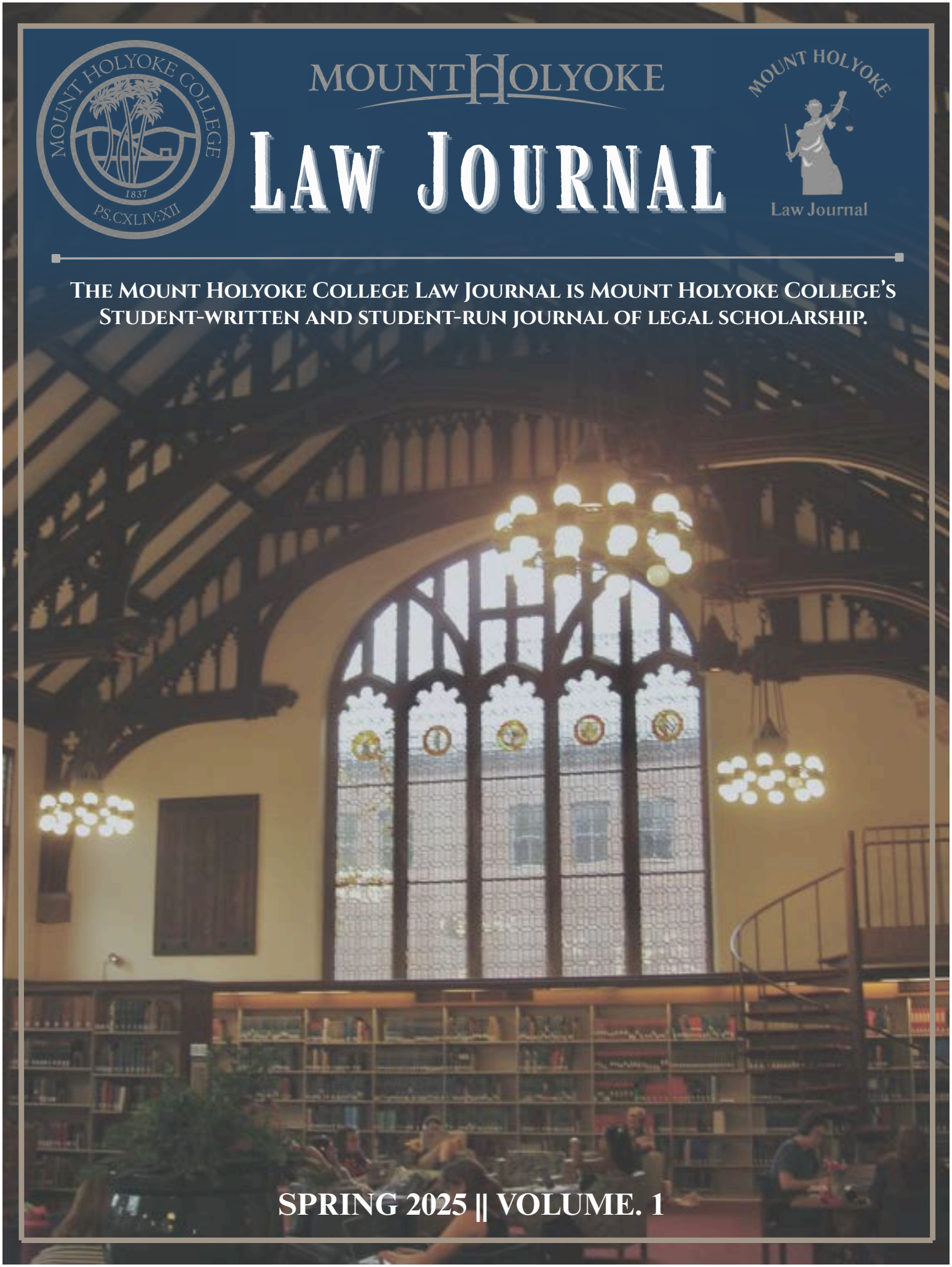
# MOUNT HOLYOKE LAW JOURNAL

The Mount Holyoke College Law Journal is Mount Holyoke College's Student-written and student-run journal of legal scholarship.



SPRING 2025 || VOLUME. 1

**Statement of Editorial Values**

We stand principled in our support for free speech and academic freedom. Even in moments where producing critical scholarship may be precarious, we remain unwavering in our commitment to the empowerment of students engaged in critical legal scholarship.

Signed,
Hailee Pitschke
Founding President & Editor-In-Chief ‘25

## Editor's Note

I am truly honored to present the first volume of the Mount Holyoke College Law Journal. I want to first and foremost thank Katherine Sloop and Jiwon Kim, who both gave their all to the development of this organization. I could not have asked for more dedicated collaborators.

I would additionally like to express my gratitude to the editors and contributors who made this issue possible. Their hard work was exceptional and their commitment to the study of justice has been amazing to witness.

This is my last semester at Mount Holyoke College, and I am so proud of everything accomplished by our organization. I know that I am leaving the journal in good hands, and I am excited to read future publications of this journal for years to come.

Signed,
Hailee Pitschke
Editor-In-Chief '25

## Special Mentions

The Mount Holyoke College Law Journal has been fortunate enough to benefit immensely from the wider Mount Holyoke community. The Career Development Center, the Weissman Center for Leadership, and the Office of the President all contributed to the success of this journal. Mount Holyoke College President Danielle Holley was particularly critical to our organization's formation, acting as a source for guidance and support as our faculty advisor.

Additionally, we would like to thank those who contributed to the artwork and design of the journal. Myra Zia took the lead in designing the cover, exercised her photography skills in the process, and worked heavily on the format and design of the journal. Asmi Shrestha contributed to the cover design. Diana Perez, who was studying abroad this semester, designed the Mount Holyoke College Law Journal logo.

# Table of Contents

# The Islamic Veil and the Veil of Rationality: Laïcité as Clandestine Human Rights Abuse

Prisca Afantchao
Edited by Briana Janeira (Senior Editor) and Diana Lytvynova (Junior Editor)

**Abstract:**

French laws enforce *laïcité* not to promote equality or separation of church and state, but rather to alienate racialized Muslims in France. The repression is excused on the basis of rationality, modernity, unity, and the integration of Muslim immigrants. Truthfully, integration is hindered due the veil being outlawed in the classroom, disintegrating the identities of Muslim people at the height of their psychological development, promoting compartmentalization. If *laïcité* continues to go unquestioned and untouched in the French law, there will never be a modern France without *nationalisme laïciste* and its white supremacy. This paper asserts that *laïcité* should not be reformed, but rather abolished in favor of laws protecting the right to wear religious garb in the classroom. Many legal scholars who have studied *laïcité* support its enforcement, citing the importance of separating church and state. Conversely, scholars in human rights and religious freedom, such as Alexis Artaud de la Ferrière argue that *laïcité* has evolved into an orthodoxy of state sanctioned secularism called *nationalisme laïciste*. It is less common for critical philosophy and critical race theory to challenge *laïcité* in the state of France. This paper seeks to apply critical philosophical concepts to legal analysis to find a more historicized argument for the abolishment of *laïcité*, considering the racial wounds caused by religious repression in colonial France when analyzing contemporary repression.

This paper argues that French *laïcité* law stages a 'primal scene' of racial exclusion, structurally embedding white nationalism within secular constitutionalism. Laïcité is defended as a way to maintain a unified French community, but in reality, it acts as a legal excuse for the perpetual foreignizing, destabilizing, and alienation of French Muslims, ultimately preventing unity. By foreignizing I mean juxtaposing any cultural or religious practices associated with Islam to "Frenchness." The alienization comes from being legally obligated to keep part of your identity visually hidden and perhaps feeling that you don't have a steady place to be fully yourself, which is destabilizing, especially for young people who are still growing up and establishing a sense of self which religion may be a part of. Physical lines are drawn, forcing hijabis to fracture themselves at the will of the French government. They cannot go past the school parking lot with their veil on and their clothing is often policed by school administrators. Analyzing the laws of laïcité through a critical philosophy of race, it becomes evident that legal enforcement of laïcité makes the physicality of Muslim youth a spectacle and prevents them from being fully themselves or "integrating" like the government wants.

## Secularization and Modernization

Hijabis being in public is not a threat to secular government and although the United States is by no means a beacon of religious liberty or harmony, the Islamic veil is nowhere near being an impetus for the main religious-based conflict happening in American politics. There are multiple other Western liberal democracies that allow a hijab to be worn in public spaces like a public school or a workplace. France maintains a wall between religion and public life, while the U.S. emancipates itself from the sacred without denying it.[1]

It is generally accepted that secularization and modernization are synonymous, and it is generally accepted that modernization and unification or harmony are synonymous. The Enlightenment and the Reformation, both strongly associated with secularization, are seen as much needed introductions of rationalism and sanity, compared to previous eras of governance and culture seen as overwhelmed by hereticism and fantasy in hindsight. Now, the labeling of the Islamic veil as an ostentatious display of religion pushes the hijabi student into being a symbol of a dark age, lacking agency, being controlled by religion, and bringing the past into the present. In contrast to the regular conception of the Enlightenment and the Reformation, "the initial moment

[1] Olivier Roy, *Secularism Confronts Islam* (New York: Columbia University Press, 2007).

of formation rested upon an outgrowth of fanatical religiosity—the heretication of non-conforming beliefs and behaviors the consequence of which was the intensification of power over community and territory."[2] Furthermore, in terms of religion, those eras were first marked by the maintenance of the status quo for the majority and the ruling class, not necessarily religious freedom or freedom of thought, etc. One can argue that modern conceptions of and enforcement of laïcité serve a similar function.

**Nationalisme Laïciste**

To analyze the wielding of laïcité as a tool of suppression by the French government, I will be interrogating the illegality of Muslim Algerian citizenship in 19th century colonial France, as the "primal scene" of French islamophobia which gives us *"nationalisme laïciste."* Laïcité, both in the governmental and quotidian sphere, has become *"nationalisme laïciste,"* its own kind of orthodoxy. Nationalisme laïciste promotes a substantive normative belief that citizens should not only fulfill certain civic obligations to the nation but that they should believe in the moral goodness of the French Republican regime and publicly manifest their loyalty to that regime. By using the term "primal scene" I am not referring to Sigmund Freud's psychoanalytic writings but rather to the Professor & Director of Africana Studies at Villanova University, Vincent Llloyd's conception of the relationship between dignity and domination. To Lloyd, the "primal scene" of domination/the marking of domination is the master/slave relationship as described in Frederick Douglass's book *Life and Times of Frederick Douglass.*[3] In this narration, Douglass and his master, Covey, fist-fight one-on-one. This interpretation of "primal scene" can be applied to multiple forms of domination, not solely anti-Black, white supremacist domination. Rape is the marking of patriarchy. Military and police violence is the marking of colonialism. Violence accompanied by poverty is the marking of capitalism.[4]

Legally, a primal scene is equivalent to a case that sets legal precedent which continues to inflict harm on a certain population from that moment on. Every time a case is settled, a policy decision is made, or even classroom discipline is doled out based on this original unjust precedent, the injustice is reanimated. Applying the concept of the primal scene to laïcité, laïcité

[2] Nehal Bhuta, "Freedom of Religion, Secularism, and Human Rights." (Oxford University Press EBooks, 2019).
[3] Frederick Douglass, Celeste-Marie Bernier, and Andrew Taylor, *Life and Times of Frederick Douglass: Written by Himself* (Oxford: Oxford University Press, Incorporated, 2022).
[4] Vincent W. Lloyd, *Black Dignity: The Struggle against Domination* (New Haven: Yale University Press, 2023).

is not just a tool of legal repression but a systemic means of depersonalizing and demoralizing only racialized, Muslim, French people, rooted in colonial logic. Even before contemporary laïcité, religious repression was enforced through the *Sénatus-consulte* of July 14, 1865, requiring Algerians to renounce Islam in order to obtain French citizenship.[5] Renouncing Islam was the only way for Algerians to be claimed as people worthy of transcending the status of colonial subjects and obtaining full citizenship status, along with the rights and respectability of citizenship. Though very few Algerians took this drastic step to become French citizens, the legacy of this *Sénatus-consulte* lives on through the enforcement of secular dress on French Muslims, most of whom are of African origin.

Laïcité is defended as a way to maintain a unified French community, but the enforcement of laïcité works against integration of French Muslims with the rest of French society. On the French government's website, there is a document titled "Freedoms and Prohibitions in the Context of "Laïcité" (Constitutional Secularism)." Under the section "Freedoms and Rights Guaranteed by Laïcité" there are three points that stand out to me (emphasis my own):

- Laïcité guarantees freedom of conscience for everyone; this includes the freedom to believe or not to believe, to practice a religion, to be atheist, agnostic or to be an adept of humanist philosophies, to change religion or to cease to have any religion. **A distinction must be drawn, however, between the freedom to believe and the freedom to express one's beliefs.** There can be no restriction to the freedom of belief…
- Laïcité guarantees the neutrality of the State, local authorities and public services, thereby **ensuring their impartiality towards all citizens**, regardless of their beliefs and convictions.
- **No religion or conviction can be either privileged or discriminated against.**[6]

According to this webpage, laïcité is based on the separation of church and state, and it does not discriminate. This is a rosy description, however. The law may be codified and meant to be followed, but its ideals are not always followed, and a government laying out a law like "no religion or conviction can be either privileged or discriminated against" does not make it a reality. Discrimination still happens even when it is technically outlawed. Like freedom of

[5] Rabah Aissaoui, "Politics, Identity and Temporality in Colonial Algeria in the Early Twentieth Century," *The Journal of North African Studies* 22, no. 2 (February 2, 2017): 182–204.
[6] "Libertés et Interdits Dans Le Cadre Laïque," Government of the Republic of France, accessed May 2, 2025.

speech laws, opinions/beliefs can be held without repercussions, but actions and expressions of those opinions/beliefs cannot be done without repercussions. This begs the question of *why* the wearing of the Islamic veil is an unacceptable expression of belief. To find the answer presented by the French government, one can look at the legislation around the March 2004 law that officially banned the Islamic veil in public schools. The ban was on "the wearing of signs *or* outfits demonstrating religious affiliation in public schools*,* colleges and high schools," in the name of the principle of secularism, and included headscarves of Muslim girls, yarmulkes of Jewish boys, and turbans of Sikh boys, as well as large crosses.[7] Religious symbols/attire that was allowed included small stars of David, small hands of Fatima, small crosses, and eventually under-turbans for Sikh men, but not full turbans. The answer seems to be that these types of religious symbols/attire are too imposing while the others are not and so the French government has the right to siphon certain religious expression to the private sphere because it is claiming to be defending constitutional secularism. A type of religious segregation has become the norm in France.

