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Trends in the Legal Persecution of Christians and the Erosion of American Religious Liberties

A Senior Honors Project

Christie McGinley

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I. Introduction

Many Americans have been alarmed to hear about instances of the denial of certain religious freedoms to Christians, whether it is the disallowance of public prayer or the legal relegation of certain aspects of the Christian message to the category of “hate speech”. Christians stand accused of being bigoted, dangerous, unintelligent, and uninformed. Recent attacks through court actions and policies seeking to restrict or even punish Christians for exercising their traditionally protected liberties appear to be increasing in frequency and severity, often requiring Christians to take defensive legal measures of their own. The news is filled with stories of the intensifying conflict, and Christians are becoming acutely aware of the legal risks they face in simply practicing and expressing their faith in the midst of an ever more hostile and intolerant American society.

In order to determine the true gravity of the situation, it is necessary to move beyond mere speculation. Although many Christians clearly feel threatened, and threats to religious liberty seem be increasing, there needs to exist some concrete data to lend credence to this hypothesis. The media has reported conflicting stories, sometimes affirming and sometimes rejecting these notions. Additionally, media headlines are not necessarily reliable sources of truth. The prevalence of bias in the media, the understandably emotional responses of individuals, and the dangerous but widespread bandwagon effect of sensationalized information can make for an incredibly cluttered pathway to truth. In the following pages, I present the results of a study that digs beyond the news headlines and reactionary sound bites to determine the actual trends in the legal persecution of Christians and the erosion of American religious liberties.
To complete this study, I utilized a variety of research tools and techniques. I identified and contacted multiple religious liberties organizations such as the Christian Legal Society Center for Law and Religious Freedom and the Alliance Defense Fund. I also gathered data from the United States Equal Employment Opportunities Commission and similar state agencies to determine current and historical statistical trends in religious liberties cases and religious discrimination claims filed and pending. I performed traditional academic research, exploring different search terms, not only to read the scholarly articles they generated, but also to determine how many articles, websites, and cases they generated. Finally, I performed specific legal research by analyzing relevant judicial decisions published over the past two centuries.

Collectively, this research suggests that interest in religious liberties controversies is increasing, threats to religious liberties are increasing in frequency and severity, and judicial opinion is shifting in a way that appears to be disproportionately threatening to the Christian religion. The number of religious liberties cases overall is not increasing to a large extent but is increasing enough to demand some attention. Augmenting the statistics, actual U.S. Supreme Court opinions help define with additional clarity the direction in which the trends in American religious liberties jurisprudence are evolving.

Throughout the rest of this comment, I will analyze the situation based on each type of research conducted. In Section II, I will expound upon the findings of existing nonprofit religious liberties organizations. In Section III, I will reveal how my primary research suggests an increased interest in religious liberties. Section IV will present the data from the EEOC and similar state organizations, along with carefully analyzing its implications. In Section V, I will cite and explore in more depth past and present Supreme Court
decisions. Section VI will conclude by summarizing the findings of all the aforementioned research.

II. Nonprofit Religious Liberties Organizations

Originally, I attempted to obtain quantitative data from various religious liberties organizations in order to discover if and how significantly requests for their services were increasing and what sorts of cases were becoming relatively more frequent. Due to a lack of availability of this type of statistical record-keeping by the organizations, I was compelled to adopt a more qualitative approach to the research. Instead of drawing my own conclusions based on an array of statistics, I was forced to rely on the organizations’ own conclusions.

It is difficult to succinctly summarize the statements of my organizational contacts, mostly because they each seem to recognize unique areas of concern. Before delving into any details, it is important to understand how I conducted the study, not only so that the findings make sense, but also to ensure that any biases are recognized and taken into consideration when evaluating the usefulness of the information.

First, I compiled a list of relevant nonprofit organizations, researching some basic facts about each and listing their contact information. Although the list was not exhaustive, it did provide a broadly representative sample to begin gathering information. The organizations identified were Liberty Counsel, the Alliance Defense Fund, the Christian Legal Society Center for Law and Religious Freedom, the Pacific Justice Institute, the Christian Law Association, the Thomas More Law Center, the Independence Law Center, and the American Center for Law and Justice. I sent e-mails to each organization (not
including the American Center for Law and Justice). My initial correspondence mentioned my affiliation with Messiah College and my desire to compose a thesis on religious liberties. I asked merely for a contact person within the organization with whom I could speak about more “specific questions”. Not surprisingly, I did not receive a significant number of immediate responses. Liberty Counsel declared that they were too overwhelmed with active cases to deal with specific questions, and I received no response from the Thomas More Law Center. Nevertheless, I was able to maintain ongoing contact with five organizations.

Once I established contact, I submitted a request for certain statistics. Unfortunately, every organization regretfully indicated that they do not document the specific pieces of information I requested. At that point, I opted to adjust my research process. I sent yet another e-mail, this time requesting an on-the-record quote in response to the following question: “In your experience defending religious liberties, do you detect an increase in the frequency of these inquiries and if so, what are the most pressing issues your organization is currently facing?”

