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There is No Such Thing as Freedom of Religion: How Constitutional Law Complicates the Divide Between Church and State

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**There is No Such Thing as Freedom of Religion: How Constitutional Law
Complicates the Divide between Church and State**

Senior Project submitted to

The Division of Social Studies

of Bard College

by

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Annandale-on-Hudson, New York

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Dedication

I would like to dedicate this work to my mother, Laura Heckman. She is, without a doubt, the strongest, kindest, smartest, most beautiful woman that I know. She has never wavered in her love and warmth, even in the face of countless obstacles. She is the kind of woman that you aspire to be. The kind of woman that I want to be. Thank you, mom. You are my everything.

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Introduction

I have always understood freedom of religion to mean that I had a right to practice the faith of my choosing and that the practice of that religion and that choice would be protected by the federal government. I never had to think about it much besides that, it was merely a topic in my fourth grade U.S. History class and a footnote in the discussion of the writing of the Bill of Rights in high school. I practiced the right without thinking about it every day. I grew up as a pastor's kid. I went to church every Sunday. I attended climate marches, LGBTQ Pride parades, Black Lives Matter marches and immigration rallies all with the members of my congregation. My ability to practice my faith and my ability to be an active citizen of the United States always felt like a given. My constant blending of religion and politics never seemed to me to be a problem, as long as the government stayed out of my religion and religion stayed out of the government there weren't any issues. I felt comfortable in my existence as an American Citizen, and all the rights that I knew were mine. It was not until I was a freshman in college, sitting in a classroom, in a class called "Freedom of Speech" that I realized that those rights that feel like a given, are often not a given at all. The complexities of the practice of our rights, creating our rights and making rulings about rights means that these inalienable truths are in fact, not always true. Human rights and the state contain certain inherent contradictions that the system is constantly having to evaluate, correct or change. The re-evaluation of these rights happens in the Supreme Court of the United States.

The term freedom of religion is often evoked by political candidates, religious leaders and outraged citizens. It is used in the debates on many issues ranging from Islam in the United States, prayer in schools, the religious values of candidates, or conversations about controversial

religious arguments in Congress or the courts pertaining to issues such as gay marriage, a women's right to choose, or vaccinations. I have always felt that freedom of religion has been used as a trump card. If someone's argument begins to infringe on being a violation of someone's right of freedom of religion, people would back off. There was no need to understand the nuance of the use of religion or the context of what they were saying but rather only that it was an issue of someone being able to practice their faith. But if it does work as a trump card, isn't that problematic? Wouldn't you need to be able to validate what religion is and its rules in order to prove that someone is indeed practicing their religion instead of being religious as a way to hide their true intentions or using religion to hide acts of hate? In order to prevent this gross exploitation of freedom of religion, would the government not need to make rulings about what religion is and how it works? And in doing so, don't we have to acknowledge that the government gets to, effectively determine how religion can operate, at least in the public sphere? It is precisely this confusion that has brought me to the startling conclusion that there is no such thing as freedom of religion. I don't mean that freedom of religion is not practiced. I am evidence that religion is practiced freely in the United States every day. And, I am also not saying that the United States doesn't actively work toward this goal of religious freedom. Rather, I would like to make the point that the idea of religious freedom as a given, a right that is constantly available, that same idea that I grew up with, and that many other Americans believe to be true, is in fact not a fixed concept, but rather a changing ideal. Religious freedom is inherently contradictory, and therefore is constantly attempting to correct itself, and that inevitably leads to violations of the freedom of religion.

In order to figure out how this right is hindered, certain questions must be answered. Where does religious freedom come from? Why put it in the Constitution? What exactly does the Constitution say? Why is it important or just as important as other rights? What makes it different from freedom of expression? What makes religion important? How do we use religion or the freedom of religion? How do we protect it? Why does it need protection? Do we need to protect it? How is it threatened by the congressional, executive or judicial branches of government? Is this right endangered at the moment? Is redefining religion or freedom of religion the same thing as endangering it? And simply enough, what is religion? My main objective is to help to answer these questions, and to help to understand how this right is threatened or misused in the United States of America. The hope in finding the faults of the practice of religious freedom is to better understand how freedom of religion can work in a space of constant contradictions.

Through the research of this paper and from lived experience, I have come to understand that freedom of religion is practiced. I understood the First Amendment right to freedom of religion to manifest as the separation of church and state. I used to think that that wording was, in fact, in the Constitution, but it's not. This idea of the separation of church and state is a way of understanding the right of freedom of religion. I used to think that this separation was real. I envisioned it like a wall, made of brick, impenetrable, but now, I know that this separation is more of a dotted line, a fence easily jumped, a permeable membrane.

