</sup>

Lest anyone be mistaken, Obama’s election did not usher in an era of post-racial harmony. To the contrary, opposition to Obama was

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<sup>212</sup> Kyle Cheney, *No, Clinton Didn’t Start the Birther Thing. This Guy Did*, POLITICO (Sept. 16, 2016, 4:24 PM), <https://www.politico.com/story/2016/09/birther-movement-founder-trump-clinton-228304>; see KENDI, *supra* note 74, at 498 (on birther movement).

<sup>213</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>214</sup> Cheney, *supra* note 212.

<sup>215</sup> WILKERSON, *supra* note 102, at 318.

<sup>216</sup> Cheney, *supra* note 212; Alana Abramson, *How Donald Trump Perpetuated the ‘Birther’ Movement for Years*, ABC NEWS (Sept. 16, 2016, 4:27 PM), <https://abcnews.go.com/Politics/donald-trump-perpetuated-birther-movement-years/story?id=42138176>.

<sup>217</sup> KENDI, *supra* note 74, at 498; WILKERSON, *supra* note 102, at 318.

<sup>218</sup> Russell Berman, *Gallup: Tea Party’s Top Concerns Are Debt, Size of Government*, THE HILL (July 5, 2010, 9:45 PM), <https://thehill.com/blogs/blog-briefing-room/news/165469-gallup-tea-partys-top-concerns-are-debt-size-of-government>; Patrik Jonsson, *Tea Party Groups Push GOP to Quit Culture Wars, Focus on Deficit*, CHRISTIAN SCI. MONITOR (Nov. 15, 2010), <https://www.csmonitor.com/USA/Elections/Tea-Party-Tally/2010/1115/Tea-party-groups-push-GOP-to-quit-culture-wars-focus-on-deficit>.

<sup>219</sup> Jeremy W. Peters, *The Tea Party Didn’t Get What It Wanted, but It Did Unleash the Politics of Anger*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/28/us/politics/tea-party-trump.html>.

often explicitly or implicitly racist.<sup>220</sup> The birthers' racist motivations were undeniable: Obama, the first Black American to be a major-party presidential nominee, was also the first candidate to be placed under "a searing nativity microscope."<sup>221</sup> He was denounced as the "food stamp" president, and he and First Lady Michelle Obama were portrayed as simians.<sup>222</sup> During his presidency, "anti-[B]lack attitudes and racial stereotyping rose, rather than fell," and, unsurprisingly, the number of hate groups increased.<sup>223</sup> Right-wing radio host Rush Limbaugh lamented that "we've lost the country. I don't know how else you look at [Obama's reelection]."<sup>224</sup> To rephrase Limbaugh, Obama could not be a real American because he was not white. In fact, could someone named Barack Hussein Obama really be Christian? Or, as many Republican opponents seemed to believe, was he a clandestine Muslim?<sup>225</sup>

#### 4. The Election of Donald Trump

Obama's presidency triggered the final event in the mainstreaming of white Christian nationalism: the presidential candidacy and election of Donald Trump. Unquestionably, in 2016, Trump rode to victory atop a white Christian backlash against Obama. While some commentators claimed that working class whites supported Trump primarily because of economic displacement and economic anxiety, numerous political scientists concluded otherwise.<sup>226</sup> White Christian resentment and anxiety fueled Trump's

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<sup>220</sup> See generally ALGERNON AUSTIN, *AMERICA IS NOT POST-RACIAL: XENOPHOBIA, ISLAMOPHOBIA, RACISM, AND THE 44TH PRESIDENT* (2015).

<sup>221</sup> KENDI, *supra* note 74, at 494.

<sup>222</sup> WILKERSON, *supra* note 102, at 318.

<sup>223</sup> *Id.* at 319.

<sup>224</sup> Thomas B. Edsall, *Is Rush Limbaugh's Country Gone?*, N.Y. TIMES (Nov. 18, 2012, 11:14 PM), <https://archive.nytimes.com/campaignstops.blogs.nytimes.com/2012/11/18/is-rush-limbaughs-country-gone>.

<sup>225</sup> Perry Bacon, Jr., *Foes Use Obama's Muslim Ties to Fuel Rumors About Him*, WASH. POST, (Nov. 29, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/28/AR2007112802757.html>; *CNN Debunks False Report About Obama*, CNN: POLITICS (Jan. 23, 2007, 2:01 AM), <https://www.cnn.com/2007/POLITICS/01/22/obama.madrassa>; Jack Wheeler, *The Audacity of Apostasy: Barack Obama's Muslim Links*, BROOKES NEWS (Jan. 8, 2007), <http://www.brookesnews.com/070801obama.html> [<https://web.archive.org/web/20070119185824/http://www.brookesnews.com/070801obama.html>].

<sup>226</sup> See Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROC. NAT'L ACAD. SCI. E4330 (2018) (rejecting the widely held assumption that economic suffering explained support for Trump in 2016).

election.<sup>227</sup> As Christopher H. Achen and Larry M. Bartels explain, empirical studies generally show that “voters primarily look for politicians who match their identities,”<sup>228</sup> and “[in] contemporary American politics, perhaps the most powerful social identity is race.”<sup>229</sup> While racial identity is always significant in the United States, Obama’s presidency evoked “psychological forces” that rendered white racial anxiety even more salient than usual.<sup>230</sup> To be forced to submit to the governing rule of Obama, a Black American with a Muslim-like name, was too much for many white Christian Americans to abide.<sup>231</sup> This reaction against Obama and endorsement of Trump proved especially true for white evangelicals, despite Trump’s seeming character flaws—being a serial adulterer, assaulting women, bragging about sexual assaults, lying and cheating repeatedly, and displaying monumental narcissism.<sup>232</sup> Enfolding themselves deeply within their racial and religious identities, white evangelicals closely identified with Trump’s message of white, Christian grievance.<sup>233</sup>

To be sure, not all white evangelicals supported and approved of Trump, but surveys demonstrate that they strongly identified with

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<sup>227</sup> WILKERSON, *supra* note 102, at 325–26; Tehama Lopez Bunyasi, *The Role of Whiteness in the 2016 Presidential Primaries*, 17 PERSPS. ON POL. 679 (2019); Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 PS: POL. SCI. & POL. 528 (2018); Mutz, *supra* note 226, at 4330–32; Mark Setzler & Alixandra B. Yanus, *Why Did Women Vote for Donald Trump?*, 51 PS: POL. SCI. & POL. 523 (2018).

<sup>228</sup> CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 313 (2016).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 267; *see id.* (explaining how political events can make a particular element of identity especially salient).

<sup>231</sup> *See* TA-NEHISI COATES, WE WERE EIGHT YEARS IN POWER xvi (2017) (stating that white fear of Obama’s success infused Trump and his symbols of racism with the potency to win); LILLIANA MASON, UNCIVIL AGREEMENT 5 (2018) (arguing political polarization increased as parties became sorted in accord with social identities).

<sup>232</sup> TISBY, *supra* note 7, at 187; Alton Frye, *A Christian’s Questions for Trump’s Evangelical Voters*, THE GLOBALIST: RETHINKING GLOBALIZATION (May 31, 2020), <https://www.theglobalist.com/united-states-donald-trump-christianity-evangelicals-ethics-covid19>; Peter Wehner, *The Cost of the Evangelical Betrayal*, THE ATL. (July 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/white-evangelicals-gambled-and-lost/613999>.

<sup>233</sup> TISBY, *supra* note 7, at 188–89; *see also* WILKERSON, *supra* note 102, at 329 (emphasizing that white evangelicals are now the Republican base); Lilliana Mason et al., *Activating Animus: The Uniquely Social Roots of Trump Support*, 115 AM. POL. SCI. REV. 1, 1 (2021) (stating that political support for Trump could be predicted based on animus toward minority groups from years before).

Trump because of race and religion. A Pew Research Center poll revealed that 81 percent of white, born-again/evangelical Christians say they voted for Trump in 2016.<sup>234</sup> What were the next most Trump-supportive religious groups? Sixty-one percent of Mormons and 60 percent of white Catholics voted for him.<sup>235</sup> And to avoid any confusion, Trump's support among white evangelicals was stronger than that received by the Republican candidates in the prior four elections.<sup>236</sup> This white Christian support for Trump continued after he became President. A subsequent Pew Research Center poll showed that 78 percent of white evangelical Protestants approved of his job performance, with the support being strongest among those who attended church regularly.<sup>237</sup> Significantly, race as well as religion played a key role in prompting support for Trump. White evangelicals are far more conservative than Black American, Latinx, and Asian American evangelicals.<sup>238</sup> White evangelical conservatism arises partly from a sense of resentment and anxiety: white evangelicals feel "a kind of nostalgia for a period in American history when Black and non-white immigrants were considered outside the bounds or peripheral to the American national community."<sup>239</sup> In fact, a majority of white evangelicals believe that, as white Christians, they face greater discrimination than do people of color and non-Christians, including Muslims.<sup>240</sup> As Seth Dowland concluded in *The Christian Century*, white evangelicals "rallied around Trump to defend a white Protestant nation. They have proven to be loyal foot soldiers in the battle against undocumented immigrants and Muslims. [Along with other factors] the election of Barack Obama signaled to them a need to fight for the

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<sup>234</sup> Jessica Martinez & Gregory A. Smith, *How the Faithful Voted: A Preliminary 2016 Analysis*, PEW RSCH. CTR. (Nov. 9, 2016), <https://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis>.

<sup>235</sup> *Id.*

<sup>236</sup> Janelle Wong, *The Evangelical Vote and Race in the 2016 Presidential Election*, 3 J. RACE, ETHNICITY, & POL. 81, 82 (2018).

<sup>237</sup> Gregory A. Smith, *Among White Evangelicals, Regular Churchgoers Are the Most Supportive of Trump*, PEW RSCH. CTR. (Apr. 26, 2017), <https://www.pewresearch.org/fact-tank/2017/04/26/among-white-evangelicals-regular-churchgoers-are-the-most-supportive-of-trump>.

<sup>238</sup> Wong, *supra* note 236, at 81–82, 94.

<sup>239</sup> *Id.* at 95.

<sup>240</sup> *Id.* at 82, 95–101.

America they once knew.”<sup>241</sup> In fact, the number of evangelicals increased during the years of Trump’s presidency.<sup>242</sup>

Trump himself personified a politics of white Christian resentment and grievance.<sup>243</sup> He and his administration constantly cast non-white and non-Christian Americans as if they were outsiders who threatened the integrity of the nation. Consequently, Trump regularly “primed” the resentment of already aggrieved white Christians.<sup>244</sup> When he first launched his 2016 campaign, Trump notoriously denounced undocumented immigrants from Mexico: “They’re not sending [people like] you,” Trump said to his followers.<sup>245</sup> “They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>246</sup> These types of statements were not mistakes uttered in the heat of the moment—later apologized for and withdrawn. Rather, such statements were central to Trump’s campaign and subsequent presidency. In another infamous example, a “Unite the Right” rally in Charlottesville, Virginia, drew white Christian nationalists who chanted, “Jews will not replace us.”<sup>247</sup> Violent outbursts left numerous

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<sup>241</sup> Dowland, *supra* note 122.

<sup>242</sup> Apparently, some Trump supporters only began to identify themselves as evangelical during his presidency. Gregory A. Smith, *More White Americans Adopted Than Shed Evangelical Label During Trump Presidency, Especially His Supporters*, PEW RSCH. CTR. (Sept. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/09/15/more-white-americans-adopted-than-shed-evangelical-label-during-trump-presidency-especially-his-supporters>; Ryan Burge, *Why ‘Evangelical’ Is Becoming Another Word for ‘Republican’*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/opinion/evangelical-republican.html>.

<sup>243</sup> See Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460, 460 (2021) (describing Trump as a white protectionist).

<sup>244</sup> WILKERSON, *supra* note 102, at 331. Trump “effectively mobilized whites around their racial identity.” JARDINA, *supra* note 7, at 4.

<sup>245</sup> Amber Phillips, *‘They’re Rapists.’ President Trump’s Campaign Launch Speech Two Years Later, annotated*, WASH. POST (June 16, 2017, 1:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated>.

<sup>246</sup> *Id.*

<sup>247</sup> Yair Rosenberg, *‘Jews Will Not Replace Us’: Why White Supremacists Go After Jews*, WASH. POST (Aug. 14, 2017, 10:03 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews>; Mykal McEldowney, *What Charlottesville Changed*, POLITICO (Aug. 12, 2018), <https://www.politico.com/magazine/story/2018/08/12/charlottesville-anniversary-supremacists-protests-dc-virginia-219353>. The white Christian nationalist marchers also chanted a Nazi slogan, “Blood and Soil.” LIPSTADT, *supra* note 114, at 31.

[This slogan] idealizes a racially defined nation, and its subtext is that only those people with ‘pure’ or ‘white’ bloodlines can be true citizens of the nation. Only they are rooted to the soil. Jews, on the other hand,

counter-protesters injured and one dead, after a white supremacist drove his car into a crowd.<sup>248</sup> Afterward, Trump declared that there had been “very fine people, on both sides.”<sup>249</sup> Trump’s statements, whether calculated or not, had consequences. “The Trump administration’s rhetoric and policies targeting non-white immigrants, Muslims, Arabs, Latinos, and others has cast marginalized minorities as un-American, un-assimilable, and threats to the public order,” explained Dana M. Moss, a sociologist.<sup>250</sup> “By declaring them as fifth columns and as threats for anti-Americanism, our leaders suggest that minority immigrants and American citizens alike warrant persecution *as if* they were foreign combatants in our numerous wars overseas.”<sup>251</sup> For much of Trump’s presidency, his only consistent policy position appeared to be racism and xenophobia.<sup>252</sup>

Trump’s reaction to his election loss in 2020 underscored not only his accentuation of white Christian resentment and grievance but also the great degree to which Trump, his supporters, and many elected Republican officials have accepted tenets characteristic of white Christian nationalism.<sup>253</sup> Trump’s attitude appeared to be that he could not have legitimately lost the election to Joe Biden precisely because Biden was sympathetic to and supported by people of color, Jews, and other non-Christians. Even after Trump’s many legal challenges to the election result were repudiated, he continued to

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are ‘cosmopolitans,’ not nationalists, and as such are interlopers and threats to the well-being of the nation.