Before proceeding, it must be emphasized that many of these organizations were formed within the last twenty years. Also, many focus their litigation efforts specifically on Christian issues. The very fact that these nonprofits exist and are vigorously engaged in their work, and that they began relatively recently, implies their necessity. Without a significant need, and therefore a large enough market for their services, these organizations would never have been founded, nor would they continue to thrive. The
Alliance Defense Fund\(^1\), for example, utilizes more than 1300 attorneys who have provided more than $100 million in free legal assistance. They average about 335 legal intake calls per month and have 169 active litigation cases. And that is just one nonprofit religious liberties organization. Additionally, the data from these nonprofits does not even take into account any of the significant volume of religious liberties matters handled by private law firms. With that being said, we can proceed to examine the specific areas of religious liberties litigation, according to various nonprofits, that appear to be becoming more prevalent.

According to the responses received, the areas of greatest concern include employment and the workplace environment (where religious beliefs are often seen as liabilities), freedom of speech in general, churches and zoning, laws not aimed at religion but problematic for religion, “tolerance” mandates, and public schooling conflicts. Each of these issues will be addressed individually through specific quotes from the organizations demonstrating their relevance.

The first area of concern is religious discrimination in the employment arena. David French\(^2\), Senior Counsel with the Alliance Defense Fund, states that,

“`The number of incidents seem to be increasing rather dramatically, and they’re moving beyond simple, ‘you can’t say that’ censorship and into

\(^1\) The Alliance Defense Fund was formed in 1994 by the leaders of more than 35 ministries in response, “to the urgent need for the legal defense and advocacy of religious freedom”. More information can be found at http://www.alliancedefensefund.org.

\(^2\) David French joined the ADF in 2006 and now serves as senior counsel. He is the director of the Alliance Defense Fund Center for Academic Freedom in Columbia, Tennessee. He has been involved and successful in litigating cases regarding religious freedoms on university campuses.
something a bit more insidious. In fact, we’re now seeing administrators sometimes imposing actual belief-based litmus tests in the so-called ‘helping professions,’ like social work, education, and counseling.”

Barbara J. Weller\(^3\), of the Christian Law Association\(^4\) corroborates this opinion. She says that,

“The cases that are becoming more difficult are the workplace cases. This is particularly true when Christians want to express their religious beliefs in the workplace or when they have religious convictions regarding things like Sunday work or other Christian standards. These things used to be commonly accepted in America and having a religious employee was considered an asset. It is becoming much more difficult these days for Christians to express their viewpoints or to witness to their co-workers. If co-workers complain about religious symbols on an employee desk or in their work area, they are generally required to remove them or face termination.”

On the other end of the spectrum, with regards to the workplace, an employer’s Christian viewpoints can rapidly become a liability. Weller goes on to explain that,

\(^3\) Barbara J. Weller has been practicing with the Christian Law Association and Gibbs Law Firm since 1995. She specializes in constitutional law and freedom of speech issues.

\(^4\) The Christian Law Association was founded in 1969 by Dr. David C. Gibbs, Jr. CLA defends, “churches and Christians who are experiencing difficulty in practicing their religious faith because of governmental regulation, intrusion, or prohibition in one form or another.” More information can be found at http://christianlaw.org
“…when an employee is terminated for a poor performance or some other legitimate reason, these employees will often sue their Christian employer and claim religious discrimination because of their employer’s religious viewpoint or politics. [The Christian Law Association] assists employers in these situations and helps them to develop policies about religion that will assist them if they are sued by these disgruntled employees. But some employers choose to eliminate the religious programs rather than face these potential challenges…it costs money for them to fight these cases in court even if they do eventually win…America’s colleges are also becoming more hostile towards religious viewpoints in their students and teachers. Professors who are too openly Christian are often fired or not granted tenure…”

The second area of major concern involves the rights of religious groups in public, especially on university campuses. According to Kimberlee Wood Colby, Senior Counsel for the Christian Legal Society⁵,

“The right to associate with people of like mind and interest is fundamental to religious freedom and free speech. We are seeing threats to this right intensify, particularly on public university campuses as illustrated by the case Christian Legal Society v. Martinez, et al., now on petition in the Supreme Court.”

⁵ More information can be found about the Christian Legal Society at http://www.clsnet.org
Another basic right under evident attack is the right to freedom of speech, a freedom that often seems to be interpreted to exclude religious speech from its protective umbrella. The Independence Law Center⁶, according to Chief Counsel, Randall L. Wenger⁷, is currently, “involved in a case regarding school speech codes that have the effect of prohibiting speech from a religious point of view.” This threat to freedom of speech is especially prevalent in instances that may be perceived as “intolerant”. The practice of homosexuality, for example, is a very emotionally charged subject that has received much recent attention. Wenger recognizes that this may be the biggest issue in coming years, because of how difficult it is for a Christian to express opinions regarding homosexuality. Weller (of the Christian Law Association) points out that,

“The homosexual issue is the most difficult one…since courts these days have tended to favor the homosexuals at the expense of Christian viewpoints. We have even seen Christians terminated for expressing biblical viewpoints about homosexuality outside of work, such as on personal blogs or websites.”