Throughout this paper, I hope to show that there is no freedom of religion without infringements on freedom of religion. That in order for the government to protect against

establishment or infringement, the government has to define religion and in doing so it has to do the very thing that it is attempting to prevent and influence the establishment of religion.

For the most part, the history of freedom of religion is the debate over what is inside and outside the boundary of religion. The project of defining puts some practices outside that boundary of religion and some practices inside the boundary. This boundary tells us what is protected and what is not protected. Removing the boundary means there is nothing to protect and that this First Amendment right is not necessary or not being used. The establishment of the boundary leaves some religions and some religious practices outside of the boundary and no longer protected. The Bill of Rights is made up of things that involve restraint and exclusions. Even if you move the boundary to include more people there is still a boundary, the existence of this boundary both protects freedom of religion and leaves it vulnerable to it. The boundary works like a wall that is crumbling and we are desperately attempting to build and repair. Without the wall, there is nothing left to protect, but as it stands it isn't effective at protecting everything that lies behind it. As soon as the government is mandated to protect something, religious freedom paradoxically means something or someone will be excluded.

The Supreme Court of the United States is the place where this tension between religion and state is felt the strongest. The Supreme Court's responsibility is to make decisions about what is constitutional and to protect the people from the tyranny of government. The ability of the Supreme Court to set a precedent means that it has the power not only to determine if someone's rights are violated but how that issue might be dealt with in the future. They are in charge of the building and protection of the boundary. The court also makes definitions for the people, they have the ability to define what is meant by religion in the Constitution and therefore

define religious freedom. These definitions are not singular but made up of many rulings and many cases over decades. This project will focus on two cases, Masterpiece Cakeshop, Ltd. vs. Colorado Civil Rights Commission and Reynolds vs. the United States of America. While there are numerous cases that tackle the issue of freedom of religion, these two cases show not just two of the ways that freedom of religion has been violated but also the trend from the 19th century to the present day. It is the goal of this paper to piece together the definition of freedom of religion as the courts have defined it and to understand the boundary that has been set. Understanding the boundary between church and state will better help those who lie inside the boundary to understand how they can protect those outside the boundary.

Chapter 1: What is religious freedom?

You do not have to be me in order for us to fight alongside each other. I do not have to be you to recognize that our wars are the same. What we must do is commit ourselves to some future that can include each other and to work toward the future with the particular strengths of our identities. And in order to do this, we must allow each other our differences at the same times we recognize our sameness.

– Audre Lorde

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

- First Amendment, The Constitution of the United States of America

Any time I'm criticized for my belief in Jesus Christ, I just breath a prayer of praise.

– Vice President of the United States, Mike Pence¹

'Tax law? I hate taxes,' she said. 'Why should I go and do something like that?' Still, she sucked it up and did as she was told. 'The Lord says: Be submissive, wives, you are to be submissive to your husbands.'

– Presidential Candidate in the 2008 election, Michele Bachmann²

¹Maureen Groppe, "Vice President Mike Pence quotes Bible in response to being called 'Christian supremacist,'" *USA Today*, accessed April 9, 2019, <https://www.usatoday.com/story/news/politics/2018/08/31/mike-pence-quotes-bible-response-being-called-christian-supremacist/1161092002/>.

² Matt Taibbi, "Michele Bachmann's Holy War," *The Rolling Stone*, June 22, 2011, accessed April 9, 2019, <https://www.rollingstone.com/politics/politics-news/michele-bachmanns-holy-war-244298/>.

Religious freedom really, truly is for everyone. It's a right given by God and is a beautiful part of our human dignity.

- Ambassador Sam Brownback of the United States Department of State

The lack of religious freedom anywhere is a threat to peace, prosperity and stability everywhere. The right to freedom of religious and the ability to live according to the dictates of your own soul is under attack in the world. This must change and that's why you're here.

- Ambassador Sam Brownback of the United States Department of State

My grandfather continually tells me that religious freedom is under attack or rather that his religious freedom is under attack. He has not gotten over the 1962 Supreme Court case, Engel v. Vitale, where it was determined that state sanctioned prayer could not be held in public schools. The decision stands even if the prayer is not affiliated with any one religion or is not required of the students.³ So the ruling means that even non-denominational prayer or group prayer where students wish to opt out are still not permitted. He and my uncles often proclaim

³ “Engel v. Vitale,” Oyez, accessed April 25, 2019, <https://www.oyez.org/cases/1961/468>.

that there is a “war on Christmas” and how sad it is that they can’t say, “Merry Christmas” to anyone any more. Both of these inconveniences to my grandfather and his peers are important to think about, though they may just seem anecdotal, because these felt experiences make evident a greater trend of the general public's confusions surrounding “freedom of religion.”