When students whose religious lives are already manipulated by the government enter school and are forced to suppress yet another part of their religious expression, laïcité no longer protects against the integration of church and state, but instead against the Muslim student's personal sense of integration. This is an issue of human rights because, as stated by Article 18 of the Universal Declaration of Human Rights, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[8] France is a supposedly liberal state that is highly involved in global liberal institutions like the United Nations, yet their legal enactment of laïcité is not in accordance with the Universal Declaration of Human Rights which these institutions, especially the United Nations itself, refer to so often and claim to uphold. The main discrepancy I find between the French government's laïcité and Article 18 is that people should be able to practice their religion in public or in private and that is not allowed in France. Multiple elements of religious observance are pushed to the shadows in the name of laïcité, again, forcing

[7] "Loi N° 2004-228 DU 15 Mars 2004 Encadrant, En Application Du Principe de Laïcité, Le Port de Signes Ou de Tenues Manifestant Une Appartenance Religieuse Dans Les Écoles, Collèges et Lycées Publics - Dossiers législatifs - Légifrance, accessed May 2, 2025.
[8] "Universal Declaration of Human Rights," United Nations, accessed May 2, 2025.

compartmentalization of only some religious communities and challenging the notion that they are truly accepted in French society.

The disintegration caused by nationalisme laïciste is described perfectly in the 2016 novel by Nargesse Bibimoune, *Confidence à mon voile* (Confessions to my veil). The novel follows the protagonist from 2002 until 2016 and recounts her developing relationship with her veil as she grows up in France as a North African girl who is also a hijabi Muslim. She describes the fate of a peer who was kicked out of school for resisting the imposition of the laïciste laws against "ostentatious" displays of religion:

She was the only one who tried to resist, the only one who refused humiliation, the only one who refused self-exclusion. I cried a lot. For her first, then for me, for you, and for all the sisters who carry you, and who in the evening are alone in front of their fear. For all those who are pointed out, who are judged, condemned even before they could defend themselves, even before they could speak.[9]

Many months later, she decides to wear a small bandana to school and reflects on the fact that, if the bandana was wider it would be *illegal,* too visible, too imposing, too Islamic, and she would be forced to remove it.[10] She may scoff at the confines of the law, but she has no power to change it. Even her peer who spoke up against the law closer to its introduction could not do anything to stop it, only to challenge the status quo, and was subsequently expelled from school.

## Conclusion

Ultimately, as Alexis Artaud de la Ferrière writes in his 2022 report, "From Laïcité to Nationalisme Laïciste" modern laïcité has developed into a way to restrict the freedoms of "minorities which are perceived as subservice to the ideal of national unity."[11] The equation of modernity with secularization and the true motivation of French secularization being the maintenance of cultural cohesion that serves white Frenchness combine to continue the suppression of hijabi students. In order to protect the liberties of Muslim people in France, especially Muslim school children, legal enforcement of laïcité as we know it should be completely abolished. Due to the repressive origins of the law, reform would likely be futile.

[9] Nargesse Bibimoune, *Confidences À Mon Voile*. IS Édition, 2016.
[10] Ibid.
[11] Alexis Artaud, de la Ferrière. *From Laïcité to Nationalisme Laïciste*, International Religious Liberty Association, 2022.

Instead of protecting secularism over the bodily autonomy and psychological stability of youth in crucial days of development, the French government should begin by legally protecting the right to wear religious garb. Due to the longstanding intensity of French laïcité, I doubt the government would pass a law allowing full discussion of religious perspectives and beliefs in the classroom. However, I do argue that allowing students to wear the veil and other religious dress in the classroom is a positive, manageable first step towards less alienation of those marginalized on the basis of religion. Beginning in the classroom will encourage youth to be not only tolerant, but genuinely accepting of visible cultural differences. Eventually, a cultural shift will be more plausible, and more people will be able to consider physical, visible religious expression as part of the personal autonomy each citizen should be afforded on the basis of *liberté*, *egalité*, and *fraternité*.

**Bibliography**

Aissaoui, R. (2017). Politics, identity and temporality in colonial Algeria in the early twentieth century. *The Journal of North African Studies*, *22*(2), 182–204. https://doi.org/10.1080/13629387.2017.1284592

Bhuta, Nehal. "Freedom of Religion, Secularism, and Human Rights." Oxford University Press EBooks, 2019.

Bibimoune, Nargesse. *Confidences À Mon Voile*. IS Édition, 2016.

*Freedoms and Prohibitions in the Context of Laïcité (Constitutional Secularism)*, https://www.documentation-administrative.gouv.fr/adm-01858746. Accessed 28 Nov. 2023.

de la Ferrière, Alexis Artaud. *From Laïcité to Nationalisme Laïciste*, International Religious Liberty Association, 2022, www.irla.org/fides-et-libertas-2022.pdf.

"Loi N° 2004-228 DU 15 Mars 2004 Encadrant, En Application Du Principe de Laïcité, Le Port de Signes Ou de Tenues Manifestant Une Appartenance Religieuse Dans Les Écoles, Collèges et Lycées Publics." *LOI N° 2004-228 Du 15 Mars 2004 Encadrant, En Application Du Principe de Laïcité, Le Port de Signes Ou de Tenues Manifestant Une Appartenance Religieuse Dans Les Écoles, Collèges et Lycées Publics - Dossiers Législatifs - Légifrance*, 2008, www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000017759496/.

Lloyd, Vincent W. *Black Dignity the Struggle against Domination*. Yale University Press, 2022.

Onishi, Norimitsu, and Aurelien Breeden. "Macron Vows Crackdown on 'Islamist Separatism' in France." *The New York Times*, The New York Times, 2 Oct. 2020, www.nytimes.com/2020/10/02/world/europe/macron-radical-islam-france.html.

Roy, Olivier, and George Holoch. *Secularism confronts Islam*. New York: Columbia University Press, 2007.

"Universal Declaration of Human Rights." *United Nations*, United Nations, www.un.org/en/about-us/universal-declaration-of-human-rights. Accessed 18 Dec. 2023.

# People Over Principle: Analyzing the Criminalization of Addiction and Implementing Harm Reduction Policies in America

Veronica Rhoten
Edited by Clara Tupitza (Senior Editor) and Nicole Lasko (Junior Editor)

**Abstract:**

This essay explores the harm reduction approach as a way of addressing the addiction and public health crises and emphasizing human dignity in the criminal system. It utilized an evidence-based approach to contrast the medical standard around addiction and harm reduction policies adopted in European nations with the conservative stance taken by the United States. The essay examines the complexity of addiction in the United States, taking into account the racialized nature of drug criminalization and its historical roots. It advocates for a shift towards harm reduction policies, following the lead of some states in the Pacific Northwest and making drug sentencing equitable.

Harm reduction is a pragmatic approach to treating the drug addiction crisis that prioritizes public health safety and the dignity of human life in line with scientific and social evidence regarding the most effective ways to treat substance use.[1] Several developed nations have adopted policies that align with harm reduction such as the United Kingdom, the Netherlands, and Portugal, among others.[2] However, the United States, despite making strides towards treating the illness of racism, an inherent facet of the drug criminalization system, has taken a much more conservative legal approach towards substance use and healthcare than many of its European allies, to the detriment of its citizens. This essay argues that the racialization seen in American drug law and sentencing serves as both a symptom as well as a point of origin for the state's refusal to adhere to harm reductive health policies grounded in neurobiology.

While the policies that are commonly linked with harm reduction are famously associated with the Netherlands, the harm reduction movement began in Liverpool.[3] This is due in large part to the UK's legal allowance of a maintenance prescription, a medical practice wherein doctors prescribe a stable, regular dosage of patients' preferred drugs as a form of treatment.[4] The movement's progression was significantly enhanced by the HIV and injection drug crisis of the late 1980s in Edinburgh. As a result of the massive economic depression, people were turning to substance use in droves at increasingly younger ages.[5] To counter this, local authorities and pharmacists refused to sell needles to suspected drug users. Concurrently, the singular local methadone program closed, leaving people to return to street drugs. People quickly resorted to needle sharing and using street drugs which spread blood-borne illnesses rapidly and led to babies being born HIV-positive. The result of this was Edinburgh being labeled the "Aids Capital of Europe" by 1987, highlighting just how ineffective this type of policing is in managing public health.[6] In many ways, the harm reduction movement was launched because of the fear of AIDS in both the United States as well as the United Kingdom.

Addiction is pathologized because it is an involved, multi-system disease, but possession is criminalized because American society has moralized drug dependence to stigmatize minority

---

[1] D C. Des Jarlais, "Harm Reduction--a Framework for Incorporating Science into Drug Policy." *American Journal of Public Health* 85, no. 1 (1995): 10–12.
[2] Maia Szalavitz, UNDOING DRUGS: The Untold Story of Harm Reduction and the Future of Addiction (S.L.: Hachette Go, 2022), 47.
[3] Szalavitz, *UNDOING DRUGS: The Untold Story of Harm Reduction and the Future of Addiction,* 30.
[4] Szalavitz, *UNDOING DRUG : The Untold Story of Harm Reduction and the Future of Addiction,* 32.
[5] Szalavitz, *UNDOING DRUGS : The Untold Story of Harm Reduction and the Future of Addiction,* 32.
[6] 5. Szalavitz, *UNDOING DRUGS : The Untold Story of Harm Reduction and the Future of Addiction,* 37.

populations.[7] Today, while the U.S. has come much further in its perception of people struggling with addiction, the policy approach toward the drug crisis has remained largely unmoved. The criminalization of drugs began in the early 20th century with the Harrison Act, which outlawed the nonmedical use of cocaine, morphine, and opium outright as well as heroin—though this was added in a later amendment.[8] Although the current model for addiction treatment reeks of American puritanical values given the highly religious subtext of popular programs like Alcoholics Anonymous, this perspective towards drug abuse is relatively recent, starting only in the 20th century with the influx of immigrant workers.[9]

American social engineering is to blame for much of the modern attitude towards addiction and psychoactive substance use, significantly influencing sentencing. This can be seen in the disparity in sentencing between crack cocaine and powder cocaine, one is associated with poor Black Americans and the other with upper class white people due to propaganda surrounding the war on drugs.[10] One case that exemplifies this is Whitner v. South Carolina (1997). In this case, Cornelia Whitner pled guilty to charges of child abuse and child endangerment for ingesting cocaine while pregnant.[11] After serving 18 months, her sentence was vacated in November of 1993 and later sought post conviction relief (PCR) arguing that the circuit court lacked subject jurisdiction and she had ineffective counsel which was granted on both grounds.[12] The South Carolina Attorney General appealed this decision, and the state Supreme Court ultimately ruled 3-2 the South Carolina Children's code did include viable fetuses, extending rights to fetuses in a highly contested judicial ruling.[13] This ruling poses a clear threat to reproductive rights' and bodily autonomy. This judicial overreach grants fetuses rights equivalent to living children in child abuse and neglect cases. However, the case itself concerned alleged prenatal drug abuse and was merely the crowning achievement of Attorney General Charlie Condon's war on drugs that he had been waging against addicted Black mothers

---

[7] 1.Carl Erik Fisher, *The Urge: Our History of Addiction*, (Penguin Press, 2022), 124.
[8] 1.John H Halpern and David Blistein, *Opium: How an Ancient Flower Shaped and Poisoned Our World*, (Hachette Books, 2019), 130.
[9] 2.Carl Erik Fisher, *The Urge: Our History of Addiction*, 124; 1.Scott Thomas, "12 Step Programs for Drug Rehab & Alcohol Treatment," American Addiction Centers, last modified September 3, 2024.
[10] 1."NACDL - Race and the War on Drugs," NACDL - National Association of Criminal Defense Lawyers, last modified November 29, 2022.
[11] Whitner v. State, 492 S.E.2d 777 (S.C. 1997)
[12] Whitner v. State, 492 S.E.2d 777 (S.C. 1997)
[13] "Court Declines to Hear Treatment v. Jail Case - Drug Policy Alliance," Drug Policy Alliance, effective May 25, 1998.

since 1989.[14] Preceding this case, he had instituted the Interagency Policy on Cocaine Abuse in Pregnancy (Interagency Policy) through collaboration with the Medical University of South Carolina (MUSC) and one Nurse Shirley Brown.[15] This policy mandated the noncensual drug testing of pregnant patients, reporting results to the police, and subsequent arrest for drug and child abuse charges as punishment or intimidation.[16] Condon used this to wage a crusade against addicted Black mothers and build a political platform for himself. His policy resulted in the arrests of 42 patients all but one of whom were Black. [17] Women who were arrested while pregnant spent the duration of their pregnancies in jail and were forced to deliver their children in handcuffs. Detractors of these brutal policies, like Dorothy Roberts, have argued that this was a modern tragedy comparable to enslaved women delivering their children under bondage.[18] He used this campaign to launch himself in the public sphere and win the attorney general position that he would later use to force an appeal and overturn Whitner's PCR. Condon elevated himself through the abuse of the American justice system to target poor, addicted, Black pregnant women and mothers. He had a narrow focus in this endeavor, prosecuting cases of crack cocaine abuse exclusively, despite the program producing positive drug tests in white women for other substances. Condon's prosecutorial conduct is a gross miscarriage of justice, but his successful utilization of his record and the ruling in Whitner v. South Carolina exemplifies the racialized American attitude around drug addiction, even amidst the backdrop of growing concern over the eventual opioid epidemic in the late 1990s.