Weller sees threats to freedom of speech in other circumstances as well: “CLA also regularly defends street preachers and tract distributors as more and more communities try to force out this longstanding free speech from their public streets and other venues.” The Pacific Justice Institute also acknowledges this disturbing trend in restrictions on

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⁶ The Independence Law Center is dedicated to preserving First Amendment freedoms. More information can be found at http://independencelaw.org

⁷ Randall L. Wenger founded the Independence Law Center in 2006 and now serves as its chief counsel.
freedom of speech. According to the organization, churches and individuals in the workplace feel very restricted in what they are permitted to say. Those at the Pacific Justice Institute⁸ say that much of this can be attributed to a mistaken reliance on the misinterpretation of the “separation of church and state” premise. As will be expounded upon later in this paper, the concept of a separation between church and state seems to be overtaking and overriding earlier interpretations of the First Amendment to the point of actually inhibiting certain religious freedoms. Religious liberties nonprofit organizations confront this scenario on a regular basis.

Although issues affecting the individual are often at the forefront of religious liberties cases, one should not ignore those matters that affect churches as a whole. In the past, churches have encountered trouble with their tax-exempt status and have faced complaints regarding free-speech issues and zoning restrictions. The Independence Law Center believes the zoning issue is becoming a more significant concern. According to Wenger, “…we had churches running afoul of local zoning because they were meeting in movie theaters.” Churches, being unique organizations because of their religious nature, typically encounter many such restrictions.

According to Wenger, some of the greatest difficulties can be found in laws that were never even intended to limit religious freedoms. He states that, “…I’m not sure that it’s truly hostility toward religion that is the motivating factor as much as apathy towards religion…there are more and more places where religious practice is being threatened by laws that are not aimed towards, but still problematic for, religion.”

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⁸ More information about the Pacific Justice Institute can be found at http://www.pacificjustice.org
The Christian Law Association, the most informative organization with which I was in contact, is increasingly encountering cases dealing with public schooling and the rights of parents. Schools, according to Weller, have become the ultimate authority on what children will learn, and the rights of parents to influence that education is decreasing.

“Schools are becoming more coarse with regard to assigned reading material, and there is an open agenda of brain washing students to accept homosexuality and diverse families as normal. When parents remove their children from school to home school them because of these negative sexual (or sometimes political) influences, they often face hostility from child welfare or other groups that attempt to harass them or to require their children to attend public schools…CLA is concerned that America could eventually become like Germany or other European countries where home schooling is banned and all children are required to attend public schools, even though children are presented in those schools with explicitly sexual indoctrination.”

To try to condense all these different areas of legal concern into one all-encompassing category would be futile, since their only common attribute is their relation to religious liberties. Although almost all of the nonprofit organizations acknowledged that religious freedom issues are becoming more frequent and more difficult to defend, there was very little agreement when it came to specifics. Much of this can be attributed to the fact that certain organizations may be better known for handling certain types of cases, causing them to encounter them more frequently than others. Nevertheless, the existence of so many growing areas of concern points to the overall increases in this type of litigation.
Whether cases pertain to employment, religious groups, churches, freedom of speech, or public schooling, an underlying increase in challenges to religious freedoms appears evident.

III. Search Results

Information gathered from nonprofit religious liberties organizations, as expected, seems to point toward an increase in the prevalence of religious liberties controversies. The unavoidable and understandable bias of these organizations, however, is obvious. The question posed in the introduction of this paper includes a number of different aspects, certainly not only limited to the question of whether there is an increasing threat to religious freedoms. Also essential to our analysis is the question of whether the topic of religious liberties in general is becoming more prevalent. Is this an area of greater study and interest? Are people becoming more aware of their freedoms or encroachments on those freedoms? Are more people asking questions? Are more articles, websites, even legal cases addressing those questions? The next section of this paper attempts to provide some answers.

I decided to conduct a study involving a few commonly used search engines. I also created a list of search terms that relate to religious liberties. The search engines I selected were Google, Google Scholar, Google Scholar Law, and the Academic Search Premier database. These search engines were chosen because they cover a reasonable array of disciplines. Google is one of the most commonly used Internet search engines. It provides results that include articles, websites, businesses, and blogs. This is obviously a
broad but very imprecise source. Google Scholar provides results that are a bit more
academic in nature, including scholarly journals and articles. The Academic Search
Premier database is similar, except it is more organized and closely monitored. Therefore,
its results can be considered especially reliable. Finally, Google Scholar Law provides a
list of cases and opinions that specifically deal with the search terms. These four search
engines seemed comprehensive enough to qualify for this study.

In addition to carefully selecting search engines, I also identified several key search
terms. The search terms used in this study include the following (the use of quotes
indicates where I actually included quotes in the search box): “religious freedom”, legal
“religious freedom”, “religious discrimination”, court cases “religious freedom”,
discrimination”, legal “religious discrimination”, Christian discrimination, and legal
Christian discrimination. Although the individual studies differed a bit, they all were
substantially equivalent variations of these terms.

A uniform approach was used to conduct this study. I searched each term to determine
how many total “hits” came up for each year. The study generally covered the time
period from 1995 through 2008. Again, the goal was to identify trends, not specifics. I
then organized the data into standardized charts. In the first column I listed all the search
terms. Then, starting around 1995, I listed the data from left to right for each year. At the
bottom, I totaled the “hits” for that year. At this point, I was able to generate a number of
graphs to conveniently illustrate the data. I created graphs for each search engine and
each search term, over the given time period. I also created a “total hits” graph, to
summarize each search engine given the sample of search terms. The trends in the data
could then be determined by observing the slopes of the graphs, most notably whether they sloped upward or downward.