The restrictions on state sanctioned prayer in schools were an effort to maintain the line drawn between church and state and to ensure that no child felt they had to be religious or participate in a religion. People beginning to say, “Happy Holidays” instead of “Merry Christmas” is intended to demonstrate sensitivity to the fact that not all people celebrate Christmas. Saying “Happy Holidays” ensures that there are no assumptions about religious background, and all people feel their traditions are recognized. When my grandpa says, “You can’t say ‘Merry Christmas’ anymore.” My mother always responds, “Says who?” reminding him that he can say it, it just is not the cultural norm anymore. No one is going to punish him for this choice of words. When discussing *Engel vs. Vitale* and its repercussions of the case I always remind my grandfather that prayer is not outlawed, merely the act of making children who are in a federal or state funded space participate in a religious act is being called into question. Even Thomas Jefferson said, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."⁴ Schools are federally and state funded spaces, so the taxpayer pays for it. Making children pray in schools means that the individual who does not pray is having their tax dollars work toward instituting prayer. We can’t allow

⁴ Choper, Jesse H. “The Religion Clauses of the First Amendment: Reconciling the Conflict.” *University of Pittsburgh Law Review* 41 (1980): 678.

something that is federally funded to be run amok with religion, even a non-denominational religious act.

Religious freedom exists in a paradox. The state must come to define religion and regulate religion in order to protect the practice of religious freedom. *Engel v. Vitale* was decided and set a precedent about religious acceptance and inclusion in the United States. But now *Engle v. Vitale* is somehow being used as an example of how religious freedom is being taken away. This is evident in the conversations that I have had with my grandfather and with other Americans who feel their freedoms are being threatened. But is his First Amendment right to express his religion actually hindered by a public schools inability to impose prayer in schools? There are many ideals that are caught up in this human right, separation of church and state, freedom of religion, religious liberty, religious practice, state roles, and regulation. All of these factors allow for this conflation of not being able to pray in schools and the loss of religious freedom. In this chapter I will attempt to unpack how religious freedom's complexity can lead to these conflicting understandings of how religious freedom functions as a human right.

To begin to understand the complexity we must ask, what is freedom of religion? How is it defined? This, like any human right, is difficult to do because it means different things to different people. Religious definitions are forever changing. But this is not uncommon for First Amendment rights. The advent of online media and 24 hour news services have created new challenges for the freedom of the press. Social media gave shape to a new to freedom of speech, and diversity, modernization, and spiritualism have forever changed the way we think about freedom of religion. Freedom of religion is a right that can be protected in various ways. Much of our understanding of freedom of expression and the pursuit of life, liberty and happiness can

be encompassed by some components of freedom of religion. So then, why put it in the Constitution? Why is it important or just as important as other rights? What makes it different from freedom of expression?

Well to begin with, we are founded on principles that are aimed at the prevention of tyranny. Religion, though it has many positive attributes, has led to a numerous tyrannical structures and monopolies of power, such as the Papacy, the Crusades and Spanish Inquisition in Christendom. In addition some of the colonies of America are founded on the basis of religious freedom, since their communities were greatly made up of religious refugees fleeing religious persecution.

Freedom of religion is a First Amendment right; this very fact means it is integral to the structure of the United States of America. The Bill of Rights was made with the rights of the citizen in mind. But freedom of religion, like all law is subject to interpretation, and changes meaning with time. There are concepts, movements, and ideas that the Founding Fathers could not have imagined. This paper inadvertently is an argument for a living constitution. A living constitution is one that changes with time and is subject to modern day interpretation. The very nature of freedom of religion proves that the Constitution needs interpretation. The combination of pluralism and progressivism in the last 100 years means that freedom of religion needs to be constantly redefined. To quote Justice Brennan,

We are not an assimilative, homogeneous society, but facilitative, pluralistic one, in which we must be willing to abide by someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.⁵

⁵ Roger Berkowitz and Austin Sarat, "Disorderly Differences: Recognition, Accommodation, and American Law," *Yale Journal of Law & the Humanities: Vol. 6 : Iss. 2 , Article 7.*, 1994, 4.