Unfortunately, no politician has been willing to be seen breaking over a century of tradition, even manufactured tradition, of being 'tough on drugs and crime,' and thus are unwilling to truly aid all of their constituents. As seen in the careers of Attorney General Condon and Ronald Reagan, more often than not politicians have used anti-drug sentiments to bolster their careers. While many people envision drug decriminalization as the major end goal of harm reduction, it is only one policy under a large umbrella that encompasses multiple avenues to treat a public health crisis and infrastructure issue that impacts everyone. The counterargument of decriminalization and harm reduction has historically been that it promotes the use of illicit

[14]Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* (New York: Vintage Books, 1997), 168.
[15] Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* 165.
[16] Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* 165.
[17] Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* 166.
[18] Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* 166.

substances.[19] However, this perspective is not based in realism. Drug abuse is inevitable, so the method that is healthiest for the greatest number of people is to offer safety and security, provide resources for treatment, and prevent wider health crises like HIV. Addiction is classified in the DSM-V as Substance Use Disorder (SUDS), with diagnoses being specific to the substance upon which the patient is physiologically dependent. Substance Use Disorder is a cluster of cognitive, behavioral, and physiological symptoms, specific to the dependent drug, that indicate continued use of the substance despite its use being uncontrollable or causing significant dysfunction or distress within the patient's life.[20] Many people find themselves struggling to empathize with addicts because of the paradoxical nature of the illness and this illusion of choice. Chronic non-medical use of psychoactive substances like opiates or amphetamines alters the wiring of the brain and body.[21] A great deal of the populace has internalized the dehumanizing messaging around people struggling with addiction and lack understanding of the neurobiological and physiological changes that accompany addiction that directly contradict the common myth of choice.

While evidence against this can be easily sourced in the success of these policies abroad, the argument itself illustrates a larger issue that must be tackled alongside this fight.[22] People must first believe that the value of human lives is greater than the *perception* of strict adherence to a moral principle, particularly lives belonging to those who they have dehumanized. Sentencing guidelines on drug possession must be changed to begin to ameliorate the issues of racial bias within the criminal system. Already there have been strides made in states such as Oregon and Washington, where low-level drug possession has been decriminalized.[23] Other states should follow suit and implement the 'cautioning' model they adopted from British policy where public safety officials divert those caught with illegal substances to social services at least twice before arrest and prosecution.[24] A model like this relieves some of the burden on our prison system but also takes into account the neurobiological reality of addiction. It is a major departure

[19] Des Jarlais, "Harm Reduction--a Framework for Incorporating Science into Drug Policy," 11; 2. Fisher, *The Urge: Our History of Addiction*, 284.
[20] Jerrold S Meyerand Linda F Quenzer, *Psychopharmacology : Drugs, the Brain, and Behavior*, 105.
[21] Jerrold S Meyerand Linda F Quenzer, *Psychopharmacology : Drugs, the Brain, and Behavior*, 105.
[22] Szalavitz, *UNDOING DRUGS : The Untold Story of Harm Reduction and the Future of Addiction,* 45.
[23] Ann Lininger, 2020, "Harm Reduction Is Justice | Yale Law & Policy Review," Yale Law and Policy Review, effective 2020.
[24] Ann Lininger, 2020, "Harm Reduction Is Justice | Yale Law & Policy Review," Yale Law and Policy Review, effective 2020.

from the antiquated way of thinking which dictates that addicts can "just say no" or quit if they possess enough willpower. Additionally, state sanctioned police violence highlights that law enforcement is ill equipped to handle sensitive matters pertaining to drug use, mental health, or non-emergent de-escalation, so the redirection to social workers rather than criminalization may prove safer and more orderly for American society long term. The law and policy must respect scientific reality as it pertains to human physiology, otherwise we possess little footing to legislate on medical issues. It is crucial to acknowledge that we do not federally criminalize other forms of disease. The arms of the law cannot be brandished against those who make choices that sects of our society disagree with on a moral basis, nor can we afford to sacrifice nonviolent individuals to the prison industrial complex in the name of order.

**Bibliography**

ACLU of New Jersey. "It's Past Time to Decriminalize All Drugs: A Q&A with Harm Reduction Advocate Caitlin O'Neill." ACLU of New Jersey, August 19, 2024. https://www.aclu-nj.org/en/news/its-past-time-decriminalize-all-drugs-qa-harm-reduction-advocate-caitlin-oneill-0.

Carl Erik, Fisher. *The Urge: Our History of Addiction*. Scribe Publications, 2022.

Des Jarlais, DC. "Harm Reduction--A Framework for Incorporating Science into Drug Policy." *American Journal of Public Health* 85, no. 1 (January 1995): 10–12. https://doi.org/10.2105/ajph.85.1.10.

Drug Policy Alliance. "Court Declines to Hear Treatment v. Jail Case." Drug Policy Alliance, June 3, 2023. https://drugpolicy.org/news/court-declines-hear-treatment-v-jail-case/.

Halpern, John H, and David Blistein. *Opium: How an Ancient Flower Shaped and Poisoned Our World*. Hachette Books, 2019.

Lininger, Ann. "Harm Reduction Is Justice." *Yale Law and Policy Review*, 2020.

Meyer, Jerrold, and Linda Quenzer. *Psychopharmacology: Drugs, the Brain, and Behavior*. Oxford University Press, 2019.

National Association of Criminal Defense Lawyers. "Race and the War on Drugs." NACDL, November 29, 2022. https://www.nacdl.org/Content/Race-and-the-War-on-Drugs.

Roberts, Dorothy. *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*. Vintage Books, 1997.

Szalavitz, Maia. *Undoing Drugs: The Untold Story of Harm Reduction and the Future of Addiction*. Hachette Go, 2021.

Thomas, Scott. "12 Step Programs for Drug Rehab & Alcohol Treatment." American Addiction Centers, September 3, 2024. https://americanaddictioncenters.org/rehab-guide/12-step.

# The Privatization of Housing and the Persistence of Segregation: A Case Study of Minneapolis 2040

Nora Priede von Herber
Edited by Veronica Rhoten (Senior Editor) and Leah Dutcher (Junior Editor)

**Abstract:**

This essay analyzes the legal and social foundations of racial and economic inequality in housing, using the Minneapolis 2040 Plan as a contemporary case study. At the heart of the analysis is the legacy of racial covenants and redlining - once legally sanctioned, now illegal under the Fair Housing Act of 1968 - which created deeply segregated urban landscapes and a lasting racial gap in homeownership. The essay explores how opposition to the Minneapolis 2040 Plan, particularly from white, upper-middle-class neighborhoods, echoes these historical patterns of exclusion, now reframed as concerns over property values and neighborhood character. Drawing on legal precedents like Shelley v. Kraemer (1948) and housing scholarship from theorists Jim Kemeny and Peter Saunders, the essay argues that the privatization of housing reinforces wealth inequality and spatial segregation. It further critiques the limitations of existing legal reforms, highlighting the need for stronger welfare policies and zoning reforms to dismantle the structural barriers to equitable housing. Ultimately, the essay advocates for sustained, equity-focused housing policies that confront historical injustices and promote access to stable, affordable housing for marginalized communities. The Minneapolis 2040 Plan represents a step toward these goals, but its long-term impact remains to be seen.

During the summer of 2018, red lawn signs started popping up throughout my neighborhood. I grew up in Tangletown, a middle class neighborhood in south Minneapolis, Minnesota, now at the epicenter of national debates around racial equity. White letters shouted, "DEVELOPERS WIN! NEIGHBORHOODS LOSE! STOP MPLS 2040." Quickly, talk spread throughout Tangletown as residents shared their opinions - most of them negative - about a new policy called Minneapolis 2040. These perceived threats from my neighbors made it into my conscience. I feared losing the tranquility of my neighborhood, decorated with manicured lawns, repaved roads, and pedestrian friendly sidewalks. As more signs appeared, I learned what Minneapolis 2040 entailed.

Minneapolis 2040 is a policy initiative to make housing, public transit, education, and other institutions more accessible to a growing population. One of its aims is to decrease racial gaps in homeownership. In Minnesota, there is a 36 percentage point homeownership gap between white people and people of color.[1] This disparity can be traced back to racial covenants and redlining, both now illegal. Racial covenants, also called restrictive covenants, were created in the early twentieth century. White elites thought that families of color decreased property values and property deed clauses barring ownership by non-white persons became widespread. During the same time period, sections of the city were labeled as either desirable or not desirable in order to create white-only neighborhoods, known as redlining.[2] Neighborhoods were redlined because they were lower income and/or non-white, and thus were destined to remain so. They also tended to have a mix of single-family houses and apartment buildings. This is in direct contrast to neighborhoods that were thought of as desirable to live in by white families. The process included imposing single-family zoning regulations. By requiring their owners to come up with a down-payment for a single-family home instead of paying monthly rent for an apartment, lower income families were barred from entering those neighborhoods. Today, these neighborhoods have higher property values, which correlates with better school districts, access to resources, and public safety.

Minneapolis 2040 was threatening to my neighbors because it negated what they considered rights to private property, and at the heart of that was the prospect of falling property values. The motivation of redlining was to protect areas of high property values, which would

[1] "Eliminate Disparities," n.d.
[2] "What Is a Covenant | Mapping Prejudice," n.d.

ensure that white communities continue to own or have disproportionately high access to resources. Home ownership is essential to increasing one's wealth, which is what makes the racial home ownership gaps in Minnesota so stark. This gap is hard to close, as it can be assumed that property values will continue to rise (the 2008 financial crisis is an exception to this generations-long trend). As property values increase, property taxes rise which affects the quality of neighborhoods, including their public schools. Additionally, after one's mortgage is paid off, they will profit from rising property values. An op-ed in the New York Times in 2014 reads, "Homeownership has long been central to Americans' ability to amass wealth... the net worth of homeowners has significantly outpaced that of renters."[3] Central to the 2040 Plan was the elimination of single-family zoning, in order to open up suburban spaces for multi-unit, rental dwellings. These dwellings would be more likely to have non-white tenants, due to renting being cheaper than owning. The negative reaction to the 2040 Plan perpetuated the same racist attitudes that fueled redlining almost a century before, although this time they could be rationalized in the guise of protecting property values.

Jim Kemeny, a British sociologist in the field of housing studies, argues that owner-occupation is "founded upon the privatization of housing consumption" and thus is"anti-collectivistic" and "discourages cooperation."[4] He argues that housing privatization leads to the privatization of society, due to it being the most profitable form of tenure.[5] Housing privatization exacerbates wealth gaps between the rich and the poor. As housing is resold, its value continues to rise, making it harder for first time buyers to enter the market. This then perpetuates wealth inequalities; the rich get richer from their investments and the poor get poorer because they have to allocate more of their income to their housing budget. These concepts are reflected in the spatial arrangement of housing in Minneapolis; some areas of the city are in significantly worse condition than others.

Racial covenants faced significant backlash throughout the twentieth century until their prohibition in 1968. One such example is Shelley v. Kramer (1948). In 1945, a Black family, the Shelleys, unknowingly bought a house with a restrictive covenant in St. Louis, Missouri. It stated that the house could not be "occupied by any person not of the Caucasian race."[6] Their purchase

[3] The Editorial Board. "Homeownership and Wealth Creation."
[4] Kemeny, "Homeownership and Privatization" (1980), 373.
[5] Ibid., 374 and 375.
[6] LII / Legal Information Institute. "Shelley V. Kramer (1948)," n.d.

was challenged by the Kraemers, a white family, who sought to enforce the covenant. After being upheld by the Missouri Supreme Court, it was brought to the U.S. Supreme Court who ruled that the restrictive covenant violated the equal protection clause of the Fourteenth Amendment. Although a step in the right direction, Shelley v. Kramer did not prevent the existence of racial covenants and only prohibited their enforcement by the state.[7] They could still be enacted in private agreements and up until the Fair Housing Act of 1968, they continued to be added to property deeds. Racial covenants came to an end with the Fair Housing Act, which prohibited discrimination in the financing, renting, or selling of a house. It has been amended several times to add other protected characteristics, such as a familial status, sex, and religion.[8]

Despite this legislation, most U.S. cities are still spatially segregated by race and income. A 2016 project by the University of Minnesota titled "Mapping Prejudice" aimed to bring awareness to the history of housing discrimination in Minnesota, identifying and mapping racial covenants still existing in property deeds.[9] This was an important step in acknowledging the prevailing racism in Minnesota and a push for systemic change. The 2040 Plan aims to reduce these inequalities by using zoning and taxation to bend incentives toward diversifying housing types and promote mixed land use.[10] This would be a progressive step in making Minneapolis more affordable and accessible for historically marginalized communities, such as Black and Brown residents. The proposed measures were perceived by many white, upper-class residents to threaten the structure and foundation of single-family, predominantly white neighborhoods.

My entire life has benefitted from my parents' status as homeowners, and thus from the privatization of my house from the public rental sector. In a few years, my parents will pay off their mortgage and will have more money to renovate the house. This will reduce the strain of paying for my college education, opening up more opportunities and resources for me. Because my parents own our house, I will always have access to that house as a fall back. Living where I did gave me access to a quality public school education, equipping me with academic resources many others are not afforded. In 2019, Minnesota was ranked the worst in the nation for racial

[7] Thompson, Cheryl W. "Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country." NPR, November 17, 2021.
[8] "The Fair Housing Act," June 22, 2023.
[9] University of Minnesota, "About Mapping Prejudice | Mapping Prejudice," mappingprejudice.umn.edu (University of Minnesota, n.d.).
[10] "Access to Housing," n.d.

education gaps.[11] In an effort to combat this, public school districts were redrawn in 2021 to include more white families at what the district considers "racially isolated schools" i.e schools that have 86% or more students of color.[12] These efforts from the district indicate an awareness of the benefits that homeownership brings, but demonstrate an inability to address them at the root of the issue and provide a stronger welfare state in Minneapolis. The reactions to both Minneapolis 2040 and redistricting were varied and can be traced back to the segregation of neighborhoods.