As a whole, most of the graphs seem to be positively sloped, indicating that interest in religious liberties is, in fact, increasing. But before drawing any final conclusions, it is important to evaluate the results from each search engine individually. First I will address the search engine that is, in my opinion, the least reliable for this sort of study, Google. Total hits for all search terms in the year 1995 were a mere 55,233. In 2008, however, that number jumped to a whopping 876,870. That amounts to an increase of about 1,488%. Statistically speaking, that would be a massive increase. The graph for Google Total Hits almost appears to grow exponentially. Apart from a few spikes in the data, almost every single individual search term had similar results. The problem with this data, however, is that much of this growth can be attributed simply to the increase in Internet usage. The fact that more and more websites are being created can account for many of the new websites in existence pertaining to religious liberties. I conjectured that almost any keyword searched in Google would show at least some increase over a period of time. Although it is anything but exact, it seemed a bit more reliable to select some sort of “control” term, and compare the religious liberties results to the control results. As expected, the control term did show increases over the 13 year period, but not nearly to the extent that the religious liberties terms did. From 1995 to 2008, it appeared that the control numbers only grew about 94%. As a percentage of the control group, total religious freedom cases grew from 49.32% of the control number to 404.09%. This

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9 See Appendix A, beginning on page 33
suggests a more reasonable growth rate for our study’s search terms over the 13 year period. Instead of 1,488%, it is a bit more accurate to suggest that the results only increased by about 719%. Obviously, many assumptions were made and just a few alterations in the study technique could have produced vastly different results. For now, I will suggest that the raw amount of religious liberties articles, websites, blogs, etc. is increasing just a bit more than average topics. Although increased Internet usage can account for much of the growth in numbers, it cannot account for all of it.

The results from the Google Scholar search are much more reasonable and a bit more reliable. Total hits increased from 13,845 in 1997 to 31,799 in 2008. Over the 11-year period, that is an increase of about 129.7%. Every single search term showed similar upward trends, with almost no outliers. Instead of including every website created, Google Scholar limits its results to scholarly articles. Even the search process itself is more reliable. In regular Google, I was forced to use the Julian Date method, which has a tendency to include results that are incorrectly dated. Google Scholar sorts articles by publication date, ensuring a bit more accuracy.

Although the Academic Search Premier database also showed upward trends, they were a bit more muted than the previous two search engines discussed. The pool of data was significantly smaller, as well. In 1995, the database only brought up a total of 190 articles, after searching every single search term. By 2008, that number had grown to about 375. This is about a 97.37% increase. Although the Academic Search Premier is a reliable, monitored and accurate database, there was not sufficient volume for most of the search terms to make the data entirely reliable. For example, the search term, “legal ‘religious discrimination’” produced no results for the first three years, and remained
somewhere between 0-5 results for the rest of the time period. It is difficult to draw any conclusions from such a small amount of data. The search term, “religious freedom” on the other hand, showed a relatively steady increase from 56 results to 164 results. Although the numbers for this database were a bit more scattered and less statistically significant, it still points to the same types of trends as the other search engines.

Finally, Google Scholar Law limits its search results to case law and written opinions. Once again, the advanced search feature here allowed me to search more accurately by year, providing far more useful information than regular Google. The results of this search engine definitely show more of the solid growth trend in legal interest in the areas of religious freedom. The total hits from 1994 to 2008 increased from 3,986 to 7,096. This is an increase of about 78%. Although, again, there were a few spikes in the data, each search term showed similar increases.

Throughout this entire study, no single search term appeared to grow more or less than any other search term. The growth in Christian-specific search terms behaved very similarly to the growth in general religious terms, albeit with fewer overall results. I am more than willing to admit the many shortcomings inherent in this method of research. Taken individually, none of these search engine results would be especially significant. As a whole, however, I must conclude that they do point toward at least modest increases in the level of interest in religious liberties matters.
IV. EEOC and State Data

Although religious liberties lawsuits can arise in many different venues, employment cases are especially common. Fortunately, employment lawsuit data is collected and categorized by an organization called the Equal Employment Opportunities Commission (EEOC). Additionally, a significant number of employment lawsuits are filed each year. The accessibility and sheer quantity of data make for a very interesting study. In this section, I will outline the findings of the EEOC, explain the relevance of those findings, and draw conclusions based on the information. Also, I will address similar findings on the state level and incorporate that research, as well.

The process for this section of the research was perhaps a bit less complicated than the process for the other sections. I first perused the EEOC website and discovered that a great deal of their statistical data was readily available. I proceeded to scour the Internet for similar state agencies. Many of the state organizations did not limit their findings to employment-related cases. These websites also included data on the frequency of discrimination in areas like housing and public accommodations. Because the data collected by these organizations was not limited to instances of religious discrimination, that information had to be extracted from the remainder of the data. I did not search extensively for the state information, but merely collected data from those organizations that were relatively accessible. I gathered information from Connecticut, Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, and Pennsylvania. While the

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10 Litigation statistics from the EEOC can be found at http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm
EEOC data was very complete and thorough, the state organizations did not provide such comprehensive information. From some states, I was able to compile statistics over the past 10 years in housing, employment, and public accommodations. In other states, I was only able to find a few years’ data. Much of this information was found in annual reports, not all of which are posted on the Internet, although it is all considered public information.