Justice Brennan brilliantly points out what makes religious freedom so complex. It is that we must all agree to disagree, suspending our own value system in the name of democratic togetherness. Religion effects issues of marriage, children, education, sexuality, domesticity, slavery, sacrifice, and many other social issues, all of which are regulated by law. But, sometimes these practices go against the the law, which makes the practice of religion a complicated action. Along with these complexities, comes fear, fear of the unknown or the different. "To understand difference, one must take the dread which it inspires seriously."⁶ The dread that is described here is part of reason that religion is so hard to regulate. How can we regulate religions we fear or that we do not understand? How do we handle religions that contradict one another?

One of the ways we handle the complexity is separation of church and state. It seems simple enough, but when you closely examine how we have been functioning as a country, you see that this separation is not existent in society, nor is it exactly what the Constitution or the court have been practicing. We use God often as a source of power for political work, "In God We Trust" is written on U.S. Currency and courtroom walls, and The Declaration of Independence and the Constitution both mention God as a source of power or justification. Moreover the IRS actively determines the tax status of religious institutions by enforcing its own criteria for a legitimate religion. The Supreme Court of the United States is also guilty of this as it has to, in every religious freedom case, make a determination about religion, regardless of the verdict.

One of the main reasons to attempt to make these distinctions is for taxation purposes. If anyone can be a church, then anyone can enjoy the tax benefits that religious institutions enjoy.

⁶ Berkowitz and Sarat, "Disorderly Differences," 4.

The Internal Revenue Service (IRS) of the United States of America does not have a definition of a church or “an establishment of religion” but they do have fourteen guidelines to help groups see if they qualify. The guidelines are as follows:

Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include:

- Distinct legal existence
- Recognized creed and form of worship
- Definite and distinct ecclesiastical government
- Formal code of doctrine and discipline
- Distinct religious history
- Membership not associated with any other church or denomination
- Organization of ordained ministers
- Ordained ministers selected after completing prescribed courses of study
- Literature of its own
- Established places of worship
- Regular congregations
- Regular religious services
- Sunday schools for the religious instruction of the young
- Schools for the preparation of its members

The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes.⁷

There are a couple important things to note. First, the IRS is extremely lenient with its terminology, being careful not to make the requirements too specific. This is a list of possible attributes, not requirements. They note that the list of attributes is from federal tax law and cases, which means this is a topic that has been debated. They also make sure to note that each case is different and that these are merely things that they consider when looking at a religious entity. The IRS does, however, have more general requirements for non-profits that are not applicable.

⁷ "Churches' Defined | Internal Revenue Service.," IRS.gov, last modified July 5, 2018, accessed December 12, 2018, <https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined>.

These are required in order to qualify for tax exempt status, these requirements are that “the organization must be organized and operated exclusively for religious, educational, scientific or other charitable purposes; net earnings may not inure to the benefit of any private individual or shareholder; no substantial part of its activity may be attempting to influence legislation; the organization may not intervene in political campaigns; and the organization’s purposes and activities may not be illegal or violate fundamental public policy.”⁸ The IRS is creating clear and definite regulation on the work of religious communities. The IRS then creates a conflict by saying that if the religious organization wants to qualify for this tax code, they need to behave a certain way. If the separation constantly exists in the paradox between practice and law, then why and how do we come to understand religion. What are the boundaries of religion that we create? Why is it so commonly used, even when that phrasing does not even appear in the Constitution itself.

In arguments about violations of the First Amendment we often hear the term “separation of church and state.” But how does that work in the Constitution. Prayer in schools is an excellent example of this. Individuals are allowed to pray in schools privately but state funded schools that receive federal funding are not allowed to force prayer in schools. This means that Muslim students who need to pray through the day and Christian students who pray before a meal are more than welcome to, just privately and without the influence of the state. The argument for this cultural change is separation of church and state. An individual is allowed to practice their faith but the state is not allowed to force the practice of religion or endorse it. But why do we so quickly cite separation of church and state rather than the First Amendment. We

⁸ "Churches' Defined," IRS.gov.

speak about separation of church and state as if that wording is found somewhere in the Constitution or in law, but in reality it does not. This phenomenon could be the result of colloquialisms but I think that it is the result of something deeper.

Separation of church and state is an American ideal. It simply means that government should not interfere with religion and that religion should not interfere with the government. The limitation of governing, however, does not mean that the two cannot influence one another. Jefferson speaks about the wall of separation in a letter from 1801. In the letter he states that the intent of the separation of church and state is that neither government or religion should govern or determine the other.⁹ Instead, Jefferson writes, the hope is that separation will support the freedom of thought and the freedom to choose. Religion is uniquely based in thought and in action. This dichotomy of practice means that in order to protect the individual from tyranny, the individual must have freedom of thought and freedom of belief as well as the freedom to act. In order to better understand the separation of church and state, we must understand and accept that this not a law set in stone, but rather an idea that is deeply influenced by individual circumstances and the historical cultural development of the United States.