Peter Saunders, a British academic focusing on welfare reform and housing studies, writes, "The interface between the household and the wider society is a critical boundary in social life, for it marks the distinction between private and public, self and society, the individual and the state. The dark image of the 'knock on the door in the middle of the night' is so terrifying precisely because it negates our belief in the sanctity of our own homes."[13] Using Saunders' framework, the 2040 Plan was a knock at the door, threatening the private sphere of my neighborhood. Kemeny, on the other hand, would counter this by saying this division between the private and public spheres is a product of weakening welfare states, turning housing from a natural right into a commodity. Historical barriers to homeownership and their long lasting effects are becoming more visible, thus increasing the potential for policy makers to pass legislation to make affordable housing more accessible. This knowledge about housing privatization provides a lens with which to view the housing market and those who have been disadvantaged because of it, opening up avenues for systemic change in Minneapolis.

After being passed in 2019 and a several-years-long court battle due to environmental lawsuits, legislation was passed in 2024 that allowed the 2040 Plan and subsequent housing development to continue.[14] The City of Minneapolis stated that the city has seen high levels of affordable housing in recent years and low rents compared with the rest of the country, but it is unclear if that is due to the 2040 Plan or other factors.[15] More research is needed in the coming years to see if the promised benefits of the 2040 Plan are seen, such as increased Black home ownership and housing affordability. In order to create more equitable cities, it is necessary to

[11] Shultz, David. "Improving Minnesota education: What does the evidence say really works?" Minnesota Reformer, March 14, 2023.
[12] Mervosh, Sarah. "In Minneapolis Schools, White Families Are Asked to Help Do the Integrating." The New York Times, November 27, 2021.
[13] Peter Saunders, "A Nation of Homeowners" (1990), 266.
[14] Minneapolis, City Of. "City Moving Forward With Minneapolis 2040 Comprehensive Plan," n.d.
[15] Ibid.

investigate the historical discrimination and legislation that our cities are built on. Much of this starts with housing. Stable and affordable housing allows for access to resources such as employment, education, the Internet, harm reduction, and more, all of which contribute to eliminating wealth gaps. By continuing to advocate for housing policy and legislation that targets the needs of all residents, U.S. cities will become more equitable and safer for all.

**Bibliography**

"About Mapping Prejudice | Mapping Prejudice," n.d. https://mappingprejudice.umn.edu/about-us/project.

"Access to Housing," n.d. https://minneapolis2040.com/policies/access-to-housing/.

"Eliminate Disparities," n.d. https://minneapolis2040.com/goals/eliminate-disparities/.

Kemeny, Jim. "Home ownership and privatization." International Journal of Urban and Regional Research 4, no. 3 (September 1980): 373–75. https://doi.org/10.1111/j.1468-2427.1980.tb00812.x.

Mervosh, Sarah. "In Minneapolis Schools, White Families Are Asked to Help Do the Integrating." The New York Times, November 27, 2021. https://www.nytimes.com/2021/11/27/us/minneapolis-school-integration.html.

Minneapolis, City Of. "City Moving Forward With Minneapolis 2040 Comprehensive Plan," n.d. https://www.minneapolismn.gov/news/2024/june/2040-plan/.

Saunders, Peter. A Nation of Home Owners. Routledge, 1990.

LII / Legal Information Institute. "Shelley V. Kraemer (1948)," n.d. https://www.law.cornell.edu/wex/shelley_v_kraemer_(1948).

Shultz, David. "Improving Minnesota education: What does the evidence say really works?" Minnesota Reformer, March 14, 2023. https://minnesotareformer.com/2023/03/14/improving-minnesota-education-what-does-the-evidence-say-really-works/#:~:text=Minnesota%20Department%20of%20Education%20statistics,the%20nation%20for%20racial%20disparities.

The Editorial Board. "Homeownership and Wealth Creation." The New York Times. November 2014. https://www.nytimes.com/2014/11/30/opinion/sunday/homeownership-and-wealth-creation.html.

"The Fair Housing Act," June 22, 2023. https://www.justice.gov/crt/fair-housing-act-1.

Thompson, Cheryl W. "Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country." NPR, November 17, 2021. https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination.

University of Minnesota. "About Mapping Prejudice | Mapping Prejudice." mappingprejudice.umn.edu. University of Minnesota, n.d. https://mappingprejudice.umn.edu/about-us/project.

"What Is a Covenant? | Mapping Prejudice," n.d. https://mappingprejudice.umn.edu/racial-covenants/what-is-a-covenant.

# Confronting The Feres Doctrine: Ensuring Equal Protection and Due Process for Active-Duty Service Members

Cat McKenna
Edited by Coco Chen (Senior Editor) and Bei Jia Viggiano (Junior Editor)

**Abstract:**

In 1950, the Supreme Court's decision in Feres v. United States established the Feres Doctrine, which barred active-duty service members from suing the federal government for injuries deemed "incident to military service", a purposefully ambiguous term. As a result, many active-duty members have been unable to file claims under the Federal Tort Claims Act (1946) for issues such as medical malpractice, sexual assault, and other incidents. Besides limited legislative and judicial efforts to mitigate its effects, the doctrine continues to deny jurisdiction to service members, raising serious concerns about justice, accountability, and the balance of power. In addressing this concern, this article will examine whether the doctrine must be overruled to ensure permanent legal precedent that protects service members.

## Introduction

For active-duty military personnel, reservists, and veterans, "Thank you for your service" is often repeated as a token of national gratitude. However, beneath this honor and pride lies a troubling contradiction: a lack of meaningful action and accountability from the United States Federal Government to ensure protection. In 1950, the Supreme Court's decision in *Feres v. United States* barred active-duty servicemembers from suing the federal government for injuries deemed "incident to military service," establishing the Feres Doctrine.[1] In cases of medical malpractice and sexual assault on military bases and institutions across the country, the Feres Doctrine must be challenged to ensure that service members are guaranteed equal protection and due process under the law.

To confront the Feres Doctrine, this paper will explore the legislative history surrounding sovereign immunity, analyze the Supreme Court's decision reinstating federal immunity for service members, and argue that this expansion causes judicial negligence that violates the 14th Amendment. Finally, it will present current remedies to the Feres Doctrine and advocate for its overturning to ensure permanent constitutional protections for service members' cases of sexual assault and medical malpractice.

## The Federal Tort Claims Act: A Complicated History

The Federal Tort Claims Act contains substantial legal loopholes.[2] Despite legislative progress to limit federal immunity leading up, the sections about service members hinder that progress. Congress passed the FTCA in 1946, allowing private individuals to sue the United States Government for specific wrongful acts committed by federal employees. Before FTCA, sovereign immunity protected the Federal Government from being sued. However, this changed after the FTCA, as plaintiffs can sue the federal government as if it were a private party. Since the FTCA, sovereign immunity has been limited, but the act has come with a few exceptions. According to the Congressional Research Service, section 2680 lists the type of claims plaintiffs may not pursue against the federal government: Section 2680 (a) encapsulates the "discretionary function exception" that protects the United States from a liability that involves the federal

[1] *Feres v. United States*, 340 U.S. 135 (1950); Legal Information Institute. 2025. "Feres Doctrine." *Wex*. Last modified April 6, 2025. https://www.law.cornell.edu/wex/feres_doctrine.
[2] U.S. Congress. *Federal Tort Claims Act*, 28 U.S.C. § 2671 et seq. (1946).

employee's personal choices. Section 2680(a) prevents plaintiffs from suing the U.S in "intentional torts." Preceding the *Feres v. United States*, FCTA Section 2680(j) "shields the United States from any tort claim 'arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war".[3] If a lawsuit contains any of these exceptions, the FTCA does not apply. Yet, in 1950, this provision was expanded to limit the liability for military-related cases further.

The scaled-back restraints on sovereign immunity in the FCTA Section 2680(a) and Section (j) make the legal process difficult for military members. After *Feres,* these protections were limited. In 1947, Lt. Rudolph Feres, along with other officers, was killed by a fire in the barracks at Pine Camp, New York. These barracks were built with significant flaws in safety and fire prevention.[4] *Feres* grouped with *Griggs v. United States* and J*efferson v. United States*, cases involving military medical malpractice, sued for damages under the FTCA.[5] When the case was appealed to the U.S Supreme Court, all three claims were dismissed, creating the precedent known today as the Feres Doctrine, hindering proper accountability within military leadership and the federal government for the next 70 years.

**The Majority Opinion: The Scope of Sovereign Immunity**

The Court's decision in *Feres* expands the scope of sovereign immunity. In the majority opinion, Justice Robert Jackson briefly discussed the FCTA and its crucial role in immunity. He argued that the act "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit".[6] Regarding tort claims against the United States, he stated that just because the courts have jurisdiction to hear lawsuits against the federal government, it does not mean these lawsuits will succeed.[7] Therefore, the FCTA is viewed as a potential door opener for case-by-case lawsuits.

However, despite this established jurisdiction, the philosophy surrounding military personnel changes. Justice Jackson later examined the federal government acting as a private

---

[3] Lewis, Kevin M., and Andreas Kuersten, 201, *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*. Congressional Research Service, January 25, 2011. https://sgp.fas.org/crs/misc/LSB10305.pdf.
[4] Caprioli, Jennifer M, "Historic Pine Camp Fire Helps Shape Today's Military," *Army.mil*, October 13, 2011, https://www.army.mil/article/67169/historic_pine_camp_fire_helps_shape_todays_military.
[5] *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).
[6] *Feres v. United States,* 340 U.S. 139 (1950).
[7] *Feres v. United States,* 340 U.S. 141(1950).

party and drew a comparison to that of a state and a militia. He argued that even if a "private individual" could include a state government, states don't allow their militia members to sue for injuries suffered during service.[8] He then pointed out that in a military context, both the service member and the perpetrator of the tort are federal by nature, rendering such claims invalid against the United States.[9] In concluding his argument, he cited that the legislature has the authority to amend the FTCA and that compensation is already established through the Veterans Affairs Program.[10] Therefore, active-duty service members cannot sue under the FTCA for scenarios related to military service, as there are alternative avenues. Ultimately, the Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," distorting the FCTA's original intent for tort claims to be resolved on a case-by-case basis and inventing the "incident to military" principle halts claims from military personnel, establishing federal immunity against these groups.[11]

**The Overstepping of Sovereignty and the Negligence of the Court**

The majority opinion's re-establishment of sovereign immunity violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. By preventing active-duty personnel from filing a tort claim, the Doctrine creates legal tiers within federal service and prevents civilian courts from exercising jurisdiction over tort claims.

The Court's reinstatement of sovereign immunity to service members defies the Equal Protection Clause. The majority opinion articulates, "The relationship between the Government and members of its armed forces is 'distinctively federal in character.'"[12] This phrase implies that the military relationship reflects the constitutional principles of the federal system, particularly the divisions between the state and federal governments. While the armed forces are a national institution, they operate within the federal framework. This complicates access to remedies under the Federal Tort Claims Act and sets them apart from civilian employees, as it distinguishes a dual authority for the military. Therefore, federal workers who are citizens can sue under the

[8] *Feres v. United States,* 340 U. S. 142 (1950).
[9] *Feres v. United States,* 340 U.S. 143 (1950).
[10] *Feres v. United States*, 340 U.S 145 (1950).
[11] *Feres v. United States,* 340 U.S. 146 (1950).
[12] *Feres v. United States*, 340 U. S. 142-144 (1950).

FTCA, but active-duty service members are prevented from doing so due to this claim. This distinction creates two separate classes of legal access: one with full protection under the FTCA and another, composed of military personnel, with significantly limited or no access at all. For example, a civilian could sue for sexual assault under the FTCA, while military personnel cannot. This formation of separate classes of legal access serves as a violation of the Equal Protection Clause. The military may be structurally different, but in principle, it is a federal job, and its service members are federal employees. The existence of this legal "line" raises a fundamental question: Why should service members be denied the right to sue the federal government for workplace-related harm when their civil servants retain that right? The decision in *Feres's* "incident to military service" forecasts a division that contradicts the Equal Protection Clause.

In addition to the 14th Amendment's Equal Protection Clause, federal immunity implemented by *Feres* violates the Due Process Clause. The first part of this violation is the Court's reallocation of power to Congress. Justice Jackson went on to write in the opinion, "Congress, which provides systems of simple, certain, and uniform compensation for injuries or death of those in armed services."[13] This statement highlights the authority of the legislature to address claims arising out of military service, creating a structural constitutional conflict. Reflecting on checks and balances, while Congress creates laws and allocates federal funding, the Court is responsible for deciding whether or not legislative actions are unconstitutional. Since the Court said that military Tort claims are covered by Congressional compensation, it strips away jurisdiction for service members' tort lawsuits. Moreover, the court distorted the FCTA's original intent for tort claims to be resolved on a case-by-case basis, gave the 'jurisdiction' over to Congress, and extended the sphere of immunity.

Second, this structural constitutional conflict leads to judicial negligence and denial of due process. By barring jurisdiction from active-duty personnel, the Feres Doctrine obstructs a path to accountability for harms like medical malpractice and working conditions. This absence of accountability fosters negligence in the court, ultimately denying due process. For example, the court noted that "the few cases charging superior officers or the Government with neglect or misconduct which have been brought since the Tort Claims Act, of which the present are typical,

[13] *Feres v. United States*, 340 U. S. 144 (1950).

have either been suits by widows or surviving dependents, or have been brought after the individual was discharged."[14] An illustration of this issue is found in *Daniel v. United States*, where the plaintiff alleged that his wife, a Navy lieutenant on active duty, died during childbirth due to negligent medical care at a Navy hospital.[15] Under the Feres Doctrine, the plaintiff was denied a writ of certiorari to appeal the case. The inability to appeal the case reveals a denial of due process, as the plaintiff, a Navy dependent, was prevented from seeking proper compensation for harm inflicted by the government and judicial negligence. In cases like *Daniel v. United States*, the Feres Doctrine and the FTCA restrict access to legal justice, obstructing active-duty service personnel from receiving due process of law.