Once I compiled the research, I began organizing it into Excel spreadsheets. The first priority was simply to list all of the religious discrimination cases filed over the time period available (this applies to both the EEOC and state data). Although the EEOC religious discrimination cases seemed to be increasing, I also noticed that there were more cases being filed in general. I decided to record the total number of all types of discrimination cases filed, and then determine whether the religious-specific cases were increasing as a percentage of that. I then calculated similar percentages for all the state data. I also noticed that some states kept track of the specific religions affected by discrimination. For those states, I calculated how many Christianity-specific cases were filed. For the EEOC data, I was able to get a bit more specific with analyzing the levels of litigation. I compiled data on new cases that were received, as well as cases that were resolved.

Finally, I converted almost all of the chart data into graphs. These graphs were similar to the graphs I created for the database searches, with the years on the x-axis and the number of cases filed on the y-axis (or percentage of cases filed). Once again, these graphs allowed me to visually examine the trends in the cases filed. If the graphs
generally sloped upward, I could conclude that there had been at least some increase in religious discrimination cases filed.

The individual state data was largely inconclusive\textsuperscript{11}. Although Pennsylvania’s reported cases\textsuperscript{12} seemed to increase overall, a few spikes in the data rendered it a bit less useful. In Connecticut\textsuperscript{13}, both the actual number of cases and the percentages of cases remained virtually the same, apart from a few sporadic years of increases. Hawaii\textsuperscript{14} and Kentucky\textsuperscript{15}, likewise, displayed no discernible trends. For Massachusetts\textsuperscript{16} and Michigan\textsuperscript{17}, the sheer dearth of data caused the results to likewise be relatively useless. Although cases in Illinois spiked in 2008, the rest of the years show no clear positive slope. Minnesota\textsuperscript{18}, however, showed signs of moderate upward trends, especially in the graphs that dealt with the percentage of total cases filed. Minnesota was also the state with the most available information, with data spanning from 1993 to 2008. While the

\begin{itemize}
  \item See Appendix B, beginning on page 38.
  \item Pennsylvania Human Relations Commission data can be found at http://sites.state.pa.us/PA_Exec/PHRC/publications/annual_report.html
  \item Data from the Connecticut Commission on Human Rights and Opportunities can be found at http://www.ct.gov/chro/cwp/view.asp?a=2523&Q=315780
  \item Hawaii’s Department of Labor and Industrial Relations statistics can be found at http://hawaii.gov/labor/hcrc/hcrc-links/reports.shtml
  \item The Kentucky Commission on Human Rights’ statistics can be found at http://kchr.ky.gov/reports/reports.htm
  \item Data from the Massachusetts Commission Against Discrimination can be found at http://www.mass.gov/mcad/
  \item Data from the Michigan Department of Civil Rights can be found at http://www.michigan.gov/mdcr/0,1607,7-138-4954_4998---,00.html
  \item The Minnesota Department of Human Rights’ statistics can be found at http://www.humanrights.state.mn.us/about/report_factsfigures.html
\end{itemize}
percentage of total cases filed that dealt specifically with religion was only 0.87% in 1993, that number jumped to 2.62% in 2008. Although the upward trend is hardly smooth or steady, the data does suggest that the number of these cases seems to be increasing.

Unlike the inconclusive state data, the EEOC data did exhibit a clear upward trend\textsuperscript{19}. Cases received, along with cases resolved by the EEOC increased over the period from 1992 to 2008. Not only that, but the percentage of total cases resulted in a distinctly positive slope. In 1992, the percentage of total receipts that dealt with religious discrimination was only 1.92%. That number increased relatively steadily to 3.43% in 2008. The percentages for litigation resolutions were similar as well. This data suggests that, at least with respect to employment cases, religious discrimination lawsuits are increasing in frequency, both relatively and absolutely.

Perhaps the inconclusive nature of the state data can be attributed to the specific states selected. Also, when taken individually, the total numbers of cases in each state were so few that even the smallest changes had a large impact on the appearance of the graphs. For example, in Hawaii in 2001, the total number of religious discrimination cases regarding employment, housing and public accommodations was only 9. Although other states had higher numbers, very few reached three digits. For that reason, the EEOC compilation of data seems significantly more reliable. Unfortunately, the EEOC only reports cases concerning employment, so the question of identifying trends in religious discrimination cases in housing and public accommodations remains unresolved. In most

\textsuperscript{19} See Appendix C, beginning on page 47
states, however, most of the cases reported happened to occur in the realm of employment.

Although the EEOC information only lends insight into one area of religious discrimination, these numbers do support the hypothesis that religious discrimination cases are generally increasing in number.

V. Supreme Court Litigation

Whereas the other sections of this paper focused on particular areas of religious liberties, this section addresses the direction in which our country, as a whole, is moving. Regardless of whether the Supreme Court is influencing public opinion or public opinion is affecting the Supreme Court, to some extent, Supreme Court decisions seem to correspond well with the views of the American public. By discerning the historical and current views of the Supreme Court on the subject of religious liberties, one can draw some conclusions about the future.