There are two important components of the First Amendment right to freedom of religion, the Free Exercise Clause and the Establishment Clause. Both components are present in the Amendment itself. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first clause, the Establishment Clause, embodies the idea that the establishment of religion cannot be hindered or influence by law. The establishment

⁹ James Lankford and Russell Moore, "The Real Meaning of the Separation of Church and State," *TIME*, January 16, 2018, accessed April 9, 2019, <http://time.com/5103677/church-state-separation-religious-freedom/>.

refers to the institution of faith communities. Most faith traditions have hierarchies, structures, rules, disciplinary boards and leaders that make up their communities on local, national and global scales. The Establishment Clause protects these groups from being infringed upon by state law. This prohibition on infringement means that the influence of religious leaders and law will, ideally, not be influenced by the American political sector. The Establishment Clause is a restriction placed on Congress, the legislative branch, this is important to note because it leaves some wiggle room for the Supreme Court to make rulings on these matters. Laws that infringe on the establishment of religion will, most likely, be tried in the Supreme Court of the United States of America, this is the system working. The purpose of the Supreme Court and our three branches of government is to check one another. But if an outside company or a something in the private sector infringes on the establishment of religion then it is complicated because the Supreme Court is open to more interpretation of freedom of religion. This often happens with war memorials that include quotations from the Bible present on them. These are often not built by the government but are placed in public spaces in an effort to commemorate. The establishment clause is complex because it exists within specific criteria, and how the Supreme Court of the United States interprets it determines the legal ramifications.

The other clause that is present in our First Amendment is “Congress shall make no law... prohibiting the free exercise thereof.” This refers to the practice of religion. This clause is aimed at protecting the ability of the individual to practice the religion of their choice. The complexity of this right lies with the number of things that overlap between religious and secular or religion and state. Marriage, child rearing, women’s role in society, education, public health, food consumption, death and burial, are all things that religion usually has a say in but that the

state also needs to regulate. This means that though we have the protection of infringement clause we often find that the government has to infringe on the infringement clause in order to maintain social order. An example of this is the discussion around vaccinations. Often students can get a religious exemption in order to attend public school unvaccinated but the very fact that you have to prove your religion to do this means that the United States is making a judgement of your religiosity and how you practice. Your ability to practice is infringed upon until you can prove your religion. The irony of the situation may feel unjust, in order to be recognized as entitled to religious freedom you have to prove religious action. The way that we defend freedom of religion is by defining religion, which directly conflicts with the Establishment Clause.

The Constitution breaks religious freedom down into two practices, the first being the Establishment Clause and the second is the Free Exercise Clause. These two clauses come together to form the First Amendment right to freedom of religion. The Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause encompasses not just the practice of the individual but the establishment that is religion, including buildings, leaders, clergy and the rules that make up a religion.

To better understand how this sentence in the Constitution operates and understand whether something violates the Establishment Clause, we can look to this three-step checklist developed by Jesse Choper. "(1) must have a secular, rather than a religious, purpose, (2) may not have the principal or primary effect of advancing or inhibiting religion, and (3) may not involve 'excessive entanglement' between government and religion."¹⁰ When you break these

¹⁰ Choper, "The Religion," 673.

things down you come to understand the Establishment Clause as a limit on the government, rather than on the people or religious group or entity. In its ideal, "the Establishment Clause should forbid only government action whose purpose solely religious and that is likely to impair religious freedom by coercing, comprising, or influencing religious beliefs."¹¹ But there are numerous instances where this is directly affected in court. When courts, for example, make a ruling on polygamy they are influencing a religious belief, regardless of the outcome of the case because they are asserting that they have the authority to make a decision about the establishment of religion. The very act of making a decision about religion in court means that the government has made a ruling about religion itself and therefore has influenced or hindered it. With this in mind, knowing that separation of church and state is impossible and that the Establishment Clause is ultimately ineffective in courts, then why we still insist on the idea of freedom of religion?