*Id.*

<sup>248</sup> Neil MacFarquhar, *Victims of Charlottesville Rally Argue the Violence Was Planned*, N.Y. TIMES (last updated Nov. 8, 2021), <https://www.nytimes.com/2021/10/24/us/charlottesville-rally-trial.html>.

<sup>249</sup> Jane Coaston, *Trump’s New Defense of his Charlottesville Comments is Incredibly False*, VOX (Apr. 26, 2019, 2:30 PM), <https://www.vox.com/2019/4/26/18517980/trump-unite-the-right-racism-defense-charlottesville>; Angie Drobnic Holan, *In Context: Donald Trump’s ‘Very Fine People on Both Sides’ Remarks (Transcript)*, POLITIFACT, POYNTER INST. (Apr. 26, 2019), <https://www.politifact.com/article/2019/apr/26/context-trumps-very-fine-people-both-sides-remarks>.

<sup>250</sup> Dana M. Moss, *Enter a New Regime? Lessons From the Study of Authoritarianism for US Politics*, in Charles Crabtree et al., *Contentious Politics in the Trump Era*, 51 PS: POL. SCI. & POL. 17, 21 (2018).

<sup>251</sup> *Id.* Moss refers to this denigration of non-whites and non-Christians as “negative othering,” which is characteristic of authoritarians. *Id.*

<sup>252</sup> See Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460 (2021)

(Trump’s policies reduced to white protectionism).

<sup>253</sup> BELEW, *supra* note 7, at 238–39 (expressly tying Trump to the white power movement).

maintain he had won.<sup>254</sup> The election, he insisted, had been corrupt or fraudulent—that Biden and his supporters had stolen the election. This nation was no longer the United States—the true United States, a white Christian nation—if non-whites and non-Christians had installed their preferred candidate in the presidency.

To be clear, the integration of white Christian nationalism into the Republican party had been advancing for years.<sup>255</sup> Trump, though, accelerated this intertwining by amplifying and seemingly legitimizing white Christian supremacist tenets, including racism, antisemitism, and white grievance. Predictably, starting with Trump's election in 2016, the threat of white Christian domestic terrorism increased dramatically: from 2016 to 2018, the percentage of terrorism-related deaths attributable to white supremacists jumped from 20 to 98 percent.<sup>256</sup> The Department of Homeland Security (DHS) identified Domestic Violent Extremists (“DVEs”) and particularly white supremacist extremists (“WSEs”)—who target people of color, non-Christians, and LGBTQ individuals, and are often anti-government—as “the most persistent and lethal threat” to the United States.<sup>257</sup> In fact, in October 2020, DHS reported: “Some DVEs and other violent actors might target events related to the 2020 [p]residential campaigns, the election itself, election results, or the post-election period.”<sup>258</sup> Yet, Trump and his administration continually suppressed concerns about white Christian nationalism and the potential for a violent insurrection—even after armed protesters stormed the Michigan State Capitol in April 2020 demanding an end to coronavirus lockdown orders, and the F.B.I.

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<sup>254</sup> Tim Elfrink, *After Electoral College Backs Biden, Trump Continues Falsely Insisting He Won: 'This Fake Election Can No Longer Stand'*, WASH. POST (Dec. 15, 2020, 4:20 AM), <https://www.washingtonpost.com/nation/2020/12/15/trump-electoral-college-biden/>; Betsy Klein, *Trump Continues to Claim He Won the Election. He Did Not*, CNN (Nov. 18, 2020, 1:27 PM), [https://www.cnn.com/business/live-news/election-2020-misinformation/h\\_0c9b7b7c121bb1b0d482e49698a62e79](https://www.cnn.com/business/live-news/election-2020-misinformation/h_0c9b7b7c121bb1b0d482e49698a62e79).

<sup>255</sup> POSNER, *supra* note 7, at xvi, 74 (stating that Trump was not an aberration, but rather was the culmination of decades of conservative organizing).

<sup>256</sup> Rebecca Ulam Weiner, *The Growing White Supremacist Menace: COVID-19 Has Been a Boon for Far-Right Extremists*, FOREIGN AFFS. (June 23, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-06-23/growing-white-supremacist-menace>.

<sup>257</sup> DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT, at 17–18 (Oct. 2020).

<sup>258</sup> *Id.* at 17.



foiled a subsequent plot to kidnap Michigan Governor Gretchen Whitmer and bomb the state Capitol.<sup>259</sup>

Thus, before election day on November 3, 2020, it was plain for all to see that Trump was encouraging right-wing extremists to engage in electoral violence.<sup>260</sup> Then, after Trump lost the election, he continued his instigation, ranting about the stolen election, despite lacking substantiating evidence.<sup>261</sup> Trump, with the support of legal scholar John Eastman, a former Supreme Court clerk for Clarence Thomas, urged Vice President Mike Pence, in his role as President of the Senate, to declare (falsely) that because seven states had contested slates of electors, Trump had actually won the election.<sup>262</sup> Pence resisted, questioning Eastman's factual and constitutional assertions.<sup>263</sup> The unsurprising result was the siege on the Capitol on January 6, 2021, which temporarily prevented Congress from formally certifying the electoral votes and declaring Joe Biden the next President.<sup>264</sup> And

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<sup>259</sup> Zolan Kanno-Youngs & Nicholas Fandos, *D.H.S. Downplayed Threats from Russia and White Supremacists, Whistle-Blower Says*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/us/politics/homeland-security-russia-trump.html>; Steve Inskeep et al., *Former DHS Official: Trump Pouring 'Fuel On The Fire' of Domestic Extremism*, WBUR (Sept. 2, 2020), <https://www.wbur.org/npr/908347989/former-dhs-official-white-house-failed-to-take-far-right-extremism-seriously>. On events in Michigan: Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html>; Pema Levy, *Attack on Michigan Capitol Was a "Preview" of January 6, Impeachment Prosecutors Argue*, MOTHER JONES (Feb. 11, 2021), <https://www.mothejones.com/mojo-wire/2021/02/michigan-attack>; Ivan Pereira, *Protesters, Some Armed, Spill into Michigan Capitol Building Demanding End to Stay-At-Home Order*, ABC NEWS (Apr. 30, 2020, 5:15 PM), <https://abcnews.go.com/US/michigan-rally-shelter-place-order-spills-capitol-building/story?id=70432928>.

<sup>260</sup> BOB WOODWARD & ROBERT COSTA, PERIL 234–36 (2021) (discussing fears of violence before January 6); Aila M. Matanock & Paul Staniland, *The Militarization of U.S. Politics: How Trump's Presidency Opened the Door to Armed Electoral Interference*, FOREIGN AFFS. (Oct. 29, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-10-29/militarization-us-politics>.

<sup>261</sup> Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>.

<sup>262</sup> WOODWARD & COSTA, *supra* note 260, at 209–12, 224–27.

<sup>263</sup> *Id.* at 215, 226–27.

<sup>264</sup> *Id.* at 227–29 (discussing events of January 6); see Daniel Flatley, *Why Jan. 6 is Key Date for Trump's Election Grips: QuickTake*, BLOOMBERG (Jan. 5, 2021, 11:19 AM), [https://www.bloomberglaw.com/product/blaw/document/QMGYAYT0G1KY?criteria\\_id=02cc0fefeda915d623lead71e548f7cc&searchGuid=73f6629d-b112-4ce4-a1dc-cb69391f19aa](https://www.bloomberglaw.com/product/blaw/document/QMGYAYT0G1KY?criteria_id=02cc0fefeda915d623lead71e548f7cc&searchGuid=73f6629d-b112-4ce4-a1dc-cb69391f19aa); Meg Wagner et al., *Congress Finalizes Biden's Win After Riot Disrupts*

just as white Christian nationalism encompassed diverse smaller movements and organizations,<sup>265</sup> the Capitol riot brought together numerous white supremacist, antisemitic, and anti-government groups. Many of them marked themselves by wearing or carrying symbols of their beliefs. There were the obvious symbols, such as the Confederate battle flag, Nazi swastikas, and a gallows and noose (indicating the lynching and terrorization of Black Americans).<sup>266</sup> But there were also more obscure symbols, such as t-shirts with Qs (for conspiracy theorists believing in QAnon), the Roman numeral III (for the anti-government Three Percenters), and even Hawaiian shirts (for the anti-government and radical libertarian Boogaloo Bois).<sup>267</sup>

The Capitol riot ultimately resulted in the deaths of five individuals and injuries to dozens of others, including many police officers;<sup>268</sup> subsequent to the riot, four more police officers died by

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*Capitol*, CNN (Jan. 7, 2021, 5:14 AM), <https://www.cnn.com/politics/live-news/congress-electoral-college-vote-count-2021/index.html>.

<sup>265</sup> See BELEW, *supra* note 7, at 6–7.

<sup>266</sup> Laura E. Adkins & Emily Burack, *Capitol Riots: What Far-Right Hate Symbols Were on Display?*, JERUSALEM POST (Jan. 8, 2021, 2:05 PM), <https://www.jpost.com/diaspora/antisemitism/capitol-riots-what-far-right-hate-symbols-were-on-display-654694>; Elly Belle, *Nazis Stormed The Capitol. Why Are People Afraid To Call Them That?*, YAHOO (Jan. 8, 2021), [https://www.yahoo.com/video/nazis-stormed-capitol-why-people-181210396.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAALPo0gA6ilaf\\_4QKDMrNL5v8cn5ILsiqt11Akn5pL0fwhpaZwS\\_QA314uUvz6fl-rmepxkaRkmGQUlqujKSyWFmLXULnTxhdYDtM4rIxjQT5iQfCWLblqHUhpeg1wfYnG0FOP7sFf5p2memp9zDZ5KSG1WCuk3Jnf0yXGCg3yKE](https://www.yahoo.com/video/nazis-stormed-capitol-why-people-181210396.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALPo0gA6ilaf_4QKDMrNL5v8cn5ILsiqt11Akn5pL0fwhpaZwS_QA314uUvz6fl-rmepxkaRkmGQUlqujKSyWFmLXULnTxhdYDtM4rIxjQT5iQfCWLblqHUhpeg1wfYnG0FOP7sFf5p2memp9zDZ5KSG1WCuk3Jnf0yXGCg3yKE).

<sup>267</sup> Matthew Rosenberg & Ainara Tiefenthäler, *Decoding the Far-Right Symbols at the Capitol Riot*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/video/extremist-signs-symbols-capitol-riot.html>; Michael J. Mooney, *The Boogaloo Bois Prepare for Civil War*, THE ATL. (Jan. 15, 2021, 8:47 AM), <https://www.theatlantic.com/politics/archive/2021/01/boogaloo-prepare-civil-war/617683>; Khrysgiana Pineda, *The Boogaloo Movement is Gaining Momentum. Who are the Boogaloo 'Bois' and What Do They Want?*, USA TODAY (June 19, 2020, 3:10 PM), <https://www.usatoday.com/story/news/nation/2020/06/19/what-is-boogaloo-movement/3204899001>.

<sup>268</sup> Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (last updated June 23, 2022), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>; Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers During Assault on U.S. Capitol*, WASH. POST (Jan. 11, 2021, 7:22 PM), [https://www.washingtonpost.com/local/public-safety/police-capitol-injures-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/local/public-safety/police-capitol-injures-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207_story.html).

suicide.<sup>269</sup> Even in the midst of the chaotic violence, Trump continued to insist the election had been stolen. In a tweeted message, apparently to the rioters themselves, he said, “I know your pain. I know you’re hurt. We had an election that was stolen from us. . . . This was a fraudulent election, but we can’t play into the hands of these people. We have to have peace. So go home, we love you, you’re very special.”<sup>270</sup> Then, after Vice President Pence had been escorted from the Senate chamber for his safety—and Trump reportedly knew of Pence’s continuing endangerment—Trump nonetheless tweeted a denigration of the Vice President: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”<sup>271</sup> In short, while Trump occasionally appeared to call for peace during the riot, he refused to call off the rioters and even seemed to revel in their violent support.<sup>272</sup>

Trump, it should be emphasized, did not become a pariah in the Republican party because of his denial of the election results or seeming support for the rioters. To be sure, after the riot, some Republicans left the party, and there was talk of the creation of a new

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<sup>269</sup> Kevin Breuninger & Dan Mangan, *Two More Police Officers Die by Suicide After Defending Capitol During Riot by Pro-Trump Mob, Tally Now 4*, CNBC (last updated Aug. 3, 2021, 12:15 PM), <https://www.cnbc.com/2021/08/02/3rd-police-officer-gunther-hashida-kills-himself-after-capitol-riot-by-trump-mob.html>.

<sup>270</sup> *We Love You, You’re Very Special’: President Trump Tweets Message, Later Removed, to Rioters Storming the U.S. Capitol*, CBS BALT. (Jan. 6, 2021, 11:50 PM), <https://baltimore.cbslocal.com/2021/01/06/its-time-to-go-home-now-president-trump-tweets-message-to-supporters-storming-the-u-s-capitol>.

<sup>271</sup> Courtney Subramanian, *A Minute-by-minute Timeline of Trump’s Day as the Capitol Siege Unfolded on Jan. 6*, USA TODAY (Feb. 11, 2021, 5:10 PM), <https://www.usatoday.com/story/news/politics/2021/02/11/trump-impeachment-trial-timeline-trump-actions-during-capitol-riot/6720727002>.