This section required a different type of research process. Although I planned to look at many complete court cases as primary sources, I also wanted to conduct a bit of secondary research, as well. I began by selecting 28 Supreme Court cases that seemed relevant and influential. I selected these cases by reviewing books on the topic of religious liberties, noting the specific court cases that their respective authors considered to be “defining”. I then compiled a list of these cases, sorted them by date, read some cursory information about them, and finally read the actual opinions themselves. The cases I selected ranged from 1844 to 2005, with the majority occurring during the
twentieth century. The point of this research was not to explain every action of the Supreme Court, and it certainly was not to advance a political agenda. Instead, I wanted to determine the role of the Supreme Court in the religious liberties debate—its decisions, as well as the extent of its involvement. Also, I especially wanted to gain an understanding of how the Court previously and currently views and interprets the First Amendment of the United States Constitution.

Much of the debate about religious liberties and state involvement centers around the First Amendment of the Constitution. The part of the Amendment in question says,

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

The amendment is typically divided into two main “clauses” during interpretation: The Free Exercise Clause and the Establishment Clause. The Establishment Clause focuses on the role of the state in “establishing” a religion, while the Free Exercise Clause focuses on the rights of individuals to practice their religions as they see fit. Almost all recent Supreme Court cases dealing with religious freedom or state involvement in religion cite this amendment. The Supreme Court must look at the “intention” behind the Amendment itself and historical interpretations of the Amendment. A large part of the court’s decisions rely on “precedent”, or the decisions rendered in previous cases. Understanding the relevance and importance of the First Amendment and historical precedent is essential to drawing any conclusions based on the Supreme Court Cases examined.

Of the 28 Supreme Court Cases I selected, most of them dealt with questions of public schooling. Some other areas where religious freedom issues emerged included tax issues,
questions regarding public officials, funding for universities, and courthouses and other public property. These cases covered a huge variety of topics, including, but not limited to: Bible reading, religious groups and equal access to facilities, funding and parochial schools, presence of religious figures and curricula in public schools, prayer, the tax-exempt status of churches, funding for religious colleges and universities, home schooling and parental rights, clergy in public office, the Ten Commandments in public areas, chaplains, nativity scenes, the inclusion of creation science in public school curriculum, vouchers, and the phrase “Under God” in the recitation of the pledge of allegiance. Taken as a whole, these individual cases can reveal a bit about the direction in which our country is moving.

Before delving into these cases, I must acknowledge a few things. First, this section of the paper deals with a much larger time span than previous sections. Whereas most of the other sections spanned the last ten to twenty years, this section attempts to view the past century and a half. When addressing this type of research, it seems more important to step back and view the bigger picture of history. With the Supreme Court, history is essential to decisions in the future, and this history will give us a much better indication of where we are going. Also, I must recognize that other individuals have conducted far more extensive research on this topic. Many books have been written, and although I did want to gain an unaffected perspective on the cases, I also felt compelled to include the findings of those who have conducted far more research than I.

I encountered two distinct ways to view these Supreme Court cases. First, I could look at the basic decisions rendered and determine whether they seemed to hurt or harm the case
for religious freedom. Another way to view this, however, would be to read the entire opinions to determine how the First Amendment was interpreted and applied.

Based on a cursory examination of more recent Supreme Court cases (the past 40 years or so), there is not much evidence that the rights of individuals to exercise their religious freedoms are being suppressed. There are, however, signs of increasing attempts to eliminate religious references and involvement in public matters.

With regards to individual rights, I encountered four cases that upheld these rights and one that seemed to oppose them. In Santa Fe Independent School District v. Doe (2000)\(^{20}\), the court ruled that it is unconstitutional to have student-led, student-initiated prayer at a public school football game. This seems to restrict the rights of students to voluntarily participate in religious practices. Nevertheless, many recently decided cases uphold the tenets of individual religious freedom. In Wisconsin v. Yoder (1972)\(^{21}\), the court upheld the rights of parents to home school a child, whom they refused to send to public school for religious reasons. In Widmar v. Vincent (1981)\(^{22}\), the court ruled that the University of Missouri is not required to disallow religious student groups from using its facilities. Similarly, in Board of Education v. Mergens (1990)\(^{23}\), the court ruled that it was unconstitutional for the school to deny permission to a group of students to form a

\(^{21}\) Wisconsin v. Yoder, 406 US 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)
\(^{23}\) Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 US 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990)
Christian club. Finally, in Zelman v. Simmons-Harris (2002)\textsuperscript{24}, the court ruled that a voucher program to allow parents the choice to send their children to a religious or nonreligious school did not violate the Establishment clause of the Constitution.