## Legislative Remedy and Future Implications

There have been slight improvements in prosecuting and protecting service members from medical malpractice that have remedied the Feres Doctrine. In 2009, Congress passed the Carmelo Rodriguez Military Medical Accountability Act.[16] The bill added a new section to the United States Code allowing service members to file claims when harmed by medical malpractice that directly relates to a government-employed healthcare system. This exclusion only applies to those serving in combat positions who can file for tort claims, but it expands the scope of protection under the FTCA. In 2020, under the Richard Stayskal Medical Accountability Act, current members of the military can file an administrative claim for medical malpractice if they have suffered injury or death due to the negligence of a federal employee providing healthcare.[17] Although these acts signal legislative progress in confronting medical malpractice, there is a lack of litigative progress in protecting service members. There is no clear legal precedent, which can lead to resistance in military legal structures. Therefore, the Feres Doctrine must be overturned to ensure that military personnel have access to a civil court.

Looking forward, this lack of legal precedent is harmful regarding cases of sexual assault on military bases and institutions. In the years of post-9/11 wars and military service, independent studies suggest that reports are 2 to 4 times higher than what the Department of Defense estimates, which is 75,569 in 2021 and 73,695 in 2023. Moreover, during the American

[14] Feres v. United States 340 U. S. 145 (1950)
[15] *Daniel v. United States*, 426 F.2d 281 (5th Cir. 1970).
[16] *Public Law No. 117-70*, *Carmelo Rodriguez Military Medical Accountability Act of 2021*, 117th Congress (2021).
[17] *Public Law No. 116-34*, *Richard Stayskal Medical Accountability Act of 2019*, 116th Congress (2019).

war in Afghanistan, 24% of service of female service members experienced sexual harassment or assault, and 1.9% of male service members experienced sexual harassment or assault.[18] In these instances, the absence of permanent legal precedent prevents many survivors of sexual assault from pursuing their cases in civilian court, as the Department of Defense fails to report and hold parties causing harm accountable. Furthermore, the military chain of command often places survivors in the position of reporting their assault to a superior who may have a connection to the perpetrator, making it more difficult to come forward. In a civil servant job, this position may occur as well, but unlike military personnel, civil servants can sue the federal government under the FTCA and have due process of law. While there has been some progress in *Spletstoser v. Hyten*, where the court ruled that sexual assault is not considered "incident to service," the doctrine is still precedent.[19] Thus, the Feres Doctrine must be overturned so active-duty personnel have equal protection under the law and establish an essential precedent that holds the federal government accountable.

## Conclusion

In *Feres v. United States*, the federal government failed to protect active-duty military members by denying them basic constitutional rights to due process and equal protection under the guise of federal immunity. Similarly**,** the Court's decision broadened the scope of federal immunity and shifted authority to Congress, thereby violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. While there has been some progress in addressing medical malpractice and cases of sexual assault within the military, service members remain vulnerable as they still do not receive the same legal protections as civilian federal employees under the Federal Tort Claims Act (FTCA). Looking ahead, the Feres Doctrine must be overturned to establish a legal precedent that guarantees equal protection and due process for all federal employees, including active-duty service members.

[18] Greenburg, Jennifer. "Deserted: The U.S. Military's Sexual Assault Crisis as a Cost of War." *Costs of War* (August 14, 2024).
[19] *Spletstoser v. Hyten*, No. 20-56180, 2022 WL 3348334 (9th Cir. Aug. 11, 2022); Sanford Heisler Sharp McKnight, LLP. "Challenging the Feres Doctrine: Sexual Assault in the Military." *Sanford Heisler Sharp McKnight*, February 25, 2025.

**Bibliography**

Caprioli, Jennifer M. "Historic Pine Camp Fire Helps Shape Today's Military," *Army.mil*, October 13, 2011, https://www.army.mil/article/67169/historic_pine_camp_fire_helps_shape_todays_military.

*Daniel v. United States*, 426 F.2d 281 (5th Cir. 1970).

*Feres v. United States*, 340 U.S. 135 (1950).

Greenburg, Jennifer. "Deserted: The U.S. Military's Sexual Assault Crisis as a Cost of War." *Costs of War*, August 14, 2024.

*Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949).

Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

Legal Information Institute. "Feres Doctrine." *Wex*. Last modified April 6, 2025. https://www.law.cornell.edu/wex/feres_doctrine.

Lewis, Kevin M., and Andreas Kuersten. *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*. Congressional Research Service, January 25, 2011.

*Public Law No. 116-34*, *Richard Stayskal Medical Accountability Act of 2019*. 116th Congress (2019).

*Public Law No. 117-70*, *Carmelo Rodriguez Military Medical Accountability Act of 2021*. 117th Congress (2021).

Sanford Heisler Sharp McKnight, LLP. "Challenging the Feres Doctrine: Sexual Assault in the Military." *Sanford Heisler Sharp McKnight*, February 25, 2025.

*Spletstoser v. Hyten*, No. 20-56180, 2022 WL 3348334 (9th Cir. Aug. 11, 2022).

U.S. Congress. *Federal Tort Claims Act*, 28 U.S.C. § 2671 et seq. (1946).

# A Decision Born Out of Dishonesty: *Kennedy v. Bremerton*, 597 U.S. ___ (2022)

Hailee Pitschke
Edited By Myra Zia (Senior Editor) and Asmi Shrestha (Junior Editor)

**Abstract:**

The case of *Kennedy v. Bremerton* appears at first glance to refer to religious liberties for public employees. Though some might consider this case to be relatively inconsequential, the themes reflected in the Supreme Court's handling of the case have major consequences for the future of the court as a whole. This article argues that the case of *Kennedy v. Bremerton* marks a significant turn in the court as blatant dishonesty about precedent and about the facts of cases is normalized. It theorizes that the erosion of the Establishment Clause's strength in this case poses a threat to *Obergefell v. Hodges* in the concurrences written by Justices Alito and Thomas. Furthermore, it illustrates Justice Kavanaugh's positionality as a swing vote on the court by analysing his dissenting opinion and strategic neutrality in the oral arguments. Most importantly, this article examines two key concerns emerging from this case. First, the court's majority opinion completely ignored the precedent set by *Lemon*, significantly undermining the principle of stare decisis. Second, the court's majority and dissenting opinions had distinctly different understandings of the facts. This article seeks to call attention to the erosion of basic principles within the court which jeopardize its legitimacy as a neutral institution.

## Introduction

*Kennedy v. Bremerton*, 597 U.S. ___ (2022) is a case about religious freedom, the distinctions between public and private employees, and the First Amendment. The case expanded the right to religious expression for public employees at the expense of private citizens. Many would consider that, alone, to be an egregious miscarriage of justice. However, there are several equally if not even more concerning trends being reflected in this case, placing several more issues in complicated positions. *Kennedy v. Bremerton* (2022) brings light to a number of deeper trends within the Court, such as threats to the rights of the marginalized and strategic decisions getting in the way of honest intellectual discourse.

## The Facts of the Case & Procedural History

The case of *Kennedy v. Bremerton* (2022) is an odd one, primarily because of the conflicting reports on the facts of what exactly happened. Joseph Kennedy, a Christian high school football coach at Bremerton High School, began praying after each football game at the center of the field, where students regularly joined him. Officials from the school district asked him to stop, with the explicit reasoning provided being concerns that the expression might be considered a violation of the Establishment Clause. The school board suggested he pray in private, and offered to find a private space for him to pray in. In a social media post, Kennedy expressed that he felt he would be fired for his refusal to comply, resulting in a media frenzy. Members of the crowd during subsequent games were reported to have knocked down members of the marching band and shouted at school faculty.[1] Kennedy was placed on paid leave by the district, and Bremerton's director of athletics recommended that he not be rehired. Kennedy did not reapply the next year.

Following leaving Bremerton High School, Kennedy would initially file in the U.S. District Court for the Western District of Washington, which ruled in favor of the school board. On appeal, the Ninth Circuit upheld the opinion.[2] In March 2020, the District Court granted summary judgment in favor of the school district and, a year later, the Ninth Circuit ruled once

[1] Howe, Amy. "In the Case of the Praying Football Coach, Both Sides Invoke Religious Freedom." SCOTUSblog, 2022.
[2] *Kennedy v. Bremerton School District,* 869 F.3d 813 (Ninth Circuit 2017).

again in favor of the school district.[3] The Ninth Circuit then denied a rehearing en blanc.[4] Certiorari was granted in January of 2022, finally sending the case to the Supreme Court.

## Kennedy's Case Meets the Court

*Kennedy v. Bremerton* (2022) was first introduced to the Roberts Court in 2019, when the court denied the petition for a writ of certiorari.[5] The Ninth Circuit declined to hear the case en blanc, and Judge Diarmuid O'Scannlain disagreed with the panel, saying "[i]t is axiomatic that teachers do not 'shed' their First Amendment protections 'at the schoolhouse gate'" referencing *Tinker v. Des Moines*, 393 U.S. 503 (1969). This would place the balance between Free Exercise rights for public employees and the Establishment Clause as the key issue facing the court.

### The Court's Justices

The Roberts Court possessed a clear conservative majority, which led to a large amount of public criticism. Historically, the Court has been meant to transcend political biases, but the Roberts Court has recently been critiqued for voting along political lines. Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, Gorsuch, and Barrett were all nominated by Republican presidents and have oftentimes voted as a unit. Justices Breyer, Sotomayor, and Kagan were all nominated by Democrats, and have also all voted as a singular block on many occasions. Due to the constant overturning of precedent and the appearance as a political entity rather than a just court, the Court's sense of legitimacy has been eroded throughout recent years in the eyes of the public. Some would argue that Chief Justice Roberts, in particular, has appeared to be concerned about the appearance of the Court, as evidenced by the tactics utilized in the way the Court has addressed recent cases— especially this one.

### The Issues Posed

In *Kennedy v. Bremerton* (2022), the Court was asked to strike a balance between rights. The school district sought to restrict Kennedy's expression on the grounds that it may constitute a violation of the Establishment Clause. The Court was asked whether or not this was a justified

[3] *Kennedy v. Bremerton School District*, 443 F. Supp. 3d 1223 (W.D. Washington 2020); *Kennedy v. Bremerton School District*, 991 F.3d 1004 (Ninth Circuit 2021).
[4] *Kennedy v. Bremerton School District*, 4 F.4th 910 (Ninth Circuit 2021).
[5] *Kennedy v. Bremerton School District*, 139 S. Ct. 634 (2019)

restriction on expression. The Court had to further consider whether or not this restriction of expression was in violation of Kennedy's Free Exercise or Free Speech rights. The issue boiled down to where the line between Kennedy's right to free religious expression (as a public employee) and the students' rights to be free from a state-established religion may be drawn.

## The Court's Opinions

### The Majority Opinion

In a 6-3 decision that was divided perfectly along party lines, the Court held that "[t]he Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression."[6] By siding with Kennedy, the Court expanded protections for religious expression further in the case of public employees, at the expense of students' right to be free from coercive religious practices in school.

The majority opinion,written by Justice Gorsuch, differentiated between this case and other school prayer cases by claiming that the "prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience" and that "[s]tudents were not required or expected to participate."[7] The majority opinion emphasized that at the time Kennedy led his prayers, other members of the coaching staff could "do things like visit with friends or take personal phone calls," meaning that Kennedy's actions took place outside of his capacity as a coach.[8] Therefore, Kennedy's prayers were acts of private, personal expression.

The majority's opinion continued on to frame the application of the Establishment Clause in this capacity as anti-religion. Justice Gorsuch wrote that there is "no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion' in this way."[9] The prevailing notion expressed in this decision is one that frames restrictions for public employees' religious expressions within schools as inherently anti-religion. This sentiment carries throughout the opinion and forms the basis for the Court's argument that Kennedy's rights were infringed upon by the school board. According to the

[6] *Kennedy v. Bremerton*, 597 U.S. ___, 1 (2022).
[7] *Kennedy v. Bremerton*, 597 U.S. ___, 30 (2022).
[8] *Kennedy v. Bremerton*, 597 U.S. ___, 14 (2022).
[9] *Kennedy v. Bremerton*, 597 U.S. ___, 29 (2022).

majority opinion, the imposition of restrictions by the government onto public employees regarding "private, personal prayer" stands in violation of that employee's rights.[10]

## The Dissenting Opinion

Justice Sotomayor was joined in her dissent by Justices Breyer and Kagan. Her dissent is particularly unusual because she includes photographs and for the reasoning behind their inclusion. The inclusion of the photographs function as a logical argument typically would in a dissenting opinion, being used to substantiate her argument. In this case, the dissent involves contradicting the majority opinion's version of events just as much as it involves engaging in the logical, legal arguments being discussed in the majority opinion.

Justice Sotomayor's dissent focuses heavily on the majority opinion's description of the unfolding of the events. She states that "[t]o the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts."[11] She includes photographic evidence as if to ask the public to evaluate for themselves whether or not the description of Kennedy's prayers as private or personal had been in good faith. By including the photos, Justice Sotomayor does her best to hold the majority opinion accountable for their inaccurate description of the prayers. Rather than simply having a back-and-forth written description, which many may write off as a he-said she-said situation, Justice Sotomayor's incorporation of photographs begs the readers, the public, and the opposition to explain themselves, asking the reader to make their own evaluations based upon the evidence that she is presenting. This makes Justice Sotomayor's dissent particularly damning in the historical record.