<sup>272</sup> Jamie Gangel et al., *New Details About Trump-McCarthy Shouting Match Show Trump Refused to Call Off the Rioters*, CNN (Feb. 12, 2021, 10:29 PM), <https://www.cnn.com/2021/02/12/politics/trump-mccarthy-shouting-match-details/index.html>. For instance, in the midst of the riot, a desperate Kevin McCarthy, the House Republican leader, phoned Trump and asked him to call off the rioters. Trump purportedly responded: “Well, Kevin, I guess these people are more upset about the election than you are.” *Id.*; see Michael McConnell, *How Democrats Could Have Made Republicans Squirm*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/opinion/trump-impeachment-acquitted.html?searchResultPosition=1> (criticizing Trump’s tweets sent during the riot).

moderate-right conservative party.<sup>273</sup> Plus, ten Republicans in the House of Representatives voted to impeach Trump for his role in the riot, and seven Republican Senators voted to convict him after a Senate trial.<sup>274</sup> Regardless, the overwhelming majority of Republicans remained loyal to Trump. Immediately after the riot, 147 Republican Senators and Representatives refused to certify Biden's electoral votes.<sup>275</sup> Then, when the House sought to impeach Trump for "incitement of insurrection," 195 House Republicans voted against impeachment, and forty-three Senate Republicans voted against Trump's conviction (despite the Republican opposition, the House impeached Trump, but the Senate failed to reach the two-thirds supermajority required to convict him).<sup>276</sup> Moreover, the few

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<sup>273</sup> See Jonathan Bernstein, *Is the Republican Party Headed for a Schism?*, BLOOMBERG (Feb. 11, 2021, 7:45 AM), [https://www.bloomberglaw.com/product/blaw/document/QOD7FCDWLU6X?criteria\\_id=a5c709ff44b6ee5ea4ebc58d2053a988&searchGuid=b49c9b2a-a4d7-4484-8b72-36e7a3ca6032](https://www.bloomberglaw.com/product/blaw/document/QOD7FCDWLU6X?criteria_id=a5c709ff44b6ee5ea4ebc58d2053a988&searchGuid=b49c9b2a-a4d7-4484-8b72-36e7a3ca6032); Andrew Kenney, *Spurred by the Capitol Riot, Thousands of Republicans Drop Out of GOP*, NPR (Feb. 1, 2021, 5:00 AM), <https://www.npr.org/2021/02/01/962246187/spurred-by-the-capitol-riot-thousands-of-republicans-drop-their-party>.

<sup>274</sup> Sarah Mimms, *These 7 Republicans Voted to Convict Donald Trump for Inciting the Deadly Capitol Riot*, BUZZFEED NEWS (Feb. 13, 2021, 5:13 PM), <https://www.buzzfeednews.com/article/sarahmimms/which-republicans-voted-to-convict-trump>; Domenico Montanaro, *These Are the 10 Republicans Who Voted to Impeach Trump*, NPR (Jan. 14, 2021, 5:01 AM), <https://www.npr.org/2021/01/14/956621191/these-are-the-10-republicans-who-voted-to-impeach-trump>.

<sup>275</sup> Harry Stevens et al., *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021, 12:48 PM), <https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker>.

<sup>276</sup> U.S. CONST. art. I, § 3, cl. 6; Weiyi Cai et al., *Impeachment Results: How Democrats and Republicans Voted*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/interactive/2019/12/18/us/politics/trump-impeachment-vote.html>; Weiyi Cai et al., *Trump's Second Impeachment: How the Senate Voted*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/13/us/politics/senate-impeachment-live-vote.html>. One can only conjecture as to why so many elected Republicans remained loyal to Trump, even after he lost the presidency and probably caused the Republicans to lose the Senate and House. Of course, some Republicans claimed to be acting on principle, on the belief that impeachment was unconstitutional because Trump was already out of office. See Michael S. Schmidt, *First Up at Trump's Impeachment: Can a Former President Stand Trial?*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/us/politics/trump-impeachment-constitutional.html>. There are many problems with this claim, the least of which is that it seems perverse to invoke the Constitution to protect Trump from accusations that he incited an insurrection against the constitutional government. Many Republicans probably feared that they could not get reelected in the future without the support of the Trumpian base, and some probably feared for their physical safety if they were to openly oppose Trump. See Stephen Fowler, *Someone's Going To Get*

Republicans in the House and Senate who voted either to impeach or convict Trump were met with a swift Republican backlash. State Republican parties issued censures of these members, and several were almost immediately threatened with being challenged in the next primaries.<sup>277</sup>

In sum, the Republican party largely remains loyal to Trump. Most Republicans apparently either affirmatively believe or at least acquiesce in conspiracy theories, which range from Trump's unsupported claim that the Democrats stole the election to views as bizarre as those of QAnon, which asserts that the Clintons and other Democrats worship Satan, run a child sex-trafficking ring, and eat children.<sup>278</sup> One can no longer reasonably describe these beliefs as limited to the fringe of the Republican party. Rather, to a great degree, this is the Republican party today. Many, if not most, Republicans now either believe in white Christian supremacy or are "comfortable playing footsie with white [Christian] supremacist[s]."<sup>279</sup> In a recent survey conducted by two political scientists, Rachel M. Blum and Christopher Sebastian Parker, 88 percent of Trump supporters believed that "real Americans are losing [their] freedoms," while more than 90 percent believed that "our lives are controlled by secret plots [and] the American way of life is disappearing."<sup>280</sup> At least 60 percent

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*Killed: Ga. Official Blasts GOP Silence on Election Threats*, NPR (Dec. 1, 2020, 8:58 PM), <https://www.npr.org/sections/biden-transition-updates/2020/12/01/940961602/someones-going-to-get-killed-ga-official-blasts-gop-silence-on-election-threats> (describing threats against the Georgia Secretary of State and other officials who refused to overturn the state electoral victory of Biden).

<sup>277</sup> See Evie Fordham, *Republicans Who Voted to Convict Trump Face Backlash at Home*, FOX NEWS (Feb. 14, 2021, 9:46 AM), <https://www.foxnews.com/politics/republicans-vote-convict-trump-backlash-cassidy-burr-sasse>.

<sup>278</sup> See Thomas B. Edsall, *The QAnon Delusion Has Not Loosened Its Grip*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/opinion/qanon-conspiracy-theories.html>; Thomas B. Edsall, *How Long Can Democracy Survive QAnon and Its Allies*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/opinion/democracy-qanon.html>; Kevin Roose, *What is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html>.

<sup>279</sup> Bernstein, *supra* note 273; see JARDINA, *supra* note 7, at 8 (arguing that many whites strongly align their politics with white identity but do not openly approve of white nationalism); Smith & King, *supra* note 243, at 460 (arguing Trump is a "white protectionist" who has remade "the modern Republican Party in his image").

<sup>280</sup> Rachel M. Blum & Christopher Sebastian Parker, *The Pandemic and Paranoia – Panel Study of the MAGA Movement*, WORDPRESS, <https://sites.uw.edu/magastudy/the-pandemic-and-paranoia> (last visited Oct. 4, 2022).

of the Trump supporters are white, Christian men.<sup>281</sup> Meanwhile, Michael Humphrey, a professor of journalism and media communication, analyzed the corpus of Trump's tweets over several years.<sup>282</sup> Humphrey concluded that Trump had five main, regular themes. "1. The true version of the United States is beset with invaders; 2. Real Americans can see this; 3. I (Trump) am uniquely qualified to stop this invasion; 4. The establishment and its agents are hindering me; 5. The U.S. is in mortal danger because of this."<sup>283</sup> To underscore a crucial point, these themes resonate strongly with white Christian nationalism.<sup>284</sup>

### 5. Republican Conservatism Today

The current Republican party cannot be simply equated with the most extreme thread of white Christian nationalism.<sup>285</sup> Donald Trump is not identical to Louis Beam or Timothy McVeigh. Two key ways in which current Republican ideology departs from extremist white Christian nationalism relate to first, neoliberalism, and second, a racial and religious caste system. With regard to neoliberalism, Trump

<sup>281</sup> Rachel M. Blum & Christopher Sebastian Parker, *Demographics & Group Affinities – Panel Study of the MAGA Movement*, WORDPRESS, <https://sites.uw.edu/magastudy/demographics-group-affinities> (last visited Oct. 4, 2022).

<sup>282</sup> Michael Humphrey, *I Analyzed All of Trump's Tweets to Find Out What He Was Really Saying*, CONVERSATION (Feb. 8, 2021, 8:40 AM), <https://theconversation.com/i-analyzed-all-of-trumps-tweets-to-find-out-what-he-was-really-saying-154532>.

<sup>283</sup> *Id.*

<sup>284</sup> See, e.g., Thomas B. Edsall, *The Capitol Insurrection Was as Christian Nationalist as It Gets*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2021/01/28/opinion/christian-nationalists-capitol-attack.html>; Michelle Goldberg, *It's Marjorie Taylor Greene's Party Now*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/01/opinion/marjorie-taylor-greene-gop.html>; Annie Karni & Mike Baker, *An Emboldened Extremist Wing Flexes its Power in a Leaderless G.O.P.*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/us/politics/republicans-trump-ronna-mcdaniel.html>; Jennifer Rubin, *Stop Trying to Save the GOP. It's Hopeless*, WASH. POST (Feb. 12, 2021, 7:45 AM), <https://www.washingtonpost.com/opinions/2021/02/12/stop-trying-save-gop-its-hopeless/>; Jennifer Rubin, *The Seditionists Made Clear What Their Attack was About: White Supremacy*, WASH. POST (Jan. 15, 2021), <https://www.washingtonpost.com/opinions/2021/01/15/seditionists-cleared-up-lot-myths/>; Matthew Avery Sutton, *The Capitol Riot Revealed the Darkest Nightmares of White Evangelical America*, NEW REPUBLIC (Jan. 14, 2021), <https://newrepublic.com/article/160922/capitol-riot-revealed-darkest-nightmares-white-evangelical-america> (“[W]hat the Capitol riot revealed in all its gruesome detail—is the extent to which Trump channels the apocalyptic fervor that has long animated many white evangelical Christians in this country.”).

<sup>285</sup> See JARDINA, *supra* note 7, at 8 (arguing that many whites strongly align their politics with white identity without overtly approving white nationalism).

rejected some fundamental neoliberal principles. Most important, Trump's advocacy for and implementation of tariffs contravened the neoliberal commitment to a global free market.<sup>286</sup> Yet, perhaps the only important legislative achievement of his presidency was an old neoliberal favorite, massive tax cuts primarily benefiting the wealthy—with benefits supposedly trickling down to others (which empirically has never proven true).<sup>287</sup> Moreover, Trump also continued and intensified the crucial neoliberal theme of attacking democratic government. Of course, this anti-government theme has also been central to white Christian nationalism. Indeed, Trump's Republican party not only showed disdain for constitutional and democratic norms but also accepted white Christian nationalism's more violent anti-government stance, at least to a degree, as demonstrated by the siege on the Capitol. Trump, in his demand for fealty, can be understood as having fused together former supporters of Buchanan—individuals inclined toward white Christian nationalism—and what had been the more mainstream strand of the Republican party—what might be called the “Court Conservatives”—who had been more committed to neoliberalism.<sup>288</sup>

The historian Lisa McGirr underscores that hallmarks of the Trump presidency—“nativism, extreme polarization, truth-bashing, white nationalism and anti-democratic policies”—are likely to remain central to Republican ideology in the future precisely because “Republicans have been fueling the conditions that enabled Mr. Trump's rise since the 1980s.”<sup>289</sup> McGirr points to an underlying irony

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<sup>286</sup> Jeff D. Colgan, *Trump Wants to Impose a Whopping 35% Tariff on Businesses that Move Jobs Overseas. This Is Why*, WASH. POST (Dec. 4, 2016, 9:00 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/29/donald-trump-is-an-economic-nationalist-whats-an-economic-nationalist/>; Zach Herriges, *Neoliberal Global Elites Upset Trump Isn't Playing Their Free Trade Game*, MEDIUM (June 5, 2018), <https://medium.com/@zacherhiges/neoliberal-global-elites-upset-trump-isnt-playing-their-free-trade-game-8e12b2c1bf52>.

<sup>287</sup> See FELDMAN, NEW, *supra* note 29, at 208; Tim Dickinson, *How Trump Took the Middle Class to the Cleaners*, ROLLING STONE (Oct. 26, 2020), <https://www.rollingstone.com/politics/politics-features/trump-covid-response-economy-jobs-taxes-inequality-1080345/>; see also Camilo Maldonado, *Trump Tax Cuts Helped Billionaires Pay Less Taxes than the Working Class in 2018*, FORBES (Oct. 10, 2019, 6:40 AM), <https://www.forbes.com/sites/camilomaldonado/2019/10/10/trump-tax-cuts-helped-billionaires-pay-less-taxes-than-the-working-class-in-2018/?sh=39e27ec73128>.

<sup>288</sup> Schlozman & Rosenfeld, *supra* note 193, at 76.

<sup>289</sup> Lisa McGirr, *Trump Is the Republican Party's Past and Its Future*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/opinion/gop-trump.html>.

in the current makeup of the Republican party: namely, Republican-championed neoliberal policies economically harmed the white Christian working class, but Republicans sidestepped responsibility by scapegoating people of color, immigrants, and non-Christians. For decades, Republicans pushed for and implemented neoliberal policies while exploiting “white cultural resentments for political gain.”<sup>290</sup> As McGirr concludes, “Mr. Trump championed ideas that had been bubbling up among the Republican grass roots since the late [twentieth] century.”<sup>291</sup>

With regard to a racial and religious caste system, the most hardcore white Christian nationalists, as discussed, would not have been satisfied with even a legally enforced caste system reminiscent of the Jim Crow era. They sought a nation purged of people of color, non-Christians, LGBTQ individuals, and other marginalized groups.<sup>292</sup> Yet, most Republicans today do not seemingly want to banish or kill all non-white and non-Christian Americans. Rather, they would likely be satisfied with a partly de facto and partly de jure racial and religious caste system, a system that both informally and formally recognizes and supports white Christian supremacy and privilege. From this Republican perspective, the presidency of Obama, the apparent successes of some non-whites and non-Christians, the Black Lives Matter movement, and the immigration of people of color all seemingly justify white Christian resentment and grievance: the American system appears to need a course correction to return white Christians (especially white Christian men) to their rightful hegemonic position.<sup>293</sup>

I do not mean to suggest that white Christian anxiety is nonsensical. The demographics of the American population have, in fact, shifted.<sup>294</sup> The U.S. Census Bureau has predicted that by mid-century, the majority of the American people will no longer be white.<sup>295</sup>

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See ZESKIND, *supra* note 7, at xvii-xviii.