The more threatening sector of religious litigation concerns efforts to eliminate religious references from the public arena. Although I encountered two cases that maintain the court’s prior acceptance of religious references, I also encountered some examples that seem to indicate a reversal of that trend. In Lynch v. Donnelly (1984)\textsuperscript{25}, the court ruled (by only a 5-4 margin) that a nativity scene on display in Pawtucket, Rhode Island, did not violate the Establishment clause. Similarly, in Van Orden v. Perry (2005)\textsuperscript{26}, the court ruled by the same margin that a Ten Commandments monument on the grounds of the Texas state capitol building did not violate the Establishment Clause. On the other hand, in the same year, the court ruled in McCreary County v. American Civil Liberties Union of Kentucky (2005)\textsuperscript{27} that Ten Commandments displays in public schools and courthouses do violate the Establishment Clause (again, 5-4 margin). Finally, in Elk Grove Unified School District v. Newdow (2004)\textsuperscript{28}, Michael Newdow filed suit regarding the words “under God” in the Pledge of Allegiance, recited at the beginning of the day in his daughter’s public school. Although the case was dismissed because Newdow did not have “standing to sue” due to custody issues, this type of case could

\textsuperscript{24} Zelman v. Simmons-Harris, 536 US 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002)


\textsuperscript{26} Van Orden v. Perry, 545 US 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005)

\textsuperscript{27} McCreary County v. American Civil Liberties Union of Ky, 545 US 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005)

have major implications in the future. Eventually, the court will have to encounter this issue and, if it decides that the inclusion of “under God” is unconstitutional, we could witness a wave of attempts to eliminate almost all similar religious references. Based on these Supreme Court rulings, the biggest threat to religion is not in the realm of individual rights to practice, but in the public sphere and various efforts at eradication of all things religious from American public life.

With that understanding of current judicial rulings, this paper will now look at some of the actual opinions themselves, over the past two centuries. This section will rely heavily on a book written by Jay Alan Sekulow, chief counsel at the American Center for Law and Justice, entitled “Witnessing Their Faith”. His book sought to reveal how the religious faith of Supreme Court justices has influenced their opinions over the course of American history. His book reveals five major phases in thought regarding the religious freedom debate. Around the time our nation was founded, there was a strong emphasis on Protestant principles. Many of the moral teachings of Christianity found their way into the Constitution and other major documents of the time. The founding fathers were heavily influenced by their religious faith, and although they wanted to avoid an “established” religion like that of the Church of England, they believed that religion was essential to the survival of a nation. Around this time, the widespread belief was that people should be educated so that they could be good citizens, and in order to be good

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29 Jay Alan Sekulow founded the American Center for Law and Justice in 1990. He graduated with a bachelor’s degree and J.D. from Mercer University and received a Ph.D. from Regent University with a dissertation on American Legal History. He has appeared before the Supreme Court numerous times in defense of religious constitutional freedoms.

citizens, they must learn the morality that stems from Christianity. In the 19th century, this way of thinking began to shift slightly. Although Christianity still played a central role in private and public life, there arose a great deal of tension between Protestants and Catholics. Protestants wanted to preserve the protestant nature of America by teaching those principles in public schools. Catholics, on the other hand, wanted their children to learn principles of Catholicism. Early debates revolved around bible reading and funding for parochial schools. In Vidal v. Girard, the issue of Bible reading in public schools was not about separation of church and state. Instead, it was about a Protestant Bible being used instead of a Catholic Bible. At this time, the battle was not about eliminating religion. In the next phase, however, we see the rise of the “separation” movement. Interestingly, this movement was originally popular among Protestant groups, still in response to Catholicism. Many cases revolved around the issue of public funding for Catholic enterprises. A large portion of Protestants were adamant that the state remain “separate” from such religious entanglements. It was during this period that Thomas Jefferson’s famous “wall of separation” metaphor rose in popularity. Justice Hugo Black, in his opinion in Everson v. Board of Education (1947), wrote:

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church…Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups

31 Vidal et al. v. Girard’s Executors, 43 US 127, 11 L. Ed. 205 (1844)
32 Everson v. Board of Ed. of Ewing, 330 US 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)
and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a ‘wall of separation between church and State.”’

Following this period, despite early Protestant efforts, America began to witness a dissolution of its “Protestant Establishment”\(^\text{33}\). Instead of advocating a wall of separation, Christians began to recognize the implications of such a rigid boundary. The nation became more accommodating of other religions, even electing a Catholic to the position of President, John F. Kennedy. It was during this phase that neutrality and accommodation became the guiding terms. Justice Thomas Clark in School District v. Schempp (1963)\(^\text{34}\), articulated a new test for determining the role of the state in religious matters: “The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power…”. It is evident that the court was now concerning itself with walking a fine line between establishing a religion and infringing on the rights of individuals to practice their religion. Finally, the fifth and enduring phase of the history of church/state relations began with the Supreme Court case Lemon v. Kurtzman (1971)\(^\text{35}\). In this phase, there has been a concerted effort to remove the state from almost anything related to religion. This is by far the strictest interpretation of the “separation of church and state”. In Lemon v. Kurtzman, Justice Warren Burger created

\(^{33}\) Sekulow, Jay Alan. *Witnessing their Faith*, p. 249.

\(^{34}\) Abington School Dist. v. Schempp, 374 US 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)

\(^{35}\) Lemon v. Kurtzman, 403 US 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)
what has become known as the “Lemon Test” for determining the role of government in church/state cases. The test has three parts:

“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…; finally, the statute must not foster ‘an excessive government entanglement with religion.’”

The notion of an “excessive government entanglement with religion” has become a huge part of court cases that succeeded Lemon v. Kurtzman.