This engagement with the misrepresentation of the facts does not prevent Justice Sotomayor from pointing out the consequences of the Court's decision. She specifically emphasizes the ways in which this decision could harm young people, who are "particularly vulnerable to coercion."[12] Justice Sotomayor describes the Court's decision as setting us "further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance."[13] She cuts particularly deeply at the manner in which this decision

[10] *Kennedy v. Bremerton*, 597 U.S. ___, 13 (2022).
[11] *Kennedy v. Bremerton*, 597 U.S. ___, 1, (2022), (Sotomayor, J., dissenting).
[12] Ibid, 15.
[13] Ibid, 35.

prioritizes "the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students."[14]

### The Concurrences: Justices Thomas and Alito

Justices Thomas and Alito both wrote separate concurrences, making very similar points. In essence, they both point out that the Court has failed to set a clear standard regarding the balance of rights the case confronts. Justice Thomas directly addressed how "the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public."[15] Secondly, Justice Thomas claimed that the Court failed to define what "burden a government employer must shoulder to justify restricting an employee's religious expression."[16] While the latter may be an important point by Justice Thomas' count, the former question is the more glaring omission in the Court's majority opinion, and it's similar to the one that Justice Alito also pointed out in his concurrence "[t]he Court does not decide what standard applies to such [Kennedy's] expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified."[17] Overall, both concurrences point to a lack of clarity that emerged from the Court's decision, wherein they left several key questions entirely up in the air.

## Take-Aways

While the case of religious expression in schools is important in and of itself, *Kennedy v. Bremerton* (2022), when positioned within the Court's wider context, reveals several potential trends that have much broader implications for the Court's future.

### Concurrences & The Court's Future

Justices Thomas and Alito joined the majority opinion and, additionally, wrote separate concurrences. Justice Kavanaugh's decision was to side with the majority opinion in all except for section III-B. While the two written concurrences were short, and while Justice Kavanaugh

[14] Ibid.
[15] *Kennedy v. Bremerton*, 597 U.S. ___, 1, (2022) (Thomas, J., concurring).
[16] Ibid, 2.
[17] *Kennedy v. Bremerton*, 597 U.S. ___, 1, (2022) (Alito, J., concurring).

gave no reasoning for his decision, examining the underlying thought processes of Justices Thomas, Alito, and Kavanaugh can shed light on their visions for the future path of the Court.

*Threat to Obergefell*

In Justices Thomas and Alito's separate concurrences, both pointed to areas in which the majority opinion failed to set clear standards pertaining to the rights of public employees. While it may appear at first a bit convoluted, I think that Justices Thomas and Alito are positioning the Court in such a way as to threaten *Obergefell v. Hodges*, 576 US _ (2015). Many would argue that the majority opinion elevates (in the case of public employees) religious expression over other forms of expression. A more expansive view on the rights of public employees to free exercise, paired with Justices Thomas and Alito's propensity for overturning and undermining precedent, as well as their previous dissents in *Obergefell v. Hodges* (2015) brings a specific conservative legal strategy to mind.[18]

Post-*Obergefell v. Hodges* (2015), a columnist for the Washington Post wrote "public officials arguably have fewer religious liberty protections than do… private citizens, at least when serving in their official capacities."[19] She continued on, writing that "[s]ame-sex marriage opponents like to claim that public officials are entitled to reasonable accommodation of their religious beliefs."[20] In the wake of *Obergefell v. Hodges* (2015), there was a notion that clerks, as public employees, had a right to not issue marriage licenses to same-sex couples on the grounds of having religious objections. By pointing out the gray area the Court left regarding public employees' free exercise rights, Justices Thomas and Alito could be pointing out a potential future in which these clerks' rights to free exercise are placed above the rights of same-sex couples.

*Kavanaugh's Caveats*

Justice Kavanaugh joined the majority opinion of the Court, except for Part III-B. During oral arguments, Justice Kavanuagh asked some hard questions "[w]hat about the player who thinks, if I don't participate in this, I won't start next week? Or the player who thinks, if I do

[18] *Obergefell v. Hodges*, 576 U.S. ___, (2015) (Thomas, J., dissenting); *Obergefell v. Hodges*, 576 U.S. ___, (2015) (Alito, J., dissenting).
[19] Catherine Rampell, "Opinion | on Same-Sex Marriage, County Clerks Can't Exempt Themselves from the Law," *Washington Post*, July 9, 2015, 2.
[20] Ibid.

participate in this, I *will* start next week?"[21] Whether he actually wanted an answer to his question or not, Justice Kavanaugh has clearly been positioning himself to appear as the moderate on the Court, likely seeking a swing vote role. Justice Kavanaugh wrote no separate concurrence, and did not explain the rationale behind his issue with the section he did not join, meaning that no one knows "whether he disagreed with the majority's approach (applying Pickering to a claim involving religious speech), disagreed with the outcome of the Pickering test as applied here…, or deemed it unnecessary to decide."[22] So why did he do it? It is possible that it was a strategic decision to signal to either the public or to the rest of the Court that he's not solidly with the conservative block—he could be the Court's swing vote. *Kennedy v. Bremerton* (2022), therefore figures into the discussion about the Court's future balance.

## Blatant Intellectual Dishonesty in Two Flavors

The most frightening aspect of this case is not the erosion of the Establishment Clause, rather it's the precedent it sets by allowing for blatant dishonesty in the Court. This dishonesty comes in two distinct flavors, both threatening the institutional integrity of the Supreme Court.

### *Dishonesty Regarding Facts*

In this case, "the majority opinion and the dissenting opinion framed the facts entirely differently."[23] Was Kennedy's prayer private or public? Was it disruptive or quiet? The discrepancies in descriptions are significant and play directly into the decision. Julie D. Pfaff did an analysis of the majority opinion's claim that Kennedy's expression was decidedly private, and found that Kennedy's numerous televised interview appearances gave "credence to the dissent's version of the facts surrounding the public nature of the October 16th prayer."[24] The two descriptions of the facts cannot both be held as true simultaneously.

By misrepresenting facts, the majority opinion was able to give the opinion they wished to give, engaging with a version of the case that is not based fully in reality. The conservative block's attempt at maintaining institutional integrity hinged upon their engagement with the facts

[21] Slate, "Kavanaugh Questions," www.youtube.com, April 25, 2022.
[22] Stephanie Taub and Kayla Ann Toney, "A Cord of Three Strands: How Kennedy v. Bremerton School District Changed Free Exercise, Establishment, and Free Speech Clause Doctrine," fedsoc.org, March 9, 2023.
[23] Pfaff, Julie D., "The Supreme Court Fumbles School Prayer in Kennedy v. Bremerton School District," Atlantic Law Journal 26 (2023): 110-163.
[24] Ibid, 147.

as they wished the facts had been, rather than how they actually were. This remolding of reality in the Court's opinion sets a dangerous precedent, and cannot go entirely unchecked.

*Dishonesty Regarding Precedent*

The second layer of dishonesty comes in the form of Justice Gorsuch's statement that "this Court long ago abandoned *Lemon*."[25] While "previous Supreme Court cases had criticized Lemon and disavowed the test as controlling law in some areas… Kennedy now makes clear that Lemon and its endorsement test are not the controlling law in any context."[26] Regardless of whether or not the Court had previously begun to move away from *Lemon v. Kurtzman* 403 US 602 (1971), the ruling in *Kennedy v. Bremerton* (2022) was, essentially, an overturning. The Roberts Court has faced such backlash, such a loss of institutional faith in the eyes of the public, that they appear to be too shy to call a spade a spade. Instead, they've chosen to claim that they aren't overturning anything, because it had already been effectively overturned. Beyond just being an act of avoidance, an attempt to save face by shying away from the reality of their opinion, this could give lower courts an implicit go-ahead to ignore precedents that they don't agree with on the basis that it has been long abandoned. In this sense, the deceit regarding precedent is tantamount to an opening of Pandora's box when it comes to the potential consequences within the lower courts.

## Conclusion

*Kennedy v. Bremerton* (2022) has marked a fundamental shift in the Court's view of religious rights. Previously, public employees' free exercise rights did not extend so far as to infringe upon the rights of private citizens under the Establishment Clause. Now, that tide is turning against the private citizens. The rights of public employees to stage religious demonstrations are being placed above the rights of students who are required by law to attend school. Beyond the immediate consequences, the various narratives within the case have shed light upon problematic trends within the Supreme Court. From concerns over threats to the rights of same-sex couples to bids for the coveted swing vote position to deceit becoming a potential

[25] *Kennedy v. Bremerton*, 597 U.S. ___, 22 (2022).
[26] Barclay, Stephanie H., "The Religion Clauses after Kennedy v. Bremerton School District," Iowa Law Review 108, no. 5 (July 2023): 2097-2114.

new tool for the Roberts Court, the uniquely illuminating case of *Kennedy v. Bremerton* (2022) sheds light on the potential trajectory of the Supreme Court.

**Bibliography**

Barclay, Stephanie H., "The Religion Clauses after Kennedy v. Bremerton School District," Iowa Law Review 108, no. 5 (July 2023): 2097-2114.

Howe, Amy. "In the Case of the Praying Football Coach, Both Sides Invoke Religious Freedom." SCOTUSblog, April 24, 2022. https://www.scotusblog.com/2022/04/in-the-case-of-the-praying-football-coach-both-sides-invoke-religious-freedom/.

*Pfaff, Julie D., "The Supreme Court Fumbles School Prayer in Kennedy v. Bremerton School District," Atlantic Law Journal 26 (2023): 110-163*

*Kennedy v. Bremerton School District*, 139 S. Ct. 634 (2019)

*Kennedy v. Bremerton School District*, 4 F.4th 910 (Ninth Circuit 2021).

*Kennedy v. Bremerton School District*, 443 F. Supp. 3d 1223 (W.D. Washington 2020).

*Kennedy v. Bremerton School District*, 597 U.S. ___ (2022).

*Kennedy v. Bremerton School District,* 869 F.3d 813 (Ninth Circuit 2017).

*Kennedy v. Bremerton School District*, 991 F.3d 1004 (Ninth Circuit 2021).

*Lemon v. Kurtzman* 403 US 602 (1971).

*Obergefell v. Hodges*, 576 U.S. ___, (2015) (Thomas, J., dissenting).

*Obergefell v. Hodges*, 576 U.S. ___, (2015) (Alito, J., dissenting).

Rampell, Catherine. "Opinion | on Same-Sex Marriage, County Clerks Can't Exempt Themselves from the Law." *Washington Post*, July 9, 2015. https://www.washingtonpost.com/opinions/county-clerks-dont-decide/2015/07/09/b9922682-2676-11e5-aae2-6c4f59b050aa_story.html.

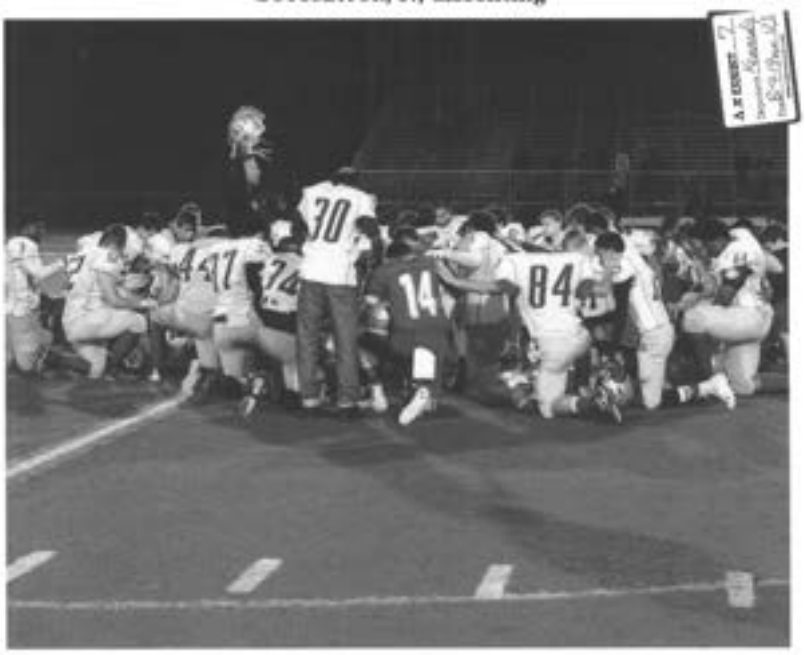
Slate. "Kavanaugh Questions." www.youtube.com, April 25, 2022. https://www.youtube.com/watch?v=955naEi8ks8&t=3s.

Stephanie Taub and Kayla Ann Toney, "A Cord of Three Strands: How Kennedy v. Bremerton School District Changed Free Exercise, Establishment, and Free Speech Clause Doctrine," fedsoc.org, March 9, 2023, https://fedsoc.org/fedsoc-review/a-cord-of-three-strands-how-kennedy-v-bremerton-school-district-changed-free-exercise-establishment-and-free-speech-clause-doctrine.

**Note:**

Below I have attached the photographs from Justice Sotomayor's dissent in *Kennedy v. Bremerton*, 597 U.S. ___ (2022) so that the reader of the paper can make their own decision regarding the actual facts of the case. This is done with the intention of keeping in line with Justice Sotomayor's message within her dissent.

SOTOMAYOR, J., dissenting



Photograph of J. Kennedy standing in group of kneeling players.

Photograph of J. Kennedy in prayer circle (Oct. 16, 2015).

Photograph of J. Kennedy in prayer circle (Oct. 26, 2015).