<sup>293</sup> See WHITEHEAD & PERRY, *supra* note 7, at 4–5, 153–54 (arguing that Christian nationalism is about political power and imposing a particular social order). This list of what provokes white resentment and grievance is not exhaustive. See WILKERSON, *supra* note 102, at 324–35 (explaining that whites voted for Trump to preserve or resurrect a caste system).

<sup>294</sup> See JONES, END, *supra* note 7, at 24–29; WHITEHEAD & PERRY, *supra* note 7, at 4 (“strong Christian nationalists are declining in number”).

<sup>295</sup> U.S. CENSUS BUREAU, TABLE 4: PROJECTED RACE AND HISPANIC ORIGIN, 2017 NATIONAL POPULATION PROJECTIONS TABLES: MAIN SERIES (2017),



Moreover, the percentage of white Christian Americans is already slightly less than a majority, while the number of religiously unaffiliated Americans is growing.<sup>296</sup> These demographic shifts have contributed to concrete changes—breakthroughs—in the makeup of at least some government institutions. For instance, Obama was elected President; the election of a Black American as President would have been unimaginable only a few decades earlier.<sup>297</sup> On the Supreme Court, there are currently six Catholics, one Jew, and two Protestants (Gorsuch was raised Catholic but attends an Episcopalian church).<sup>298</sup> Throughout Supreme Court history, the overwhelming majority of Justices have been Protestant; 90 of the first 101 Justices were Protestant.<sup>299</sup> The first Catholic to sit on the Court was Roger Taney, nominated as Chief Justice in 1836, but the second, Edward

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<https://www.census.gov/programs-surveys/popproj/data/tables.html> (last visited Oct. 5, 2022).

<sup>296</sup> JONES, END, *supra* note 7, at 47–48; see JARDINA, *supra* note 7, at 22–23, 91, 114 (explaining factors that have generated an increased sense of white identity in American politics). It is worth noting, however, that the number of self-identifying evangelicals increased during Trump’s presidency. See Smith, *supra* note 242 (citing sources discussing increased number of evangelicals). For survey statistics regarding the percentage of Americans supporting the separation of church and state, see *In U.S., Far More Support Than Oppose Separation of Church and State*, PEW RSCH. CTR. (Oct. 28, 2021), <https://www.pewforum.org/2021/10/28/in-u-s-far-more-support-than-oppose-separation-of-church-and-state>; Mya Jaradat, *What the Latest Data Tells Us About Christian Nationalism*, DESERET NEWS (Oct. 28, 2021, 12:00 AM), <https://www.deseret.com/faith/2021/10/28/22750589/what-the-latest-data-tells-us-about-christian-nationalism-pew-research-center-andrew-whitehead> (discussing the difficulties entailed in interpreting this statistical data).

<sup>297</sup> See JONES, END, *supra* note 7, at 38.

<sup>298</sup> Zachary Baron Shemtob, *The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation’s Highest Judicial Body*, 27 J.L. & RELIGION 101 (2012); David Crary, *If Barrett Joins, Supreme Court Would Have Six Catholics*, AP NEWS (Sept. 26, 2020), <https://apnews.com/article/us-supreme-court-ruth-bader-ginsburg-archive-courts-donald-trump-987e5fb6de8a1a29d1cbb00bf1f1948c>; Daniel Burke, *What is Neil Gorsuch’s Religion? It’s Complicated*, CNN POLITICS (Mar. 22, 2017, 2:37 PM), <https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html>; *Current U.S. Supreme Court Members*, INFOPLEASE, <https://www.infoplease.com/us/government/judicial-branch/current-us-supreme-court-members> (last visited Oct. 5, 2022). It should be noted, though, that tensions between conservative Protestants and conservative Catholics are much less than in prior American history. For example, Rod Dreher, a prominent conservative Christian writer, can claim to be talking to Protestants, Catholics, and Eastern Orthodox Christians. ROD DREHER, *THE BENEDICT OPTION* 4–5 (2017) [hereinafter DREHER, *OPTION*].

<sup>299</sup> Nomi Stoltzenberg, *Religious Identity and Supreme Court Justices—A Brief History*, CONVERSATION (Oct. 19, 2020, 8:24 AM), <https://theconversation.com/religious-identity-and-supreme-court-justices-a-brief-history-146999>.

Douglass White, was not nominated until 1894.<sup>300</sup> The first Jewish Justice was Louis Brandeis, nominated in 1916.<sup>301</sup> For much of the twentieth century, only a single Catholic and a single Jewish Justice would be on the Court at any one time.<sup>302</sup> In short, the religious makeup of the Court today is strikingly unprecedented.<sup>303</sup>

Yet, even with these demographic and institutional changes, a “pervasive Christian privilege prevails in the United States today.”<sup>304</sup> The structures of white Christian supremacy and privilege, built and reinforced over centuries, remain strong.<sup>305</sup> Thus, for instance, the very definition of religion in America, centered around faith and belief, arose from a Protestant Christian perspective.<sup>306</sup> From a religious and cultural standpoint, Christianity determines what is normal as opposed to what is strange, abnormal, or unacceptable.<sup>307</sup> To take one example, if a grade school has a “holiday” party, it will be

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<sup>300</sup> Shemtob, *supra* note 298, at 104; *Past U.S. Supreme Court Members*, INFOPLEASE, <https://www.infoplease.com/biographies/government-politics/supreme-court> (last visited Oct. 5, 2022).

<sup>301</sup> *Past U.S. Supreme Court Members*, INFOPLEASE, <https://www.infoplease.com/biographies/government-politics/supreme-court> (last visited Oct. 5, 2022).

<sup>302</sup> Shemtob, *supra* note 298, at 109–11; Nomi Stolzenberg, *Religious Identity and Supreme Court Justices—A Brief History*, CONVERSATION (Oct. 19, 2020, 8:24 AM), <https://theconversation.com/religious-identity-and-supreme-court-justices-a-brief-history-146999>.

<sup>303</sup> See *supra* text accompanying note 186. One explanation for the unprecedented religious makeup of the Court is the absorption of Catholics into the white Christian nationalist movement, as illustrated by the importance of Buchanan to the movement’s development.

<sup>304</sup> JOSHI, *supra* note 7, at 1.

<sup>305</sup> *Id.* at 57; see JONES, TOO LONG, *supra* note 7, at 5–6 (emphasizing that white Christian churches have actively sought to construct and protect white supremacy). Robert P. Jones writes:

In its heyday, a set of linked institutions reinforced White Christian America’s worldview across generations: the Young Men’s Christian Association (YMCA), the Boy Scouts, the Masonic Lodge, and the local country club with limits or even outright bans on membership for Catholics, Jews, and ethnic minorities. White Christian America had its golden age in the 1950s, after the hardships and victories of World War II and before the cultural upheavals of the 1960s. June Cleaver was its mother, Andy Griffith was its sheriff, Norman Rockwell was its artist, and Billy Graham and Norman Vincent Peale were its ministers.

JONES, *END*, *supra* note 7, at 38–39.

<sup>306</sup> See LEORA BATNITZKY, *HOW JUDAISM BECAME A RELIGION 1* (2011) (explaining how Judaism has needed to try to fit within the concept of a Protestant religion); see also JOSHI, *supra* note 7, at 25.

<sup>307</sup> JOSHI, *supra* note 7, at 129–30.

held in December, near Christmas, rather than in September or October, near the Jewish high holy days (Rosh Hashanah and Yom Kippur).<sup>308</sup> While conservative Christians nowadays might occasionally face criticism (for their religious views), Christianity remains the de facto religion of the United States.<sup>309</sup> As Khyati Y. Joshi emphasizes: “White Christians alone can count on consistently seeing themselves reflected in the nation’s structures, and enjoying calendars and expectations that coincide with their beliefs and practices.”<sup>310</sup>

Christians who are anxious and resentful, then, are largely reacting to their perceptions of threatened privilege. White Christian supremacy and privilege remain intact, even if white Christian cultural hegemony is no longer as thorough and complete as it once was.<sup>311</sup> Putting this in different words, demographic and institutional changes have intensified the salience of white Christian identity and fears of decreasing dominance and privilege.<sup>312</sup> “Nothing feels so imbalanced as a level playing field,” writes Joshi,<sup>313</sup> “when for as long as you can remember the field has been tilted in your favor. But of course, the playing field is still far from level.”<sup>314</sup> Predictably, examples of white Christian resentment and grievance are plentiful.<sup>315</sup> Leading Christian writers assert that the United States was founded to be an evangelical

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<sup>308</sup> See Unpacked Staff, *When are the Jewish High Holidays in 2021?*, UNPACKED (Nov. 8, 2021), <https://jewishunpacked.com/when-are-the-high-holidays-2021-version>; *Jewish Holidays 2022–2026*, ILLINI CHABAD, [https://www.jewishillini.org/templates/articlecco\\_cdo/aid/3673924/jewish/Jewish-Holidays-2021-2026.htm](https://www.jewishillini.org/templates/articlecco_cdo/aid/3673924/jewish/Jewish-Holidays-2021-2026.htm) (last visited Nov. 18, 2022); JOSHI, *supra* note 7, at 131–32 (teacher resented having Holiday party in January because Christmas was in December).

<sup>309</sup> JOSHI, *supra* note 7, at 158–59.

<sup>310</sup> *Id.* at 159.

<sup>311</sup> *Id.* at 8–10, 201; JONES, END, *supra* note 7, at 41–42 (on cultural influence); JARDINA, *supra* note 7, at 3 (“For a number of whites, these monumental social and political trends—including an erosion of whites’ majority status and the election of America’s first Black president—have signaled a challenge to the absoluteness of whites’ dominance.”).

<sup>312</sup> JARDINA, *supra* note 7, at 7, 105–07.

<sup>313</sup> JOSHI, *supra* note 7, at 46.

<sup>314</sup> *Id.*; WHITEHEAD & PERRY, *supra* note 7, at 4–5 (“[T]he sizeable portion of Americans who pine for Christianity’s former prominence in American civic life feel threatened and marginalized. They fear that their values and priorities will, at best, no longer be dominant, and at worst, that their freedom to preach their moral values and share their religion with others would be outlawed.”).

<sup>315</sup> *E.g.*, ROD DREHER, *LIVE NOT BY LIES: A MANUAL FOR CHRISTIAN DISSIDENTS* (2020) [hereinafter DREHER, LIES]; ERWIN W. LUTZER, *WE WILL NOT BE SILENCED* (2020).

Christian light for the world,<sup>316</sup> but now, Christians are under siege: “Hostile secular nihilism has won the day in our nation’s government, and the culture has turned powerfully against traditional Christians.”<sup>317</sup> In the words of Rod Dreher, “[w]e faithful orthodox Christians didn’t ask for internal exile from a country we thought was our own, but that’s where we find ourselves.”<sup>318</sup> Americans today are supposedly “living under barbarism.”<sup>319</sup> Indeed, according to Dreher, Christians in the United States now suffer oppression analogous to that formerly experienced by dissidents in the Soviet Union.<sup>320</sup>

Conservative Christians therefore must fight to impose their views while pushing others to accept Christian redemption and “eternal life.”<sup>321</sup> In the words of retired evangelical pastor Erwin W. Lutzer, Christians should not hesitate to judge and condemn “ungodly lifestyles.”<sup>322</sup> For instance, Lutzer insists that Christians must “speak against the culture” of the LGBTQ community.<sup>323</sup> Dreher explains: “For a Christian, there is only one right way to use the gift of sex: within marriage between one man and one woman.”<sup>324</sup> Predictably, conservative Christians further emphasize that they must defend traditional family roles and adamantly oppose abortion.<sup>325</sup> Perhaps less predictably, they also maintain that Christianity requires defense of

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<sup>316</sup> DREHER, *OPTION*, *supra* note 298, at 36–37 (the United States Constitution separated the sacred from the public sphere, but this could work only because the American people were religious—and more specifically, Christian); LUTZER, *supra* note 315, at 20 (“In the past, . . . American Christians . . . had home-field advantage”); WHITEHEAD & PERRY, *supra* note 7, at 4 (quoting Jeffress, “a megachurch pastor and member of Donald Trump’s evangelical advisory board, . . . ‘[t]he framers of the Constitution and the earliest jurists demonstrated a clear preference for Christianity. They did not hesitate to declare that America was a Christian nation . . . the government can (and for more than 150 years did) show a preference for the Christian faith.’”).

<sup>317</sup> DREHER, *OPTION*, *supra* note 298, at 9.

<sup>318</sup> *Id.* at 99.

<sup>319</sup> *Id.* at 17.

<sup>320</sup> DREHER, *LIES*, *supra* note 315, at 210–14; *see* SMITH & KING, *supra* note 243, at 460–61 (arguing that Trump portrayed whites as victims).

<sup>321</sup> LUTZER, *supra* note 315, at 249; *see* DREHER, *OPTION*, *supra* note 298, at 9–11 (emphasizing the need for Christians to be aggressive in promoting traditional Christianity).

<sup>322</sup> LUTZER, *supra* note 315, at 17.