How freedom of religion is used and sometimes abused is not just dependent on the individual but the social experience. Without getting too deep into the sociology that creates these spaces, it is still important to understand that pluralism effects and necessitates freedom of religion. The plurality of the modern American society means that we have to recognize and adjust to numerous religions. "Everywhere, it seems that the more difference is recognized, the more vexing the effort to accommodate difference in our institutional lives and practices becomes."¹² This act of accommodation is the reason that freedom of religion threatens and the reason that we need it. "Whereas most countries are dominated by a single religious group that

¹¹ Choper, "The Religion," 675.

¹² Berkowitz and Sarat, "Disorderly Differences," 4.

may well receive financial support from the state, the American religious pattern has been accurately described as pluralist."¹³ When dominated by a single religious group it is easier to manage what defines a religion because there are fewer variables to consider. When religion cannot be succinctly defined, it is impossible to create one set of laws that limit religion. The lack of state influence, like funding, does not mean however that religion lives without state influence. Pluralism makes it difficult to embrace and include separation of church and state as a principle because of the deeply integrated principles of religion that affect the public person, but that also means that freedom of religion and separation of church and state remain necessary to defend even the smallest of religious populations in the United States.

Why is religion so important as a right? This question is important to consider, and not as easily answered as you might think. It is a freedom of belief. Religion often is a central part of not only the individual journey but the community journey. As one of the most personal means of freedom of expression, it is important to protect freedom of religion. We see the degradation and restriction of practice as a means of torture and dehumanization in prisons and war. In Guantanamo Bay, many of the prisoners were tortured in more extreme measures when they visibly touched or used their Qu'ran. Turbans, yamakas and rosaries have been taken from prisoners as a means of control and abuse. The power that religious practice have on a person and their well being is the very reason that freedom of religion is so important. One of the main features of the United States is that there is not one state religion, though it might be said though it might be suggested that Christianity is unofficially the state religion given its dominant and historic position. The lack of federal religious restraint means that religion is free to be a deeply

¹³ Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's Press, 1987), 15.

personal experience. Religion is therefore something that you are free to come to on your own. With a flourishing of religious pluralism the options for religious affiliation are even greater than they once were. Experimentation, exploration and confusion in religion and spirituality have become even more common. Thus religion is not easily defined and that is what makes it a necessary freedom.

If freedom of religion both encourages the active practice of religion and the active practice of state influence on religion, then how do we find a happy medium? Expression is one of the great components of the human experience. As long as the United States of America has had the First Amendment right to freedom of religion it has been attempting to find a way to define and deal with this complexity. The dichotomy between it being a necessary right and it influencing the elements of the public sphere and legal actions. Figuring out this complexity is part of the reason that we have a Supreme Court. And the Supreme Court of the United States has been dealing with this issue, redefining and changing the way we understand this integral right since the beginning of the nation. We have seen cases involving schooling, public displays of religion, marriage, sexuality, gender, slavery, race, segregation, prayer in private, public and government space. Each of these continues the practice of religious freedom which is to continually change and redefine what freedom of religion means. With each redefinition the hope is that religion is able to maintain its independence and autonomy in the face of a state and a people that constantly attempting to define it and regulate it.

In order to engage with the complexity of this ideal we have to look at the way that the Supreme Court looks at the cases. With everything that the Supreme Court of the United States looks at there are two possible schools of thought when it comes to the way with which First

Amendment decisions might come to the Supreme Court of the United States. "The First Amendment decisions of the Supreme Court may be divided into two classes: those related so specifically to the wording of that Amendment as to require no assistance from the general principle of separation of church and state; and those that do need such aid, whether they evoke it specifically or not."¹⁴ If we think about the separation of church and state not as something that is identical to freedom of religion or protecting freedom religion but as a principle that we can use to determine if something is violating First Amendment rights, then perhaps we will have a guidepost for future decisions made in Supreme Court of the United States of America.

To understand the right to religious freedom we have to understand who is making these decisions and why. The United States' population is 70.6% Christian, 5.9% are members of a other faith traditions and 22.8% of the nation is non-affiliated according to a Pew Research poll.¹⁵ The poll brings to light two things. First, this is a majority Christian nation but that there are still other faith traditions present and that those religious traditions are equally entitled to practice their faith tradition. The second thing the poll evidences comes from the makeup of the Christian traditions. Evangelical Protestantism, mainline Protestantism, historically black Protestantism, Catholic, Mormon and Orthodox are all categories that this group is broken into by Pew Research.¹⁶ These groups can be broken down even further into different denominations that are not present here including Baptist, United Methodist, Episcopalian and many others. Each of

¹⁴ Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-state Thought since the Revolutionary Era*(Philadelphia: Fortress, 1972), 251.