# A Pivotal Chapter in the Evolution of American Free Speech: An Analysis of Burstyn Inc. v.Wilson

Lauren Cincotta
Edited By Gabrielle Gedeon (Senior Editor) and Memphis Bayley (Junior Editor)

**Abstract:**

This article discusses the case, *Burstyn Inc. v. Wilson*, 343 U.S. 498 (1952), in the context of the history of the application of the First Amendment. Movie censorship in American history was shaped by the recognition that popular culture has the power to shape ideas and attitudes. In 1952, the Supreme Court made a bold move in extending First Amendment protections to films, permanently altering the media landscape. In a time of reexamining American culture and identity in connection with the freedom of expression, this case serves as an important reminder that our constitutional freedoms and their application have evolved at various points in our history.

## Introduction

The First Amendment of the United States Constitution was written in the context of British oppression in the preceding years of the American Revolution. Censorship issues led to the creation of the First Amendment and its broad, ambiguous protections for free speech. The First Amendment states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] However, during the second presidential administration, the country was faced with the controversial implementation of the Alien and Sedition Acts, which sought to punish spoken or written criticisms of the government, deemed untrue, in the wake of what was known as the XYZ Affair.[2] In the late 1800's, the Comstock Act was passed and targeted the sending of materials considered obscene through the mail.[3]

Today, our society faces questions around internet censorship and the presence of misinformation. These questions demonstrate the seemingly endless nature of the debate surrounding the limits of the First Amendment's protection and its consequences in context. In the mid-20th century, a court decision that would shape the future of the American culture of censorship was brought to the Supreme Court. The case *Burstyn Inc. v. Wilson* required the Supreme Court to examine the question of the extension of free speech protection to movies, which were commonly censored. The intersection with issues of religion in this case represents a long-running theme in First Amendment cases, the right to speak in a way that might offend a dominant group.

In 1951, the film "*The Miracle*" was part of a show at a New York movie theater entitled "*Ways of Love*," which included other foreign films, shown together for a period of eight weeks. The film sparked intense backlash and protests for its perceived offensive religious imagery and plot. The movie tells the story of a peasant girl who is seduced by a man she is convinced is St. Joseph. She later gives birth to a child. This was seen to be a parody of the idea of immaculate conception from the Catholic tradition.[4] The film was first shown at the Venice Film Festival in 1948. The movie was unpopular in Italy, although it did clear Vatican censorship. It is worth

[1] (U. S Const.amend. I)
[2] Murray Dry, The Origins and Foundations of the First Amendment and the Alien and Sedition Acts, 25 J. SUP. CT. HIST. 129 (2000).
[3] Craig L. LaMay, America's Censor: Anthony Comstock and Free Speech, 19 COMM. & L. 1 (1997).
[4] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 498, (1952)

noting the film was not shown widely in the U.S, though the outcry from the New York City screening was massive.[5]

Joseph Burstyn Inc. owned exclusive rights to distribute this film in the United States. In order to be shown commercially in the state of New York, Burstyn Inc. had to apply for a license through the New York Education Department under state law. The New York Board of Regents, in charge of the Education Department, had already granted the license for the film to be shown, but in the wake of the backlash, it appointed a committee to review the decision. This committee decided that the film was sacrilegious. With this distinction, they were able to ban the distribution of the film by rescinding Burstyn Inc.'s license, through a statute that prohibits the showing of films found to be sacrilegious.[6] Burstyn then appealed the Board's decision.

In 1952, the case was argued at the Supreme Court after previously being decided in favor of the Regents at the Court of Appeals. The central question of the case was whether a New York statute that allows movies to be banned for being "sacrilegious" violates the 1st and 14th Amendments. Burstyn Inc. argued that the statute under which the license was unconstitutional under the First Amendment's protections against prior restraint and the free exercise clause. Additionally, it was argued to be unconstitutional under due process, because of the vague meaning of the term sacrilegious as used in the statute.[7] These arguments centered this case squarely in the Court's debate over First Amendment application in the 20th century.

Nearly 40 years earlier, in *Mutual Film Corp v. Industrial Commission of Ohio* (1915), the Court looked at the proposal of extending First Amendment protections to movies. In 1913, Ohio passed a censorship act for all films shown in the state. This act created a board of censors to oversee and approve films for distribution. This law was challenged by Mutual Film Corporation on the grounds that these fees interfered with interstate commerce and First Amendment protections. The Supreme Court ultimately upheld the Ohio law, 9-0, ruling that motion pictures could not be considered art and, for this reason, not entitled to First Amendment freedom of speech protections.[8] In the majority opinion, Justice McKenna noted that movies "may be used for evil."[9] This characterization of what was at the time a new medium reflects the same moral panic of the late 19th and early 20th centuries in the Comstock Era. This opinion

[5] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 509 (1952)
[6] McKinney's N. Y. Laws, 1947, Education Law, § 129.
[7] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 499, (1952)
[8] Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230, 246 (1915).
[9] Mutual Film Corporation v. Industrial Commission of Ohio. 236 U.S. 242, (1915)

further articulates concern about danger to American culture, reflecting a consideration that while the Court might not have granted First Amendment protections, they were worried about the power of this new media to influence public conscience.

It was in this historical context that *Burstyn Inc. v. Wilson* reached the Supreme Court on appeal in 1951. A changing time in the Court's history, the Vinson Court was led by Chief Justice Fred Vinson from 1946 until his death in 1953.[10] This Court was transitional, situated before the better-known Warren Court, led by Earl Warren, who was nominated by then President Eisenhower in 1953 after Vinson's death. Vinson Court heard several cases about fair criminal trials at the State Courts and was fairly well known for its jurisprudence on these issues.

The Majority opinion in *Burstyn Inc v. Wilson* was written by Justice Tom Clark, a previous Attorney General of the United States, who served on the court from 1949-1967. Clark was a Truman appointee and ally. He believed in judicial restraint as well as the role of expansive interpretation of the Constitution. He also notably participated in several Civil Rights and religious freedom cases during his later years on the Warren Court.[11]

Clark wrote in his opinion that in *Burstyn Inc. v. Wilson*, the Court only needed to address the argument that the New York Statute is "an unconstitutional abridgement of free speech and a free press."[12] In this case, the Court found that it was, and extended broader First Amendment protections to movies that were previously denied to them under *Mutual*. Movies, in this ruling, were categorized as expression through art. This medium of communication was found to be important for the communication of ideas, playing a critical role in shaping opinions. The Court also acknowledged the important role that films have in both entertaining and informing the population. He compared them to other forms of protected media, such as books and newspapers, acknowledging that these could be sold for profit, similar to charging admission to a movie.[13]

Clark did consider the limitations of such protections, noting that there could be potential restrictions based on context. The perceived danger of movies to the population, especially young people, an idea first articulated in *Mutual,* was still present in this opinion. He wrote, "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of

[10] 12 History of the court: The Vinson Court, 1946-1953, SUPREME COURT HISTORICAL SOCIETY (2022), https://supremecourthistory.org/history-of-the-courts/vinson-court-1946-1953/ (last visited Apr 5, 2024).

[11] Tom C. Clark, Oyez, https://www.oyez.org/justices/tom_c_clark (last visited Apr 9, 2024).
[12] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 499 (1952)
[13] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 501, (1952)

every kind at all times and all places."[14] In this case, the Court did not address the question of whether states can ban motion pictures under certain circumstances. The statute at issue in this case was too broad to justify the censorship the State of New York is trying to impose. Additionally, Clark highlighted the usage of the term sacrilegious in the language of the law, which the Court found made the law too vague to meet state regulation interests justifying prior restraint. In an attempt to perhaps narrow the application of the ruling, Clark clarified the holding of the Court, clearly stating, "We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"[15]

In addition, since the revocation of the license came in response to public outrage, Clark used part of the opinion to directly address the outcry from those who were offended by the film's religious imagery and perceived mockery of the concept of immaculate conception. Clark wrote:

> From the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[16]

In their joint concurrence, Justices Frankfurter, Jackson, and Burton explored more the international reception of the film and its critical reception in the U.S. This concurrence focused on the division within religious communities in response to the film.[17] In the version of facts presented in the concurrence, there was not a monolithic religious response, which contrasts with the narrative in the majority opinion of an onslaught of religious protests against the film reaching the Regents. The authors of the concurrence also took issue with the vague nature of the word sacrilegious as used in the law. After listing various historical, popular, scholarly, and religious definitions of the term, they noted the absence of adhering to any particular definition of the word, writing, "The New York court did not confine 'sacrilegious' within such technical, Thomist limits, nor within any specific, or even approximately specified, limits."[18]

---

[14] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 502 (1952)
[15] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 506, (1952)
[16] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 505 (1952)
[17] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 511,516 (1952)
[18] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 518 (1952)

This concurrence also contains interesting constitutional philosophy and analysis, especially when taken in a 21st century context. These members of the Vinson Court showed the promise of future Warren Court progressivism when considering the broader context of free speech protections as applied in this case. The authors noted the following:

> The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition.[19]

In the immediate aftermath of the case, there was some backlash from more conservative legal scholars who viewed this decision as a betrayal of the American tradition of protecting and recognizing the Christian faith as the foundation of the American legal system. One such article noted that the justices should have understood the meaning of the word sacrilegious, as the laws in the United States have always been based on concepts of Christian morality.[20] Other legal scholars applauded the decision and its potential for changes in the American landscape of censorship.

This case marked a substantial change in the trajectory of media censorship in the United States, as it had previously existed. After centuries of focusing on using the First Amendment to exclude speech from the public space, the interpretation of the First Amendment has meaningfully changed. It was now used to fortify protections for the expanded types of speech permitted in public space. The lack of movie censorship in the United States today may easily be taken for granted, but less than a century ago, censorship of movies was commonplace in American society. Even after the decision, several state boards did try to censor movies, as the majority opinion stopped short of taking away that power. This power was weakened by the Court's decision, but similar cases would pop up in the following years.[21] Ultimately, the late 20th century saw the expansion of First Amendment protections for movies as, over time, more content restrictions were challenged and eventually discarded.

Beyond just movies, this case helped to lay the groundwork for the mid to late 20th-century application of the First Amendment. The debate over protections of the First

---

[19] Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S. 518, (1952)
[20] 23 Howard Newcomb Morse, A Critical Analysis and Appraisal of Burstyn v. Wilson, 29 N.D. L. REV. 38,39 (1953).
[21] 25 Kristen Hunt, THE END OF AMERICAN FILM CENSORSHIP - JSTOR DAILY JSTOR DAILY (2018), https://daily.jstor.org/end-american-film-censorship/ (last visited Apr 10, 2024).

Amendment now extends to new aspects of life in the 21st century, such as misinformation and internet censorship. Perhaps the most interesting part of what became known as the Miracle decision is the expanded view of Constitutional protections for speech in context, as offered in the Frankfurter concurrence, is the view that protections should be considered and expanded with the times American society finds itself in.

**Bibliography**

Craig L. LaMay, America's Censor: Anthony Comstock and Free Speech, 19 COMM. & L. 1 (1997).

Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et al. 343 U.S.

Kristen Hunt, THE END OF AMERICAN FILM CENSORSHIP - JSTOR DAILY JSTOR DAILY (2018),https://daily.jstor.org/end-american-film-censorship/ (last visited Apr 10, 2024).

Murray Dry, The Origins and Foundations of the First Amendment and the Alien and Sedition Acts, 25J. SUP. CT. HIST. 129 (2000).

Mutual Film Corporation v. Industrial Commission of Ohio. 236 U.S. (1915)

History of the court: The Vinson Court, 1946-1953, SUPREME COURT HISTORICAL SOCIETY (2022),https://supremecourthistory.org/history-of-the-courts/vinson-court-1946-1953/ (last visited Apr 5, 2024)

Howard Newcomb Morse, A Critical Analysis and Appraisal of Burstyn v. Wilson, 29 N.D. L. REV. 38,39 (1953).

McKinney's N. Y. Laws, 1947, Education Law, § 129.

(U. S Const.amend. I)

Tom C. Clark, Oyez, https://www.oyez.org/justices/tom_c_clark (last visited Apr 9, 2024)

# Texas' Anti-Abortion Laws and the Politics of Anti-Feminist Backlash

Madeleine Broussard
Edited By Prisca Afantchao (Senior Editor) and Shannon Bazir (Junior Editor)

**Abstract:**

Shock and despair reverberated throughout feminist circles around the country when news of the Supreme Court's decision to overturn *Roe* broke. Yet, this decision was not only forecast by political trends such as Texas' legislative patterns for decades, but was part of a broader history of anti-feminist backlash in the United States. This paper charts a recent history of Texas' anti-abortion legislation to argue that its restrictive laws reflect our history of anti-feminist backlash, with particular emphasis on the Women's Right to Know Act of 2003 and 2021's Senate Bill 8 as evidence of policies shaped by women's growing access to autonomy. Using Andrea Dworkin's *Right-Wing Women* as a theoretical base, I analyze these policies and their abuse of anti-feminist mythology to justify punitive legislation and deceptive literature related to abortion. My argument illuminates a side of the culture war with particularly dangerous effects for the most marginalized populations—poor, Southern, Black, Indigenous, and disabled women, including those gender non-conforming individuals who seek abortion services—as well as how future anti-feminist legislation may continue to erode civil rights in post-*Roe* Texas.

Most people believe that women are more empowered now than ever before.[1] Yet, women's rights are backsliding at an alarming rate. Feminist outcry swarmed public discourse after the *Dobbs v. Jackson Women's Health Organization* decision leaked in 2022, with many lamenting what they deemed a sudden, effective end of abortion access in much of the United States. But Texas, whose most harmful laws targeting women who seek abortions and doctors who provide them have all passed in roughly the past two decades, was a longstanding blueprint for federal regulation of abortion. In the 21st century alone, lawmakers subjected Texans to a number of bills that restricted abortion access, including trigger laws, heightened standards for abortion clinics, and regulation of parental bypass, admitting privileges, and so-called "informed consent." Not only did Texas lawmakers restrict abortion as much as possible after *Roe v. Wade*, but they have done so more earnestly than ever in the 2010s and early 2020s.