<sup>323</sup> *Id.* at 121; *see id.* at 155–76 (arguing that the popular culture and public schools are confusing children’s understanding of their sexuality).

<sup>324</sup> DREHER, *OPTION*, *supra* note 298, at 195.

<sup>325</sup> DREHER, *LIES*, *supra* note 315, at xiii.

capitalism and opposition to critical race theory.<sup>326</sup> If the government prevents Christians from imposing their views on others, the government is not protecting equality. It is expressing animus against Christians—a “profoundly anti-Christian militancy”<sup>327</sup>—because Christians are seeking merely to enforce the “truth.”<sup>328</sup>

From this perspective, religious liberty entails the freedom to live a Christian life rather than equal respect for other religions.<sup>329</sup> Thus, Lutzer worries about Islam being taught in American schools because, in his view, “[n]o religion in all the world is as repressive as Islam.”<sup>330</sup> Jews should be “judged” because they “failed” God when “they had the responsibility to be a light to other nations.”<sup>331</sup> Indeed, most portentously, Christian conservatism no longer harmonizes with democracy. To the contrary, conservative Christians perceive a conflict between democracy and Christianity.<sup>332</sup> According to Dreher, “liberal democracy”<sup>333</sup> is transforming into a type of “totalitarianism.”<sup>334</sup> Consequently, “in the years to come,”<sup>335</sup> he explains, “faithful Christians may have to choose between being a good American and being a good Christian.”<sup>336</sup> In its extreme Dominion theological manifestation, Christian conservatism maintains that only devout white Christians can legitimately participate in democratic processes and lead the polity.<sup>337</sup> “In this [Dominion theocratic] way of thinking,” Virginia Garrard explains,<sup>338</sup> “there is no room for dissent or difference in opinion. . . . Others are demonized, literally.”<sup>339</sup> When non-

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<sup>326</sup> LUTZER, *supra* note 315, at 78–87, 177–206.

<sup>327</sup> DREHER, LIES, *supra* note 315, at xiii; *see* DREHER, OPTION, *supra* note 298, at 2–9 (emphasizing hostility against Christians).

<sup>328</sup> DREHER, LIES, *supra* note 315, at 212–13; DREHER, OPTION, *supra* note 298, at 99 (according to Dreher, America ultimately needs “cultural change and religious conversion.”).

<sup>329</sup> *See* DREHER, LIES, *supra* note 315, at 210–12.

<sup>330</sup> LUTZER, *supra* note 315, at 118; *see id.* at 214–16 (worrying about schools).

<sup>331</sup> *See id.* at 77.

<sup>332</sup> *See* DREHER, LIES, *supra* note 315, at ix–xv; DREHER, OPTION, *supra* note 298, at 88–99.

<sup>333</sup> DREHER, LIES, *supra* note 315, at xiv.

<sup>334</sup> *Id.* at xv.

<sup>335</sup> DREHER, OPTION, *supra* note 298, at 89.

<sup>336</sup> *Id.*

<sup>337</sup> RUSHDOONY, INSTITUTES, *supra* note 108, at 100.

<sup>338</sup> Garrard, *supra* note 105.

<sup>339</sup> *Id.* at 3.

Christians and people of color are demonized, there is “fertile ground for the growth of conspiracy theories and absurd, even obscene accusations against ‘enemies’, because Satan, always a trickster, can and does readily colonize the human mind and soul.”<sup>340</sup> Ultimately, if needed to restore Christian values and leadership, Christians can act “by any means necessary, including through violence.”<sup>341</sup>

Given these views, the widespread, white Christian support for the Trump-led Republican party is understandable.<sup>342</sup> Motivated by antagonism toward non-Christians and people of color, as well as an intensified sense of white Christian identity, Trumpian Republicans reject any democratic process that denies Trump’s and Christian conservatives’ supremacy.<sup>343</sup> From the Trumpian viewpoint, non-Christians and people of color “dilute and pollute what is genuinely American: Whiteness and Christianity.”<sup>344</sup> Thus, we get pronouncements such as that of South Dakota Republican Governor Kristi Noem: “I look at Joe Biden’s America, and I don’t recognize the country that I grew up in.”<sup>345</sup> Likewise, a blogger for the Claremont Institute, a conservative think tank, wrote: “Most people living in the United States today—certainly more than half—are not Americans in any meaningful sense of the term.”<sup>346</sup>

In a significant way, Trump pedaled innocence to white Christian nationalists. Under Trump, white Christians—especially white Christian men—hoped to return to an era when they were privileged without recognizing that race, religion, or gender mattered.<sup>347</sup> Of course, as a matter of policy, Trump and his administration actively

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<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 4.

<sup>342</sup> JONES, TOO LONG, *supra* note 7, at 239–40 (emphasizing the empirical correlation between supporting Trump and identifying as a white Christian).

<sup>343</sup> See JARDINA, *supra* note 7, at 5, 105–07; STEWART, *supra* note 7, at 5–8, 276–77; Larry M. Bartels, *Ethnic Antagonism Erodes Republicans’ Commitment to Democracy*, 117 *PROC. NAT’L ACAD. SCI.* 22752, 22752–758 (2020).

<sup>344</sup> JOSHI, *supra* note 7, at 56.

<sup>345</sup> Zack Beauchamp, *The Anti-American Right*, VOX (Aug. 3, 2021, 1:20 PM), <https://www.vox.com/22600500/olympics-conservatives-simone-biles-anti-american>.

<sup>346</sup> *Id.* (quoting Glenn Elmers).

<sup>347</sup> DARDA, *supra* note 7, at 190–91. “Trump’s promise to restore a mythical past golden age—where factory jobs paid the bills and white Protestant churches were the dominant cultural hubs—powerfully tapped evangelical anxieties about an uncertain future.” JONES, END, *supra* note 7, at 246.

sought to propagate white Christian privilege.<sup>348</sup> And even beyond those policy maneuvers, Trump's overt appeals to white Christian supremacy harkened to a time when open and explicit racism and antisemitism were widespread and socially acceptable.<sup>349</sup> Ultimately, consistent with the American tradition of vigilantism, Trump supported violence if it was necessary to save America for white Christian nationalists.<sup>350</sup> Unsurprisingly, then, a recent poll shows that fifty-five percent of Republican voters believe "the traditional American way of life is disappearing so fast we may have to use force to save it,"<sup>351</sup> while another poll shows that more than half of Trump voters characterize the January 6 insurrection as an act of "patriotism."<sup>352</sup>

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<sup>348</sup> STEWART, *supra* note 7, at 31, 244–45; Smith & King, *supra* note 243, at 467–68 (listing the Trump administration's policies pursuing white protectionism); see JOSHI, *supra* note 7, at 85, 203–04 (discussing Trump's travel ban on primarily Muslim countries).

<sup>349</sup> JONES, TOO LONG, *supra* note 7, at 13–15; JOSHI, *supra* note 7, at 59 (Trump normalized "white Christian supremacist rhetoric"); POSNER, *supra* note 7, at 157–58 (emphasizing how Trump helped bring white Christian nationalism into the open). Thus, for example, "[the Unite the Right] Charlottesville march, with its coalition of radical right-wingers and white nationalists, was intended to mobilize a new generation of haters to return to the good old days, when [B]lacks and Jews knew their place." JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* 240 (2019).

<sup>350</sup> JOSHI, *supra* note 7, at 91; see JONES, TOO LONG, *supra* note 7, at 237–42 (discussing Trump, white Christians, and the Capitol riot).

<sup>351</sup> John Haltiwanger, *Nearly Half of Republicans Say 'a Time Will Come When Patriotic Americans Have to Take the Law into Their Own Hands,' New Poll Shows*, BUS. INSIDER (July 29, 2021, 3:34 PM), <https://www.businessinsider.com/47-percent-gop-voters-patriots-take-law-own-hands-poll-2021-7>. Similarly, forty-seven percent of Republican voters believe "a time will come when patriotic Americans have to take the law into their own hands." *Id.*; see Jon Skolnik, *Poll: Majority of Republicans Support Use of "Force" to Save "the Traditional American Way of Life"* SALON (July 30, 2021 11:26 AM), <https://www.salon.com/2021/07/30/poll-majority-of-republicans-support-use-of-force-to-save-the-traditional-american-way-of-life> (discussing the same poll).

<sup>352</sup> Beauchamp, *supra* note 345.

## II. POLITICAL CONSERVATISM AND RELIGIOUS FREEDOM UNDER THE ROBERTS COURT

### A. Introduction

From 1963 to 1990, the Court typically resolved free exercise issues by applying a strict scrutiny test.<sup>353</sup> If a neutral and generally applicable law, such as a criminal statute, burdened an individual's practice of religion, then that individual could seek a free exercise exemption from the law.<sup>354</sup> The government would need to grant the exemption unless it could show that the law was narrowly tailored (or necessary) to achieve a compelling state interest.<sup>355</sup> At least in theory, this strict scrutiny test was highly protective of religion, including minority religions.<sup>356</sup> *Employment Division, Department of Human Resources v. Smith*, decided in 1990, involved a standard free exercise

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<sup>353</sup> See, e.g., *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who did not belong to established church or sect); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (holding unconstitutional the denial of unemployment benefits to a convert to Seventh-day Adventism); *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) (holding unconstitutional the denial of unemployment benefits to a Jehovah's Witness who refused to continue working in a munitions factory).

<sup>354</sup> Haltiwanger, *supra* note 351. Similarly, 47 percent of Republican voters believe "a time will come when patriotic Americans have to take the law into their own hands." *Id.*; see Skolnik, *supra* note 351.

<sup>355</sup> See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>356</sup> Even so, free exercise claimants often lost in the Supreme Court. See, e.g., *O'Lone v. Est. of Shabazz*, 482 U.S. 342 (1987) (needing to defer to prison officials, the Court viewed strict scrutiny as inappropriate); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (emphasizing the context of the military, the Court did not apply strict scrutiny); *United States v. Lee*, 455 U.S. 252 (1982) (concluding the government satisfied strict scrutiny and did not need to exempt an Old Order Amish employer from collecting and paying Social Security taxes). Claimants fared better in the lower courts. See, e.g., James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236 (1999); Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652 (1983).



exemption claim: Smith was a member of the Native American Church who sought an exemption from a criminal law prohibiting the use of peyote.<sup>357</sup> With conservative icon Justice Antonin Scalia writing the majority opinion, the Court repudiated the strict scrutiny test and concluded the government did not need to grant a free exercise exemption.<sup>358</sup>

After *Smith*, free exercise exemption claims would be decided pursuant to a rational basis test: the government would only need to show that its action was rationally related to a legitimate government interest<sup>359</sup>—except for three narrow situations specified by the *Smith* Court. Courts were to continue applying strict scrutiny in the following circumstances: first, if the government purposefully discriminated against religion;<sup>360</sup> second, if the claimant challenged the denial of unemployment compensation;<sup>361</sup> and third, if the free exercise claim was combined with another constitutional claim—such as free expression—to form a type of “hybrid” case.<sup>362</sup>

To be clear, Scalia’s opinion in *Smith* largely harmonized with conservative politics of that era.<sup>363</sup> Ever since the liberal Warren Court had begun expanding the judicial protection of individual rights and liberties, conservatives advocated for judicial restraint: the Justices, according to this conservative view, were to defer to the democratic process rather than (ostensibly) imposing their own personal or political preferences.<sup>364</sup> At that point in time, conservatives were not especially worried that non-Christians (and people of color) might use

<sup>357</sup> Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

<sup>358</sup> *Id.* at 882–90.

<sup>359</sup> Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 163–64 (2016).

<sup>360</sup> *See Smith*, 494 U.S. at 877–78.

<sup>361</sup> *See id.* at 883.

<sup>362</sup> *Id.* at 882. *Smith* spurred numerous scholarly reactions. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); William P. Marshall, *Correspondence on Free Exercise Revisionism: In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

<sup>363</sup> I do not mean to suggest that all conservatives liked *Smith*. With support from both parties, Congress acted to reinstate the strict scrutiny test for laws of general applicability infringing free exercise rights. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as beyond congressional power, at least vis-à-vis state and local governments).

<sup>364</sup> *See* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) (placing the Warren Court in a political context); sources cited *supra* note 8 (citing conservative scholars arguing for judicial restraint).

voting and the democratic process to diminish Christian supremacy and privilege. Instead, conservatives worried that religious and racial minorities would use the courts and constitutional rights to cut into white Christian hegemony. Scalia, therefore, insisted that rigorous judicial protection of free exercise, pursuant to the strict scrutiny test, “would be courting anarchy, [a] . . . danger [that] increases in direct proportion to the society’s diversity of religious beliefs.”<sup>365</sup> Under the new rational basis test, Scalia admitted that free exercise rights would be determined through “the political process” rather than through the courts.<sup>366</sup> Thus, the *Smith* doctrinal approach would “place at a relative disadvantage those religious practices that are not widely engaged in.”<sup>367</sup> That disadvantage, he concluded, is an “unavoidable consequence of democratic government.”<sup>368</sup>

While *Smith* seemed harmonious with contemporary conservatism, conservative politics would change, as discussed above. Given the demographic changes in the American population and the growing politics of grievance among white Christians, the *Smith* Court’s reliance on the rational basis test and the democratic process struck a bell of alarm. With conservatives worried that white Christians are being discriminated against and persecuted—and with a conservative bloc of Justices controlling the Supreme Court—conservative Christians wanted stronger judicial protection of religious freedom, particularly for Christians, whether under the Free Exercise or the Establishment Clause.<sup>369</sup> Moreover, if conservative Christians are to fulfill their religious duty to push others to redemption, then they must be allowed to press their beliefs and practices on others, especially non-Christians.<sup>370</sup> Courts, then, must interpret religious freedom in accord with America’s roots as a de facto Christian nation. Non-Christians can

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<sup>365</sup> *Smith*, 494 U.S. at 888.