Based on these five phases, we can begin to draw some conclusions about the future. First, we must recognize that the Court does distinguish between religious practices and religious references. While religious references have always been considered Constitutional, state-instituted religious practices are held to an entirely different standard. According to Sekulow, “…the Supreme Court has consistently distinguished between religious exercises, such as prayer and Bible reading, and patriotic exercises with religious references”\(^{36}\) (314). If the Court continues to operate based on this distinction, government will be less likely to overstep its bounds with regards to religion. If, however, cases about the constitutionality of phrases like “Under God” continue to surface unresolved, there could be a bit more difficulty. Also, although the “wall of separation” metaphor is not actually found in the Constitution, it has become a part of judicial precedent. In recent years, the wall metaphor has existed as an excuse to eradicate all religious references in public spheres, which could definitely be troubling

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for religious liberties. Additionally, the Lemon Test has provided a rigid and problematic method of evaluating government involvement. “Excessive government entanglement” can be construed to mean many things. Even the justice who created the Lemon Test, Warren Burger, later acknowledged its shortcomings and its inadequacy in evaluating church/state issues. Finally, we must recognize the role of faith over the past centuries. Sekulow’s book makes a strong case that the religious beliefs and upbringings of Supreme Court justices have invariably proven to influence the decisions they render. Unfortunately, our country seems to be moving away from its strong religious convictions, and current and future justices are less likely to have a religious upbringing and strong personal religious beliefs. If this continues to be the case, and religious views continue to have such an impact on court decisions, we could likely see a wave of rulings that will be problematic for and possibly hostile to religion.

VI. Conclusion

This project utilized a wide variety of research tools and techniques. This paper has determined the types of cases, calculated the frequency of cases, ascertained the relevance of this topic, and analyzed the interpretations of Supreme Court opinions, all to form a better understanding of the religious liberties debate. Based on this research and analysis, a few conclusions become evident. Religious liberties litigation is a growing sector of law practice. Nonprofit and private law firms have emerged over the past decades to confront these increasing challenges. The organizational contact persons with whom I communicated asserted the vital role that
their lawyers will continue to play in the future. They each identified certain specific issues that they predict will become the most frequent and/or difficult types of cases for their organizations to confront. The fact that these issues covered the whole span of religious liberties litigation matters, from public religious displays to private religious practices, from the rights of churches to the rights of street preachers, and from the roles of schools to the roles of parents, suggests that no specific area of religious liberties is necessarily becoming the most important. Instead, we must conclude that religious liberties disputes are increasing in frequency across the board, irrespective of the types, arenas, or formats of these lawsuits. Nonprofit religious liberties organizations are certainly experiencing the burden of these increases.

The search engine research yielded very clear results that indicate a growing interest in religious liberties matters. From the least reliable search engine (Google) to the most reliable (Google Scholar Law), there were obviously upward sloping graphs to represent the total “hits” that each search term generated. This indicates that the number of websites, articles, blogs, citations, and cases that deal with religious freedom are collectively increasing.

The United States Equal Employment Opportunities Commission data suggests that cases dealing with religion are increasing absolutely, and they are also increasing relative to other employment cases. Although the state data was less conclusive, the statistics collected by the EEOC point to at least some countrywide increases in religion-related cases brought to trial in the realms of employment and workplace issues.
Finally, Supreme Court cases and opinions show less hostility to religion than expected, based on the previous research. For instance, many individual freedoms are still being protected, as evidenced by a few cases during the last decade. The real threats appear to be in the public sector, where religious references are facing opposition from individuals and groups. It is expected that these sorts of cases, like Newdow’s “under God” case and the many Ten Commandments cases, will become more frequent and difficult to ignore.

Although the Supreme Court is not openly hostile to religion, the religious backgrounds of its Justices are shifting, resulting in a more secular mindset among participants. This secular mindset will likely impact future Supreme Court decisions. Also, the evolution of First Amendment interpretations is making it more difficult to justify any state involvement with religion. These issues could become the most significant in the coming years.

Religious liberties litigation is about far more than appears on the news. Although this research does not justify the paranoia about rapidly disappearing religious freedoms that some Christians seem to adopt, it does provide a basis for real concern. Christians may not be substantially “less free” today, but efforts to suppress freedoms do seem to be increasing. Although the Supreme Court still consistently affirms these freedoms, future pressures on the Supreme Court may reverse this trend. And although many nonprofit organizations exist to defend the religious freedoms of individuals, the fact that they exist suggests that individuals are facing threats to those freedoms. If the United States continues to move in the direction that these trends suggest, there may be a great deal more trouble for religious liberties in the future.
Appendix A.

The graphs on pages 33-37 represent the growth in total “hits” for each of the search engines over the period referred to in the graph title. There are also graphs related to a Christian-specific search term, covering the same time periods. Google Scholar Law results cover the time period 1994 through 2008.
Total Google Hits (1995-2008)
Appendix B
The following graphs represent state data, over the period referred to in the titles. Each state graph is followed by a graph showing the percentage of total cases that referred to religious discrimination.

Connecticut Cases Filed (2000-2008)

Connecticut % of Total Cases Filed (2000-2008)
Hawaii Cases (2001-2008)

Hawaii Avg. % of Cases (2001-2008)
Appendix C: The following graphs represent EEOC cases received and resolved.
% of All EEOC Litigation Receipts (1992-2008)

% of all EEOC Litigation Resolutions (1992-2008)