In this paper, I intend to chart a recent history of Texas abortion laws, with a particular emphasis on the most recent legislation as a symptom of backlash against women's growing demands for bodily autonomy. First, I will provide context, including a brief history of anti-feminist backlash as well as current backlash. Then, I will review Texas' 21st-century abortion laws, from 2003's Women's Right to Know Act, which employed rhetoric that postured women as victims of their right to abortion, to a looming potential policy that will ban Texas women from accessing information about abortion online. I will argue that Texas' anti-abortion laws are reflective of myths produced by the anti-feminist movement countering women's growing progress towards liberation.

Before examining anti-feminist backlash as it relates to Texas abortion laws, it is helpful to define anti-feminist backlash and trace its roots. Anti-feminist backlash is a cultural reaction to feminist strides for women's rights. Backlash manifests in a number of different ways at different times throughout history. For example, following the highly visible sexual revolution in the seventies, an 1985 Stanford University study misrepresented a "devastating plunge" in divorced women's economic statuses in light of new no-fault divorce laws,[2] and a Bush-era *New York Times* article exaggerated statistics to suggest college-educated women were "opting out" of careers en masse to dedicate themselves to their families.[3] These stories attempted to construct a

[1] "Gen Z, Millennials think women's rights have gone too far, according to new survey." New York Post, March 10, 2023.
[2] Faludi, Susan. *Backlash: The Undeclared War Against American Women.* Anchor Books, (2006), 19.
[3] Faludi, *Backlash*, XV.

post-feminist world in which women were "waking up" and realizing they need not depend on feminism. More recently, the "bimbo," who cozies up to gender stereotypes in a miniskirt and champions the "sex worker," was briefly the face of online feminism,[4] and public opinion turned virulently on Amber Heard as a reaction to #MeToo.[5] Reception to women's empowerment sways at the whim of an interminable pendulum swing.

These cultural reactions to feminism follow a pattern. In *Backlash: The Undeclared War Against American Women,* author Susan Faludi, from her post-Reagan era perspective, writes, "we find such flare-ups are hardly random; they have always been triggered by the perception—accurate or not—that women are making great strides."[6] Similarly, Andrea Dworkin references a pervasive "Motherhood First" ideology that permeates patriarchal analysis of abortion in *Right-Wing Women,* which creates shame for women who seek abortion and frames them as traitors of the nuclear family.[7] Both Faludi and Dworkin were writing during the backlash that ensued largely in response to the sexual revolution.[8] Their writing, based on not only their contexts but also using historical evidence from post-suffrage contexts, proved to be prophetic for the current moment.

Myths, such as Motherhood First, shape much of anti-abortion backlash today. As a result, at times when women begin to demand the right to control their own bodies—including the early 2010's awareness of sexual violence in the workplace and the current fight for access to gender-affirming care—the main project of backlash is to attack bodily autonomy as it relates to gender. Notes of anti-abortion backlash fueled by patriarchal mythology in an attempt to substantiate male domination can be observed in Texas' abortion policies.

In Texas, the 21st-century flavor of backlash began legislatively with the so-called "Women's Right to Know Act" (WRTK). One major clause of the act mandated that doctors give misleading information to people seeking abortion twenty-four hours before the procedure could take place, including an informational booklet produced by Texas Health and Human Services entitled "A Woman's Right to Know." The first paragraph of the first page of the 2016 version of the booklet ends with, "You need good information in order to make important decisions…You have the right to make these decisions... No one else should make them for you. No one can

[4] Haigney, Sophie. "Meet the Self-Described 'bimbos' of TikTok." The New York Times, June 15, 2022.
[5] Grady, Constance. "The Mounting, Undeniable Me Too Backlash." Vox, February 3, 2023.
[6] Faludi, *Backlash*, 10.
[7] Dworkin, Andrea. "Abortion." *Right-Wing Women.* Perigee Books, New York, NY, (1983), 97.
[8] Faludi, *Backlash*, XII.

force you to have an abortion…"[9] It ritualistically repeats this ethos with recurring phrases like "Only you have the right to decide what to do" throughout. The booklet also lists "risks associated with an abortion," the first of which is death.

These deceptive tactics not only attempt to debase feminist strides for abortion, but set the reactionary tone for the two decades of backlash ahead. Faludi identifies such rhetoric as a myth used consistently in anti-abortion backlash: that feminists have mischaracterized the liberty of bodily autonomy as a source of women's joy, when it is, in fact, a source of women's pain.[10] By assuming that pregnant women deeply want to keep their pregnancies, and that there is overwhelming social and cultural pressure to have an abortion, the booklet postures women as victims of their own right to an abortion. WRTK presented a substantial rhetorical obstacle to abortion, in addition to its multiple structural and logistical restrictions.

For example, the Act's other major clause required doctors to provide abortions at 16 weeks of gestation or later in ambulatory surgical centers, or ASCs. The logic of the ASC requirement originated in the same fear-mongering message that motivated the booklet distributed to women seeking an abortion: the belief that abortion is a dangerous medical procedure that interferes with a natural, healthy process and requires immediate emergency care. As a result of this clause, abortion clinics, which previously provided 95 percent of late-term abortions, were no longer options for Texas residents seeking an abortion.[11] Between dwindling options for treatment and the rising costs associated with late-term abortions and limited supply, most abortion seekers' only option was traveling out of state to get healthcare, which is financially strenuous. Unsurprisingly, the rate at which Texas residents got abortions decreased dramatically in 2004, the year WRTK went into effect.[12] The creativity of WRTK's example of backlash is evident: though Texas lawmakers could not place an absolute ban on abortion, they could place restrictions on abortion per *Casey* precedent, which weakened the standard for judicial review of laws that regulate abortion.

Texas lawmakers could accomplish the goal of eliminating abortion by passing laws that motivated providers to close up shop. While a steady increase in abortion facility closings were recorded from the beginning of the century, it was between 2012 and 2014 in particular that

---

[9] Texas Health and Human Services. A Woman's Right to Know. *Texas Department of State Health Services,* (2016).
[10] Faludi, *Backlash*, 415.
[11] Colman, Silvie, and Joyce, Ted. "Regulating Abortion: Impact on Patients and Providers in Texas." *Journal of Policy Analysis and Management* 30, no. 4 (2011), 784.
[12] Colman and Joyce, "Regulating Abortion," 778.

Texas saw a steep dropoff in the number of hospitals providing abortions due to new legislation.[13] Incidentally, in 2013, Texas passed House Bill 2 (HB2), an omnibus bill that banned abortion after 20 weeks post-fertilization. Though parts of HB2 were struck down before they could take effect, including an unconstitutional admitting privileges requirement and heightened standards for ASCs, HB2's damage—specifically, its warning of legislation to come, as well as its status as a sign of the times—was done. Abortion rates were declining.

Surveillance was the next step in Texas' plan to enact its growing backlash. After several more restrictions on abortion passed over the next few years, including an attempt at banning dilation and evacuation procedures, the Texas state legislature passed Senate Bill 8, or SB8, in 2021. Known as the Texas Heartbeat Act, SB8 banned abortion on detection of embryonic cardiac activity, which can occur as early as six weeks past the patient's last menstrual cycle.[14] Additionally, SB8 authorizes private citizens to file civil lawsuits against abortion providers in order to enforce the ban, offering a $10,000 bounty to those who "catch" healthcare providers and anyone who "aids and abets" an abortion—a carceral response that harnesses the United States justice system for support in enforcing the law, which will disproportionately affect Black women.[15] Horrifyingly, this also means that abusive partners and ex-partners can sue providers. SB8 is an intimidating reminder of the cultural shame of choosing an abortion, as Faludi references, and what Andrea Dworkin terms a betrayal of Motherhood First ideology.

These restrictions on online access to abortion are among the most recent developments in Texas' anti-abortion policy. In November 2024, House Representative Steve Toth filed a bill to be deliberated in Texas' 89th legislative session called the "Women and Child Safety Act." Notably, if passed, the Act would not allow anyone to "create, edit, upload, publish, maintain, or register a domain name for an Internet website, platform, or other interactive computer service that assists or facilitates a person's effort in obtaining an abortion-inducing drug"—an explicit violation of the First Amendment.[16] The policy would also prevent people from sharing any website that assists patients in accessing medication abortions and allows private citizens to bring civil lawsuits against internet service providers who do not comply.

---

[13] Gonzalez, Fidel, Troy Quast, and Robert Ziemba. "Abortion Facility Closings and Abortion Rates in Texas." *Inquiry* 54 (2017), 4.
[14] White K, Sierra G, Lerma K, et al. "Association of Texas' 2021 Ban on Abortion in Early Pregnancy With the Number of Facility-Based Abortions in Texas and Surrounding States." *JAMA,* (2022).
[15] Norwood, Candice. "Policing and Surveillance: How Texas's Abortion Law Could Add to Systemic Racism." Ms. Magazine, September 14, 2021.
[16] TX Congress, House. Women and Child Safety Act. HB 991, 89th sess. Introduced in House November 2024, 6.

Included in the text are various definitions, one of which is "abortion." Toth refers to abortion as a "murderous act of violence that purposefully and knowingly terminates human life in the womb."[17] Not only is Toth's definition unscientific and ahistorical, but it is charged with emotion; it lacks sympathy for those who seek abortion and instead angrily assumes women who get them are ruthless murderers. This is no mistake. In *Right-Wing Women,* Dworkin diagnoses the psychological underpinnings of such a strong belief that women who get abortions are murderers: "She has learned…that every life is more valuable than her own; her life gets value through motherhood…Abortion turns a woman into a murderer…This is a crime. She is guilty: of not wanting a baby."[18] Right-wing opposition to abortion is not about human life. Toth's anger is reserved for the potential mother who decisively takes action to end a pregnancy she doesn't desire, compounded by the autonomous action of facilitating her own abortion via medication in her own home—a blatant display of anti-feminist backlash.

Toth's bill also includes a swipe at one of the right's current preoccupations with feminism: transgender "ideology." Among his definitions, he includes, "'Woman' means an individual whose biological sex is female…regardless of any gender identity that the individual attempts to assert or claim."[19] Inclusion of a definition of "woman" that attacks a person's self-determination as it relates to gender identity is a symptom of anti-feminist backlash's evolving project: one that constructs a "boogeyman" out of transgender individuals. Through restrictive anti-abortion laws, Texas lawmakers apparently seek to police gender according to a traditional standard in addition to regulating abortion.

A backlash framework not only helps us understand the reasons why democratic politics of equality backslide, but also why, at a time when abortion and other rights appear to be hanging in the balance, feminist intellectual studies are under attack, transgender individuals are feared, and the media seems to favor blonde bombshells again. Anti-feminist backlash is a cultural phenomenon that, at its core, is about upholding gender mythology. Understanding the relationship between anti-feminist backlash and abortion policy in particular is essential to understanding how to remedy familiar past situations as they compare to the present for a better future. It also gives us a glimpse of hope. While privacy, the internet, and mass culture changes,

[17] TX Congress, House, Women and Child Safety Act, 1.
[18] Dworkin, Andrea. "Abortion," 97.
[19] TX Congress, House, Women and Child Safety Act, 6.

the same abortion debate has occurred for decades. Despite violent backlash, women have always continued to march closer to liberation beyond legal equality.

The Texas case is poignant for both its relevance and its impact. Texas is a large state with hundreds of thousands of births each year. It has a diverse population, with some of the strictest laws in the country, with some of the most visible cases of death due to abortion laws. The Texas case reminds us that, while restrictions on abortion are an affront to all women, Southern women, who are more likely to be poor, of color, and disabled, are the most marginalized by anti-abortion laws. Activists, advocates, and voters should reserve hope for a post-*Dobbs* future that includes enfranchisement for all. To achieve this end, we must let ourselves lash back. Many lives have already been worsened and lost to anti-abortion backlash. Should Texas lawmakers have their way, we stand to lose more.

**Bibliography**

Colman, Silvie, and Joyce, Ted. "Regulating Abortion: Impact on Patients and Providers in Texas." *Journal of Policy Analysis and Management* 30, no. 4 (2011): 775–97. http://www.jstor.org/stable/23019004.

Dworkin, Andrea. "Abortion." *Right-Wing Women.* Perigee Books, New York, NY, (1983).

Faludi, Susan. *Backlash: The Undeclared War Against American Women.* Anchor Books, (2006).

"Gen Z, Millennials think women's rights have gone too far, according to new survey." New York Post, March 10, 2023.

Gonzalez, Fidel, Troy Quast, and Robert Ziemba. "Abortion Facility Closings and Abortion Rates in Texas." *Inquiry* 54 (2017): 1–7. https://www.jstor.org/stable/26369659.

Grady, Constance. "The Mounting, Undeniable Me Too Backlash." Vox, February 3, 2023. https://www.vox.com/culture/23581859/me-too-backlash-susan-faludi-weinstein-roe-dobbs-depp-heard.

Haigney, Sophie. "Meet the Self-Described 'bimbos' of TikTok." The New York Times, June 15, 2022. https://www.nytimes.com/2022/06/15/opinion/bimbo-tiktok-feminism.html.

Norwood, Candice. "Policing and Surveillance: How Texas's Abortion Law Could Add to Systemic Racism." Ms. Magazine, September 14, 2021. https://msmagazine.com/2021/09/14/texas-abortion-law-racism-black-people-of-color/.

TX Congress, House. Women and Child Safety Act. HB 991, 89th sess. Introduced in House November 2024.

Texas Health and Human Services. A Woman's Right to Know. *Texas Department of State Health Services,* (2016).

White K, Sierra G, Lerma K, et al. Association of Texas' 2021 Ban on Abortion in Early Pregnancy With the Number of Facility-Based Abortions in Texas and Surrounding States. *JAMA,* (2022). 328(20):2048–2055. doi:10.1001/jama.2022.20423

The Mount Holyoke College Law Journal is Mount Holyoke College's Student-written and student-run journal of legal scholarship.


# Mount Holyoke College Law Journal

SPRING 2025 || VOL. 1