<sup>366</sup> *Id.* at 890.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NPR (May 23, 2019, 5:00 AM), <https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars> (discussing disagreement between Republicans and Democrats over religious freedom); *cf.* *Religious Freedom: What’s at Stake if We Lose It*, THE HERITAGE FOUND., <https://www.heritage.org/religious-liberty/heritage-explains/religious-freedom-whats-stake-if-we-lose-it> (last visited Oct. 29, 2022) (conservative Heritage Foundation arguing for strong protection of religious freedom).

<sup>370</sup> See DREHER, *OPTION*, *supra* note 298, at 9 (arguing that Christians should be allowed to discriminate against LGBTQ individuals as a matter of religious liberty).

be tolerated, but only insofar as they accept that the nation is de facto Christian—and they might need frequent reminders on that point.

Predictably, the Roberts-Court conservatives have repeatedly decided cases and written numerous opinions that manifest the newer conservative politics. For example, in *Town of Greece v. Galloway*, the Court held that clergy-delivered prayers at the start of town board meetings are constitutional.<sup>371</sup> Writing for the five-Justice conservative majority, Justice Anthony Kennedy reasoned that tradition not only determines the scope of the Establishment Clause,<sup>372</sup> but also permits the use of distinctly sectarian prayers.<sup>373</sup> Thus, Christian clergy in the town of Greece were constitutionally permitted to begin board meetings with prayers referring to the “saving sacrifice of Jesus Christ on the cross,”<sup>374</sup> and the “death, resurrection, and ascension of the Savior Jesus Christ.”<sup>375</sup> The meaning of the Establishment Clause, based on tradition, did not change merely because the United States had religiously changed during its history, transforming from an overwhelmingly Protestant nation in its early years to a religiously diverse nation in the twentieth and twenty-first centuries.<sup>376</sup> Kennedy states that “[t]he decidedly Christian nature of these prayers [given by one of the first Senate chaplains] must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today.”<sup>377</sup> Alito’s concurrence even suggested that the nation’s current religious pluralism rendered sectarian (read: Christian) prayers all the more expedient, perhaps even necessary: “Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder.”<sup>378</sup>

In a subsequent case, *American Legion v. American Humanist Ass’n*,<sup>379</sup> Alito suggested that non-Christians were welcome in America but only if they were willing to “live together harmoniously” while gazing at titanic Christian symbols, such as the thirty-two-foot Christian

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<sup>371</sup> See 572 U.S. 565, 569–70 (2014).

<sup>372</sup> *Id.* at 575–76.

<sup>373</sup> *Id.* at 577–79.

<sup>374</sup> *Id.* at 577.

<sup>375</sup> *Id.*

<sup>376</sup> See *id.* at 577–79.

<sup>377</sup> *Town of Greece*, 572 U.S. at 579.

<sup>378</sup> *Id.* at 595 (Alito, J., concurring).

<sup>379</sup> 139 S. Ct. 2067 (2019).

cross publicly displayed at a busy intersection in Bladensburg, Maryland.<sup>380</sup> In upholding the constitutionality of the Bladensburg Cross, on the basis of tradition,<sup>381</sup> Alito wrote: “The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.”<sup>382</sup> Thomas’s opinion, concurring in the judgment, emphasized that the presence of non-Christians in America should not diminish the nation’s traditional acceptance of de facto Christianity: an “insistence on nonsectarian’ religious speech [would be] inconsistent with our Nation’s history and traditions.”<sup>383</sup> Alito, apparently worried about suppression of or discrimination against Christianity, added that “tearing down monuments with religious symbolism [such as a thirty-two-foot Christian cross] and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”<sup>384</sup>

That worry, that Christians are being persecuted or discriminated against, was central to the Court’s reasoning in another case—*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, decided in 2018.<sup>385</sup> Jack Phillips, “a devout Christian,” had refused to bake a cake for a same-sex couple’s wedding reception because he opposed such marriages on religious grounds.<sup>386</sup> “The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation, in violation of the Colorado Anti-Discrimination

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<sup>380</sup> *Id.* at 2074, 2077–78 (part of introduction, unidentified as majority or plurality opinion). This part of the opinion—from Alito’s introduction—is probably majority, though it is unclear. Various justices joined parts of his opinion, making it either plurality or majority. But the introduction was identified neither as within Parts I, II–B, II–C, III, and IV, which were specified as majority, nor as within Parts II–A and II–D, which were specified as plurality.

<sup>381</sup> *Id.* at 2074 (part of introduction, unidentified as majority or plurality opinion) (emphasizing “historical context”). Alito also urged “a presumption of constitutionality for longstanding monuments, symbols, and practices.” *Id.* at 2081–82 (plurality opinion).

<sup>382</sup> *Id.* at 2074 (part of introduction, unidentified as majority or plurality opinion).

<sup>383</sup> *Id.* at 2096 (Thomas, J., concurring in the judgment) (quoting and citing *Town of Greece v. Galloway*, 572 U.S. 565, 578–80 (2014)) (citing *Town of Greece*, 572 U.S. at 595 (Alito, J., concurring)).

<sup>384</sup> *Id.* at 2084–85 (majority opinion).

<sup>385</sup> 138 S. Ct. 1719 (2018).

<sup>386</sup> *Id.* at 1724.

Act [(CADA)].<sup>387</sup> The Commission concluded that Phillips had, in fact, unlawfully discriminated, but the Supreme Court reversed, holding that the Commission had violated Phillips's right to the free exercise of religion.<sup>388</sup> In a majority opinion written by Kennedy, the Court dug down into the Commission's record and uncovered "religious hostility"<sup>389</sup> and "animosity."<sup>390</sup> Specifically, the Court emphasized a statement by one commissioner made during a Commission meeting: "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination," the commissioner said.<sup>391</sup> "And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."<sup>392</sup> Consequently, rather than following *Smith* and applying the rational basis test, the Court reasoned that one of the *Smith* exceptions applied. According to the Court, because the state had purposefully discriminated on the basis of religion, the state needed to satisfy strict scrutiny, which it could not do.<sup>393</sup>

To be clear, the commissioner's factual assertion was accurate, and obviously so: throughout history, many people have invoked religion to justify discrimination, whether it was against Jews, Black Americans, or others.<sup>394</sup> Moreover, while the Court emphasized the

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<sup>387</sup> *Id.* at 1723.

<sup>388</sup> *Id.* at 1723–24.

<sup>389</sup> *Id.* at 1724.

<sup>390</sup> *Id.* at 1731 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

<sup>391</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

<sup>392</sup> *Id.*

<sup>393</sup> The Roberts Court had invoked the purposeful-discrimination exception to *Smith* in a prior case. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). In that case, however, the state policy *explicitly* discriminated against religious entities, though in an effort to remain consistent with anti-establishment principles under the state constitution. *Id.* at 2017. *See also Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Gorsuch, J., concurring)

<sup>394</sup> On Christian-based antisemitism, see JOHNSON, *supra* note 113, at 169–310; JAMES PARKES, *JUDAISM AND CHRISTIANITY* 135 & 214 n.35 (1948); JACOB R. MARCUS, *THE JEW IN THE MEDIEVAL WORLD: A SOURCE BOOK* 315–1791, at 137–39 (Emanuel Gamoran ed., 1938) (thirteenth-century decree requiring Jews to wear distinguishing clothing). On Christian defenses of slavery, see Drew Gilpin Faust, *A Southern Stewardship: The Intellectual and the Proslavery Argument*, 31 *AM. Q.* 63, 71–73 (1979), *reprinted in* 12 *PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS* 129, 137–39 (Paul Finkelman ed.,

commissioner's statement, it was one minor point in lengthy, multilayered proceedings, culminating with a Colorado Court of Appeals decision.<sup>395</sup> Most important, Phillips did not deny that he had refused to bake a cake for the couple precisely because they were a same-sex couple—an action that unequivocally constituted discrimination proscribed by CADA.<sup>396</sup> Regardless, Gorsuch's concurrence, joined by Alito, underscored the conservative Justices' focus on protecting Christians from discrimination: “[I]t is our job to . . . afford legal protection to any sincere act of faith.”<sup>397</sup>

This heightened judicial concern for hostility toward Christianity exemplified the influence of contemporary conservative politics on the justices. During the Rehnquist Court years, the Justices only once had found that the *Smith* exception for purposeful discrimination against religion had been triggered.<sup>398</sup> In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, decided in 1993, the Court found that Hialeah had prohibited animal sacrifices so as to interfere purposefully with the practices of the Santeria religion.<sup>399</sup> Consequently, rather than applying rational basis review, the Court applied strict scrutiny and held that Hialeah had violated the Free Exercise Clause.<sup>400</sup> Under the Roberts Court, though, *Masterpiece Cakeshop* triggered a spate of cases where the conservative Justices found purposeful discrimination against religion, thus triggering strict scrutiny, which the Court inevitably found unsatisfied.<sup>401</sup> If anything, *Lukumi* surpassed *Smith* as the predominant free exercise precedent.<sup>402</sup> Partly because of these

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1989); Thornton Stringfellow, THE BIBLE ARGUMENT: OR, SLAVERY IN THE LIGHT OF DIVINE REVELATION, in COTTON IS KING, AND PRO-SLAVERY ARGUMENTS 461–546 (E.N. Elliott ed., 1860).

<sup>395</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

<sup>396</sup> *Id.* at 1724–25.

<sup>397</sup> *Id.* at 1738 (Gorsuch, J., concurring) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).

<sup>398</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>399</sup> *Id.* at 527–28, 531–34.

<sup>400</sup> *Id.* at 546–47.

<sup>401</sup> *E.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020).

<sup>402</sup> For citations to and discussions of *Lukumi*, see the following: *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–18 (2021) (Gorsuch, J., statement) (*South Bay II*); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256–57 (2020); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J.,

numerous cases relying on *Lukumi*, while emphasizing purposeful discrimination against religion, many commentators expected the Court to expressly overrule *Smith* when it decided *Fulton*.

B. *Fulton v. City of Philadelphia, Pennsylvania*

The Court in *Fulton v. City of Philadelphia* did not expressly overrule *Smith*, but the conservative Justices left little doubt about the future of free exercise doctrine.<sup>403</sup> The springboard for the *Fulton* dispute was a contract between the City of Philadelphia and Catholic Social Services (CSS), which was to provide foster care services for the city.<sup>404</sup> According to its religious tenets, though, CSS asserted that “marriage is a sacred bond between a man and a woman.”<sup>405</sup> CSS therefore refused to consider same-sex couples for foster care placements, which prompted the city to object on two related grounds: discrimination against same-sex couples violated, first, a provision of a municipal Fair Practices Ordinance, and second, a provision in the contract.<sup>406</sup> Based on those objections, the city stopped referring children to CSS for foster care placements.<sup>407</sup> In response, CSS sued the city for violating the First Amendment, particularly the Free Exercise Clause.<sup>408</sup>

Given the Court’s recent decisions, its conclusion was unsurprising—the Court held that the city had violated CSS’s free exercise rights. More surprising, though, was the alignment of Justices. The decision was unanimous. Roberts’s majority opinion was joined by the progressives, Kagan, Sotomayor, and Breyer, and the most recent conservative appointees, Kavanaugh and Barrett. Unhappy that Roberts avoided overruling *Smith*, Thomas, Alito, and Gorsuch refused to join his opinion. Alito and Gorsuch both wrote opinions concurring in the judgment and recommending that *Smith* be expressly overruled—they joined each other’s opinions, with Thomas also joining both opinions.<sup>409</sup> Barrett, besides joining Roberts’s opinion,

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dissenting) (*South Bay I*); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1730–31 (2018).

<sup>403</sup> 141 S. Ct. 1868, 1876–77 (2021).

<sup>404</sup> *Id.* at 1875.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 1875–76.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* CSS also raised a free speech claim. *Id.* at 1876.

<sup>409</sup> *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring in the judgment); *id.* at 1926 (Gorsuch, J., concurring in the judgment).

also wrote a concurrence agreeing with Roberts's conclusion that the Court, at this time, did not need to explicitly reexamine *Smith*.<sup>410</sup>

Although Roberts's opinion did not explicitly overrule *Smith*, it continued hollowing out *Smith*'s precedential importance. Roberts briefly disposed of the claim related to the Fair Practices Ordinance by interpreting the ordinance to not apply "to CSS in the first place."<sup>411</sup> Thus, the bulk of his opinion concentrated on whether the contractual provisions violated free exercise. While prior Roberts Court opinions had repeatedly invoked only one of the three exceptions from *Smith*—the purposeful-discrimination exception—Roberts relied on two exceptions in *Fulton*: the purposeful-discrimination and unemployment-compensation exceptions.<sup>412</sup> His interpretation and application of the two exceptions overlapped as he reasoned that if a law (or contract, as in this case) allows the government discretion to grant individual exemptions from the law's applicability, then under both *Smith* exceptions, the law is not neutral or one of general applicability.<sup>413</sup> The power to grant individual exemptions, Roberts feared, would allow the government to grant exemptions for secular reasons without granting exemptions for religious reasons. Roberts cited *Lukumi* as support for his interpretation of both *Smith* exceptions.<sup>414</sup>

In this particular case, Roberts found that the CSS contract allowed the city to grant exemptions from its non-discrimination

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<sup>410</sup> *Id.* at 1882–83 (Barrett, J., concurring).

<sup>411</sup> *Id.* at 1880; *see id.* at 1879–81 (disposing of the Fair Practices Ordinance issue).

<sup>412</sup> *Id.* at 1877–79.