¹⁵ "Religious Landscape Study," *The Pew Research Center*, 2014, <https://www.pewforum.org/religious-landscape-study/>.

¹⁶ "Religious Landscape."

these diverse groups have their own rules, policies and traditions that not only regulate the religious life of a person but often also things that could be considered legal matters like children, schooling, marriage, profession, days of rest or holidays. What this means is that we have a marketplace of religions in the United States, none of which controls legal action but all of which reserve the right to be protected under the Establishment Clause.¹⁷ "Not having the luxury of a monopoly, the American churches have deliberately attempted to adapt to social realities and, in the process, have cultivated skills and qualities that almost certainly have contributed to the persistence of religious attachment."¹⁸ The adaptation of religious communities means that groups are often engaging with legal matters. Church groups attempt to attract parishioners with their stance on issues such as abortion, women's rights, civil rights, socio-economic inequality, homosexuality, same-sex marriage, trans rights and environmental issues, though this is not the only reason that churches take political stances. This means that not only does religion receive certain rights from the Infringement Clause but that it also maintains certain freedoms to change and affect the political positions of the voting individual. Thus religion maintains a certain level of influence over public policy even if not intentional. In fact, "the US political system actually encourages organized groups to compete for influence over public policy."¹⁹ This encouragement includes those groups that are religious.

The political role of religion is important to note because the blurred line that is the wall between religion and politics is defined by the individual and their experience. The religious

¹⁷ "Religious Landscape."

¹⁸ Wald, *Religion and Politics*, 16.

¹⁹ Wald, *Religion and Politics*, 27.

experience of one individual can bring to the Supreme Court an issue that redefines the relationship between law and religion for every single American. This ability means that we must constantly be reevaluating the how we understand both religion itself and the way we understand the Establishment Clause. "Recognizing the political role of religion is not the same thing as judging it... people reach different verdicts about the connection between religion and politics. Some people applaud it as necessary and proper; others denounce it as the root of evil and mischief."²⁰

The varying understandings of religion and how it relates to law comes to a head in the Supreme Court of the United States of America. The legislative and executive branches may make laws, but it is in the Supreme Court that the people are able to protect themselves from infringement and protect their right to free exercise. It is in this environment that the nuance of these things is brought to the surface and we are able to build, piece by piece, what the relationship between religion and politics and religion and law should be.

There is no such thing as freedom of religion in the United States of America. This does not mean that we do not strive for this ideal and it does not mean that it is not an obtainable ideal. Freedom of religion is a forever complicated idea because it is an absolute in a world of dichotomies and uncertainties. The freedom of religion that will be talked about through the duration of this paper is one that presumed to be true. When I say that there is no such thing as freedom of religion, I mean that the absolute freedom that we hope to attain is not as clear cut or even as possible as we think. Freedom of religion is a simple concept, but the practice is vastly more complicated, and often the freedom of religion that we hope to have is not actually

²⁰ Wald, *Religion and Politics*.

possible. Instead, we are constantly forced into compromises that hinder religious expression. Sometimes these compromises are in the name of the greater good, or sometimes they are in the name of the greater good. Recognizing the ways that the United States falls short on the grounds of religious freedom allows for a conversation on how we can move forward, forever aiming toward a world where neither state nor religion hinders the free.

Chapter Two: How is Freedom of Religion Utilized?

The two cases discussed in this chapter will highlight two uncertainties of freedom of religion which hinder its ability to function in the United States. The first uncertainty is the question of who decides what religion is and when that decision is made. The second uncertainty is the complex relationship between citizenship and religious faith. At its core these issues play with the ideas of public versus private that are often highlighted in constitutional law. Almost all human rights protected by the Bill of Rights deal with this dichotomy of private and public. Religion is a uniquely private matter but when marriage, business, or other citizens get involved or are affected, the relationship changes and religion enters the public sphere. There are two cases that highlight these conflicts, *Masterpiece Cakeshop, Ltd. vs. Colorado Civil Rights Commission* and *Reynolds vs. the United States of America*. These cases challenged the court to do two things, define religion and determine how religion is allowed to operate in the public sphere, even if the action harms other citizens or is a religious act. The fact that these are important components of the decision process of the Supreme Court means that the state cannot help but interact with religion, which calls into question the use of the Establishment Clause. The importance of these two cases, however, is not just that they make determinations about the limitations of freedom of religion, but how they make those decisions and the logic that they use. From these two cases, divided by almost 150 years, we can observe about how religion in relation to the private sphere, citizenship and human rights operates in the United States Supreme Court.