<sup>413</sup> *Id.* With regard to the purposeful-discrimination exception, Roberts explained: "A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. The application of the unemployment-compensation exception was more complicated. According to Roberts, an unemployment compensation law is problematic if it allows the government to grant exemptions to otherwise mandated denials of unemployment compensation. For example, if the government can grant or deny benefits pursuant to a law prohibiting compensation to those "who had 'failed, without good cause . . . to accept available suitable work,'" then the government might find good cause to grant benefits to an unemployment-compensation claimant who relied on a secular justification (for refusing a job offer) while denying compensation for a claimant who relied on a religious justification (for similarly refusing a job offer). *Id.* at 1877 (quoting *Sherbert*, 374 U.S. at 401). In other words, if an unemployment compensation law allows the government to grant individual exemptions, then the law is not one of general applicability. *See* Laycock, *supra* note 362, at 47–53.

<sup>414</sup> *Fulton*, 141 S. Ct. at 1877.



provision.<sup>415</sup> To be clear, the city had never actually granted any exemptions, whether for secular or religious reasons, but Roberts viewed that fact to be irrelevant.<sup>416</sup> Because the city *could* have granted an exemption, Roberts reasoned that the contract was not generally applicable, pursuant to both *Smith* exceptions.<sup>417</sup> Since *Smith* applied the rational basis test only to neutral laws of general applicability, and this law (or contract) was not generally applicable, rational basis review was inappropriate.<sup>418</sup> The city instead needed to satisfy strict scrutiny, which it could not do; none of the city's asserted interests, Roberts concluded, could be deemed compelling.<sup>419</sup> Given that Roberts applied strict scrutiny and found the city's justifications wanting, he reasoned that expressly reconsidering the vitality of *Smith* was unnecessary; even if the Court expressly overruled *Smith*, it could not apply a more rigorous level of scrutiny.<sup>420</sup>

Alito's opinion, concurring in the judgment, argued at length for expressly overruling *Smith*.<sup>421</sup> I will emphasize two of his arguments. First, he argued that many of the Court's recent decisions are difficult to harmonize with *Smith*. On this point, Alito was correct. Roberts himself, in his *Fulton* majority opinion, continued the steady trend of recent free exercise cases, interpreting the *Smith* exceptions so broadly that the *Smith* rational basis approach seems effectively repudiated.<sup>422</sup> For instance, Roberts repeatedly cited *Lukumi*—now the key free exercise precedent.<sup>423</sup> In short, the *Smith* exceptions have swallowed the rule; in most cases, strict scrutiny will be applied. From Alito's

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<sup>415</sup> *Id.* at 1878.

<sup>416</sup> *Id.* at 1879.

<sup>417</sup> *Id.* at 1877–79.

<sup>418</sup> *See id.* at 1876–77 (first citing *Emp. Div., Dep't of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 878–82 (1990); and then citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993)).

<sup>419</sup> *Id.* at 1881–82.

<sup>420</sup> “CSS has demonstrated that the city's actions are subject to ‘the most rigorous of scrutiny’ under [the precedents of *Smith* and *Lukumi*, so] we have no occasion to reconsider that decision here.” *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546).

<sup>421</sup> *See id.* at 1883–1926 (Alito, J., concurring in the judgment); *id.* at 1931 (Gorsuch, J., concurring in the judgment) (arguing that “*Smith* has been criticized since the day it was decided”).

<sup>422</sup> *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020).

<sup>423</sup> *Fulton*, 141 S. Ct. at 1877, 1881–82.

standpoint, the Court might as well have acknowledged explicitly what it had already done implicitly—replacing the *Smith* rational basis test with strict scrutiny.<sup>424</sup>

Second, Alito exemplified the dramatic transformation of political (and hence judicial) conservatism by strongly criticizing none other than Justice Scalia and his *Smith* opinion. More than any other justice or scholar, Scalia was responsible for the prominent position of originalism in constitutional jurisprudence generally and within the conservative domain particularly.<sup>425</sup> In fact, Alito fully acknowledged Scalia's importance in articulating originalist methodology.<sup>426</sup> Alito quoted Scalia: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text."<sup>427</sup> Alito elaborated by drawing on Scalia's "judicial magnum opus,"<sup>428</sup> the Second Amendment case of *District of Columbia v. Heller*, in which Scalia maintained that "words and phrases" of the constitutional text should presumptively "carry 'their normal and ordinary . . . meaning.'"<sup>429</sup> Yet, Alito nonetheless launched into a searing critique of Scalia's *Smith* opinion. *Smith*, Alito wrote, "paid shockingly little attention to the text of the Free Exercise Clause. Instead of examining what readers would have understood its words to mean when adopted, the opinion merely asked whether it was 'permissible' to read the text to have the meaning that the majority favored."<sup>430</sup>

Whereas Scalia's *Smith* opinion appeared, at the time, to be harmonious with conservative politics, Alito's *Fulton* opinion better manifests current conservative politics and hence delineates the near future of free exercise jurisprudence. According to Alito's (supposedly) originalist interpretation of the Free Exercise Clause, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices

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<sup>424</sup> *Id.* at 1915–17 (Alito, J., concurring in the judgment).

<sup>425</sup> See generally BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE (2014); Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, in THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 189 (David A. Schultz & Howard Schweber eds., 2018); Greene, *supra* note 359.

<sup>426</sup> *Fulton*, 141 S. Ct. at 1894–95 (Alito, J., concurring in the judgment).

<sup>427</sup> *Id.* at 1894 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997)).

<sup>428</sup> MURPHY, *supra* note 425, at 385.

<sup>429</sup> *Fulton*, 141 S. Ct. at 1895 (Alito, J., concurring in the judgment) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)).

<sup>430</sup> *Id.* at 1894 (Alito, J., concurring in the judgment) (quoting *Emp. Div., Dep't of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 878 (1990)).

or worship.”<sup>431</sup> Contrary to *Smith*, it “does not suggest a distinction between laws that are generally applicable and laws that are targeted [at religion].”<sup>432</sup> From Alito’s perspective, then, any government action that burdens religion should trigger strict scrutiny, whether the government targets religion or otherwise—even if the government has merely enacted a neutral law of general applicability. According to Alito, the right to free exercise should be judicially protected with vigor, rather than being left to the democratic process as *Smith* had suggested.<sup>433</sup> “The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the ‘exercise of religion’) the right to do so without hindrance.”<sup>434</sup>

Alito therefore recommended a specific doctrinal approach for free exercise issues: “A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.”<sup>435</sup> In applying this test, crucial initial and overlapping questions would arise—what beliefs and conduct would be deemed *religious*? And what burdens (on religious exercise) would be deemed *substantial*? Drawing on his originalist reading of the First Amendment, Alito suggested answers to these questions. He emphasized that the originalist meaning of free exercise would need to account for the “defined dimensions” of free exercise at the time of the First Amendment’s adoption.<sup>436</sup> Thus, as Alito noted, “[n]o one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice.”<sup>437</sup> So what would count as being within the defined dimensions of protected religious practices? Apparently, Alito would have no trouble recognizing mainstream Christian (Protestant and Catholic) practices

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<sup>431</sup> *Id.* at 1896 (Alito, J., concurring in the judgment).

<sup>432</sup> *Id.* (Alito, J., concurring in the judgment). “*Smith’s* interpretation conflicts with the ordinary meaning of the First Amendment’s terms.” *Id.* at 1897 (Alito, J., concurring in the judgment).

<sup>433</sup> *Id.* at 1917 (Alito, J., concurring in the judgment).

<sup>434</sup> *Id.* at 1897 (Alito, J., concurring in the judgment); *see id.* at 1931 (Gorsuch, J., concurring in the judgment) (agreeing with Alito’s originalist interpretation of free exercise).

<sup>435</sup> *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring in the judgment). Alito acknowledged, though, that this test might need to be “rephrased or supplemented” in the future. *Id.* (Alito, J., concurring in the judgment).

<sup>436</sup> *Id.* at 1899 (Alito, J., concurring in the judgment).

<sup>437</sup> *Id.* at 1896 n.28 (Alito, J., concurring in the judgment).

as being constitutionally protected. He described “the religious demographics”<sup>438</sup> of the late-eighteenth and early-nineteenth centuries: “The population was overwhelmingly Christian and Protestant, the major Protestant denominations made up the great bulk of the religious adherents.”<sup>439</sup> Minority religious groups at the time were, as Alito put it, “tiny.”<sup>440</sup> In other words, during the early national years, the United States was de facto Protestant Christian, and most Americans would have understood free exercise to protect Protestant Christian practices and beliefs.<sup>441</sup> Consequently, Alito noted in *Fulton* that “[w]hatever the outer boundaries of the term ‘religion’ as used in the First Amendment, there can be no doubt that CSS’s contested [Christian] policy represents an exercise of ‘religion.’”<sup>442</sup>

Alito’s religious history of the early republic was largely correct.<sup>443</sup> Moreover, as Alito’s *Fulton* opinion illustrated, he and the other conservative Justices often claim to follow originalist methodology, which would ostensibly fix the meaning of the religion clauses as they were predominantly understood at the time of ratification.<sup>444</sup> So, is it therefore true that the Roberts Court, going forward, will most likely interpret the Free Exercise Clause to protect and bolster the United States as a de facto Christian nation?<sup>445</sup> Several recent free exercise

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<sup>438</sup> *Id.* at 1908 (Alito, J., concurring in the judgment).

<sup>439</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>440</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>441</sup> FELDMAN, PLEASE DON’T, *supra* note 14, at 145–74.

<sup>442</sup> 141 S. Ct. at 1896 n.29 (Alito, J., concurring in the judgment).

<sup>443</sup> Feldman, Free Expression, *supra* note 71, at 24–25 (discussing de facto Protestantism); see *supra* note 13 (historians of religion discussing religion in the early republic). Lupu and Tuttle argue that Alito pushes the history too far when he interprets free exercise to encompass all religiously motivated conduct rather than being limited to modes of worship and religious belief. Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 5 AM. CONST. SOC’Y SUP. CT. REV. 221, 240–41 (2021).

<sup>444</sup> See, e.g., NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10, 107, 110 (2019) (endorsing and explaining originalism).

<sup>445</sup> In at least two ways, one might criticize a supposedly originalist interpretation of the First Amendment that endorses de facto Christianity. First, as many have pointed out, the originalist claim to discern apolitical, fixed, and determinate constitutional meaning is highly questionable. Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821 (2019); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283 (2014). Second, some commentators, sympathetic to originalism, have nonetheless argued that the adoption of the Fourteenth Amendment might change the meaning of religious freedom, regardless of how establishment and free exercise were originally understood in the First Amendment. See, e.g., Kurt T. Lash,

cases preceding *Fulton* might suggest otherwise. In those cases, the conservative Justices used language suggesting that free exercise protects all religious believers rather than primarily Christians. In *South Bay United Pentecostal Church v. Newsom (South Bay II)*, the Court enjoined California's enforcement of a restriction on worship services, which the state had imposed to help counter the Covid-19 pandemic.<sup>446</sup> Justice Gorsuch issued a statement, joined by Thomas and Alito, that expressed concern about the effects of the restriction on not only "California's churches," but also "synagogues, and mosques."<sup>447</sup> Likewise, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, another case involving restrictions on public gatherings because of COVID-19, the conservative Justices' per curiam opinion worried about how the New York governor had targeted the Orthodox Jewish community as well as the Roman Catholic Diocese of Brooklyn.<sup>448</sup>

Other cases, however, caution against interpreting such language too broadly. To be sure, the conservative Justices appear willing to protect non-Christians when their religious interests and values converge with Christian interests and values, as happened in *South Bay II* and *Roman Catholic Diocese*. That is, the conservative Justices will protect the religious freedom of non-Christians when it harmonizes with de facto Christianity.<sup>449</sup> Yet, those same Justices have not extended constitutional protections to non-Christians when a convergence of interests was not apparent. For instance, in *Dunn v. Ray*, a prisoner, Domineque Ray, invoked his Muslim religion when requesting a stay of execution for his death sentence.<sup>450</sup> The Alabama prison housing Ray regularly allowed a Christian chaplain to accompany prisoners into the execution chamber, but when Ray requested the presence of an

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*The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

<sup>446</sup> 141 S. Ct. 716 (2021).

<sup>447</sup> *Id.* at 720 (Gorsuch, J., statement).

<sup>448</sup> 141 S. Ct. 63, 66 (2020). In another COVID-19 case, decided before Ginsburg's death, Alito's, Gorsuch's, and Kavanaugh's dissents mentioned how the Nevada executive order applied to "churches, synagogues, and mosques." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting); *see id.* at 2615 ("churches, synagogues, temples, and mosques") (Kavanaugh, J., dissenting); *id.* at 2604 ("church, synagogue, or mosque") (Alito, J., dissenting).

<sup>449</sup> *See generally* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (explaining interest-convergence principle); Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248 (2012) (same).

<sup>450</sup> 139 S. Ct. 661 (2019).

imam, the prison refused.<sup>451</sup> The Eleventh Circuit granted the requested stay, reasoning that the prison was likely violating the Establishment Clause.<sup>452</sup> In a five-to-four Supreme Court decision, the conservative Justices reversed, reasoning that the stay application was untimely; the execution could proceed.<sup>453</sup>

Another recent Establishment Clause case, *Trump v. Hawaii*, further suggests the conservative Justices' wariness of non-Christian religions.<sup>454</sup> With President Trump repeatedly denouncing Islam,<sup>455</sup> the administration imposed a travel ban that restricted entry into the United States, modifying the ban multiple times because of legal challenges.<sup>456</sup> By the time the case reached the Court for the third time,<sup>457</sup> the ban applied to nationals from eight nations—"Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen"—six of which were predominantly Muslim.<sup>458</sup> In another five-to-four decision, the Court upheld the travel ban. Chief Justice Roberts's majority opinion reasoned that the Court should defer to the administration, at least partly, because the ban related to immigration and national security.<sup>459</sup> Justice Sotomayor's dissent emphasized that the Court's decision "leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United

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<sup>451</sup> *Id.* at 662 (Kagan, J., dissenting).

<sup>452</sup> *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689 (11th Cir. 2019).

<sup>453</sup> *Dunn*, 139 S. Ct. at 661. This decision generated controversy. *E.g.*, Adam Liptak, *Justices Allow Execution of Muslim Death Row Inmate Who Sought Imam*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/supreme-court-domineque-ray.html>. Perhaps because of the media attention, the Court granted a stay for a Buddhist in a similar case arising less than 2 months later. *Murphy v. Collier*, 139 S. Ct. 1475 (2019). Nevertheless, Alito, Thomas, and Gorsuch dissented, asserting that the request for a stay had been filed in an untimely manner. Perhaps more telling, the Court more recently granted a stay of execution for a Christian prisoner seeking to have his pastor sing, say prayers, and lay hands on the prisoner as he dies. *Ramirez v. Collier*, 2021 WL 4077814 (No. 21-5592), *stay granted* Sept. 8, 2021. For the questions presented to the Court, see *21-5592, Ramirez v. Collier*, S. CT. U.S., <https://www.supremecourt.gov/qp/21-05592qp.pdf> (last visited Oct. 31, 2022).

<sup>454</sup> 138 S. Ct. 2392 (2018).

<sup>455</sup> *See id.* at 2438–39 (Sotomayor, J., dissenting) (describing how Trump denounced Muslims).

<sup>456</sup> The final ban was Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

<sup>457</sup> *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

<sup>458</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2405 (2018).

<sup>459</sup> *Id.* at 2418–20.

States' because the policy now masquerades behind a facade of national-security concerns."<sup>460</sup>

In another First Amendment case, *Pleasant Grove City v. Summum*, the Roberts Court evaded free speech principles that might have protected non-Christians.<sup>461</sup> The case involved a type of religious speech—the display of a non-Christian religious monument. Prior Rehnquist Court decisions involving religious speech had deemed public school properties to be public forums that had to be held open to Christian organizations pursuant to free speech principles.<sup>462</sup> The Roberts Court case arose when Summum, a non-Christian religion, offered to donate a monument showing Summum's Seven Aphorisms for display in a city park. Pleasant Grove refused, even though it already displayed a Ten Commandments monument in the same park.<sup>463</sup> The Rehnquist Court precedents appeared to require Pleasant Grove to display the Summum monument because a public park is a traditional public forum.<sup>464</sup> The Roberts Court decided otherwise: “[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”<sup>465</sup> In other words, in accord with the Court's “recently minted” government speech doctrine,<sup>466</sup> Pleasant Grove did not need to adhere to First Amendment principles because the permanent (Summum) monument was “not a form of expression to which [public] forum analysis applies.”<sup>467</sup>

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<sup>460</sup> *Id.* at 2433 (Sotomayor, J., dissenting).

<sup>461</sup> 555 U.S. 460 (2009).

<sup>462</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that a public elementary school needed to allow a private Christian organization to hold club meetings on school property); *Rosenberger v. Rectors and Visitors*, 515 U.S. 819 (1995) (holding that a public university needed to fund an overtly Christian student newspaper).

<sup>463</sup> For what it's worth, Summum claimed that its teachings are related to Gnostic Christianity. *Philosophy: Summum is Gnostic Christianity*, SUMMUM, <https://www.summum.us/philosophy/gnosticism.shtml> (last visited Nov. 18, 2022).

<sup>464</sup> *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (noting since time immemorial, streets and parks have been public forums).

<sup>465</sup> *Summum*, 555 U.S. at 464.

<sup>466</sup> *Id.* at 481 (Stevens, J., concurring).

<sup>467</sup> *Id.* at 464. Non-Christians have never fared well in free exercise exemption cases at the Supreme Court. Prior to *Smith*, during the era when the Court was deciding free exercise exemption claims pursuant to strict scrutiny, the Court sometimes (though not always) decided that the First Amendment required an exemption for a minority Christian sect, such as the Old Order Amish. *E.g.*, *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a

Two overlapping points of agreement between Roberts's and Alito's respective *Fulton* opinions illuminated the likely future of free exercise jurisprudence, including the extent to which the conservative justices will push to protect Christianity. First, consistent with conservative Christian politics, both Roberts and Alito suggested that the strict scrutiny applied in free exercise cases should be the most rigorous level of judicial scrutiny possible.<sup>468</sup> Free exercise judicial review should never be strict scrutiny lite, where the Court dilutes aspects of the inquiry.<sup>469</sup> Rather, strict scrutiny under free exercise should be strict in theory but fatal in fact.<sup>470</sup> Indeed, in the recent spate of free exercise decisions, the conservative Justices have persistently stressed that strict scrutiny will not be "watered down."<sup>471</sup> "[S]trict scrutiny requires the State to further 'interests of the highest order' by

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Christian who refused to work on Sundays but did not belong to established church or sect); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting an Old Order Amish claimant a free exercise exemption from a state compulsory-education law); *United States v. Lee*, 455 U.S. 252 (1982) (concluding the government did not need to exempt an Old Order Amish employer from collecting and paying Social Security taxes). The Court, however, never held that the First Amendment required an exemption for a non-Christian religion. *E.g.*, *Bowen v. Roy*, 476 U.S. 693 (1986) (denying free exercise exemption to a Native American who sought to prevent the government from using his daughter's social security number); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying an Orthodox Jewish Air Force officer a free exercise exemption from Air Force regulations prohibiting hats of any kind). The Court, though, has decided at least some free exercise cases favorably to non-Christians when the government has discriminated on the basis of religion. *E.g.*, *Cruz v. Beto*, 405 U.S. 319 (1972) (finding a free exercise violation when the government explicitly and overtly discriminated against the exercise of Buddhism).

<sup>468</sup> Roberts wrote: "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Alito was less explicit on this point, about the nature of strict scrutiny, but his views were implicit in his application of strict scrutiny—he stressed that religious (Christian) believers must be allowed, in their beliefs and practices, to criticize, hurt, and express hatred of others. *Id.* at 1924–26 (Alito, J., concurring in the judgment). Government attempts to prevent such religiously induced injuries to others will not satisfy strict scrutiny.

<sup>469</sup> See Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89, 121–22 (2005) (on strict scrutiny lite).

<sup>470</sup> Gerald Gunther, *Foreword to In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (introducing terminology of strict in theory but fatal in fact).

<sup>471</sup> *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curiam); see *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–20 (2021) (statement of Justice Gorsuch, with whom Justices Thomas and Alito join) (applying strict scrutiny rigorously).



means ‘narrowly tailored in pursuit of those interests.’... That standard ... ‘really means what it says.’”<sup>472</sup> Therefore, when reviewing any law that burdens religion (read: Christianity), the Justices will either invalidate it or require the government to grant a free exercise exemption. In their view, Christians must be protected from any burden on or hint of discrimination against their practices or beliefs.

Second, and again consistent with conservative Christian politics, both Roberts and Alito suggested that Christians must be allowed to push their own beliefs and practices, even if doing so entails insulting, denouncing, and discriminating against others (those whose beliefs and practices might contravene Christianity). Specifically, in *Fulton*, CSS discriminated against same-sex couples by refusing to consider them for foster care placements. The city responded by asserting that it had a compelling interest in protecting same-sex couples from discrimination, and therefore, the city was justified when it stopped referring children to CSS for foster care placements.<sup>473</sup> After all, as the Court held in *Obergefell v. Hodges*, same-sex couples have a protected constitutional right to choose whether to marry.<sup>474</sup> Both Roberts and Alito, however, found that the city’s interest was not compelling (and consequently, the interest was insufficient to satisfy strict scrutiny).<sup>475</sup> In other words, CSS had a protected free exercise right to discriminate against same-sex couples. This conclusion harmonized with Roberts’s and Alito’s suggestion that for free exercise, strict scrutiny should be strict in theory but fatal in fact.

Roberts reasoned that the city’s non-discrimination policy (against same-sex couples) could not be compelling because the city could grant exceptions from that policy.<sup>476</sup> Citing *Lukumi* once again, Roberts explained that “[t]he creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures.”<sup>477</sup> Alito more extensively elaborated his view that the city’s anti-discrimination policy

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<sup>472</sup> *Tandon*, 141 S. Ct. at 1298; *see* *Does 1-3 v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting) (arguing that in attempting to satisfy strict scrutiny, the state’s compelling interest cannot be a post-hoc rationale).

<sup>473</sup> *Fulton*, 141 S. Ct. at 1881. More specifically, the city asserted a compelling interest in “ensuring equal treatment of prospective foster parents and foster children.” *Id.*

<sup>474</sup> 576 U.S. 644 (2015).

<sup>475</sup> *Fulton*, 141 S. Ct. at 1882; *id.* at 1924 (Alito, J., concurring in the judgment).

<sup>476</sup> *Id.* at 1881–82.

<sup>477</sup> *Id.* at 1882.

did not amount to a compelling interest. He began by suggesting that CSS's opposition to same-sex marriage had minimal effect: "CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry."<sup>478</sup> He admitted, though, that "[m]any people today find this idea not only objectionable but hurtful."<sup>479</sup> Even so, he concluded, "protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights."<sup>480</sup> Alito did not leave it there, though. In a passage bristling with indignation, he reminded the Justices that the *Obergefell* majority opinion had "made a commitment" to religious believers (read: Christians).<sup>481</sup>

While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, the majority made a commitment. It refused to equate traditional (religious) beliefs about marriage, which it termed "decent and honorable," with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community.<sup>482</sup>

What is most noteworthy about this passage, besides Alito's lingering resentment of the *Obergefell* decision, is his hypersensitivity toward insults directed at Christians combined with his disregard for LGBTQ individuals. He insisted that CSS and presumably other Christians should not be subjected to insults as if they were "racial bigots."<sup>483</sup> Yet, CSS must be allowed to express its "ideas about marriage"<sup>484</sup>—that "marriage is a sacred bond between a man and a woman"<sup>485</sup>—regardless of whether CSS was insulting same-sex couples. In fact, Alito never seemed to acknowledge that CSS was doing any more than expressing its religious beliefs or ideas. In actuality, CSS

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<sup>478</sup> *Id.* at 1924 (Alito, J., concurring in the judgment).

<sup>479</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>480</sup> *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring in the judgment).

<sup>481</sup> *Id.* at 1925 (Alito, J., concurring in the judgment).

<sup>482</sup> *Id.* (Alito, J., concurring in the judgment) (citations omitted).

<sup>483</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>484</sup> *Id.* (Alito, J., concurring in the judgment).

<sup>485</sup> *Id.* at 1875.

was discriminating against same-sex couples; CSS's conduct was injurious.<sup>486</sup> Alito brushed aside any potential injury, attributable to CSS's conduct, because same-sex couples could feasibly go to other foster care agencies (that did not discriminate against same-sex couples).<sup>487</sup> The logic of this argument is disturbing, to say the least—would Alito similarly reason that racially restrictive covenants did not injure Black American home buyers because, after all, they could buy and live elsewhere?<sup>488</sup> Alito's final line (in the above passage), emphasizing respect for the dignity, worth, and equality of everyone, was dripping with unintended irony. Apparently, from Alito's perspective, we are all equal, so long as Christians are more equal—which of course makes sense if the First Amendment is interpreted to ensure that the United States is de facto Christian.

### III. CONCLUSION

When the Court decided *Smith* in 1990, the landmark free exercise decision and its majority opinion, written by Justice Scalia, reflected the conservative politics of that era. But conservative politics has changed over the ensuing years. From the perspective of current political conservatism, the *Smith* Court's deference to democracy and concomitant judicial restraint for free exercise claims seems inappropriate and even dangerous. More particularly, the conservative Justices on the Roberts Court seem worried that Christianity and its hegemonic position in the United States are under threat. The threat, as it is perceived, comes in two forms. First, growing secularism threatens all religion, but especially Christianity. Second, religious pluralism threatens to undermine Christianity's hegemonic place in the nation's traditions. The Court's religious freedom decisions and opinions respond to these concerns, at least in part.

Consequently, the *Fulton* Court's failure to overrule *Smith* will probably have minimal long-term significance. Either the Court will continue interpreting the *Smith* exceptions expansively, as it has done

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<sup>486</sup> Discriminatory conduct injures targeted individuals and groups by warping the social and political environment and undermining equality. Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 35–36 (2018); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

<sup>487</sup> *Fulton*, 141 S. Ct. at 1886, 1924 (Alito, J., concurring in the judgment).

<sup>488</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that enforcement of racially restrictive covenants violated equal protection).

in recent cases, or it will explicitly overrule *Smith*, as Alito recommended in *Fulton*. Both paths will lead the Court to apply strict scrutiny—far from the *Smith* rule of judicial restraint—especially in any case where a white Christian brings a religious freedom claim. In other words, whether or not the conservative Justices overrule *Smith*, they will continue to interpret the First Amendment religion clauses in accord with current conservative politics. To be sure, the Justices are unlikely to riot at the Capitol, but they are apt to understand and sympathize with the grievance of a white Christian man who is challenged to bake a cake for a gay couple.<sup>489</sup> Likewise, the conservative Justices are unlikely to support the murder or banishment of Jews, people of color, and other non-Christians, but the Justices will find that white Christians have a constitutional right to discriminate against same-sex couples and numerous others.<sup>490</sup> The Justices will be hypersensitive about any perceived slights of or discrimination against Christianity while ensuring that white Christians remain free to impose their beliefs and practices on non-Christians and people of color. In sum, the Justices will interpret the First Amendment to bolster and propagate the structures of white Christian privilege in American society.

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<sup>489</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

<sup>490</sup> *Fulton*, 141 S. Ct. at 1882; *e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (expanding the ministerial exception to the *Smith* rule and thus allowing Catholic schools to fire lay teachers because of health and age concerns, despite protections of the Americans with Disabilities Act and the Age Discrimination in Employment Act); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (recognizing a ministerial exception to *Smith* for laws of general applicability, thus allowing an evangelical church and school to fire a teacher-minister suffering from narcolepsy, despite protections of the Americans with Disabilities Act).