The First Amendment is not defined by just one right, but rather consists of many rights. Freedom of speech, freedom to assemble, freedom of religion and freedom of the press make up

this Amendment. They seem to be different rights but all four are attempting to protect the people from the tyrant and to protect the individual from the people. Freedom of expression is the most important thing that unifies these three concepts. Art work, political spending, religious texts, articles, posters, blogs, rousing speeches on street corners, opinion pieces, and even Breitbart are covered under these three rights. The practice of the four rights of the First Amendment are distinguishable. A news article is protected under freedom the press, poetry is freedom of speech and being able to attend the religious service of your choice is freedom of religion. But it is not always this simple. The distinctions between two of the First Amendment rights, freedom of religion and freedom of speech were muddled in the case of *Masterpiece Cakeshop, Ltd. vs. Colorado Civil Rights Union*. In *Masterpiece*, heard by the Robert's Court, the decision that was made was not about religion in the end, though it was an important piece of the decision. The conflation of freedom of speech and freedom of religion can lead to larger conversations about the citizen, identity, religion and who gets to define these things. The most important part of this case is the precedent that it sets for future decisions about religion.

Masterpiece Cakeshop, Ltd. vs. Colorado Civil Rights Union is a case that polarized religious groups and fell neatly between freedom of religion and freedom of speech. The complex relationship between these two concepts is made evident by the facts of this case. On July 12, 2012²¹ Charlie Craig and David Mullins went to *Masterpiece Cakeshop* to order a wedding cake. The order placed by Craig and Mullins took place before the *Obergefell v. Hodges* case, so gay marriage was still only allowed in a few states and gay marriage was not legal in Colorado. To get around this, the couple was marrying in Massachusetts and then returning to

²¹ "*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.*" *Oyez*, 9 Apr. 2019, www.oyez.org/cases/2017/16-111.

Colorado for a celebration with friends and family. While all of the actions of the couple were completely legal, the shop's owner, Jack C. Phillips, refused to make the couple's wedding cake on the grounds that he did not believe in gay marriage due to his religious beliefs. The case then went all the way to the Supreme Court. Phillips lost in Colorado courts. But still felt that the Colorado statute violated his right to freedom of religion. The statute in question was the Colorado Anti-Discrimination Act (CADA), §§ 24-34-301 to -804, C.R.S. 2014. The CADA stated that a place of public accommodation could not refuse service on the basis of sexual orientation, race or gender. The cake shop, as a public space, that gives "public accommodations" falls under the statute. The public space transforms our understanding of how religion is supposed to behave. As discussed in Chapter 1, religion is both a public and a private matter. In the United States religion and religious symbols are often welcomed in the public sphere. The statute therefore meant that though Phillips held a "legitimate" religious belief he still had to comply with the CADA. This case becomes more complicated since Phillips was making a wedding cake which has a specific purpose and was a work of Phillips' personal expression. Because the cake was considered his "art" this not only was a case about religion but about freedom of expression, making it an issue of free speech. In Phillips' point of view the state could not force him to make art he did not believe in and could not force him to compromise his religious beliefs, in making a wedding cake for a marriage he did not believe in. This was not just a question about religious freedom but whether the CADA violated the bakers right to freedom of speech and the Free Exercise Clause of the First Amendment right.

The connection in this case between freedom of speech and the Free Exercise Clause highlight one of the ways that these two rights are continually connected. Preaching, religious

art, prayer, chanting, religious text and artistic expression are all conflated to both components of the First Amendment. While there are clear connections, making distinctions between these two is equally important. We must make definitions pertaining to these two rights because the claim that these rights have been violated, sets two specific precedents. When a court says something is protected by freedom of speech, then we understand that thing as speech. For example, Citizens United tells us that corporation's political donations are speech. While this may not seem obvious, the Supreme Court creates a legal precedent for this. Similarly, how the Court chooses to talk about religion determines what religion *is*. When the Court says that believing that gay marriage is a sin is a right under freedom of religion or the Free Exercise Clause, the Court is validating that religious belief. The Court is saying that this is a "sincerely held religious belief," that homophobia is a religious belief. Legal assertions like these have profound social, as well as political, ramifications.

The ramifications of these assertions are felt in the decision and in the amicus curiae briefs of this case. In the opinion by Justice Kennedy he acknowledges that there are two main questions involving rights: "The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment."²² By stating that this is an issue of the First Amendment Justice Kennedy is including both the Free Exercise Clause and freedom of speech.

²² Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins, 584 U.S. ___ (2018) L. Ed. Accessed April 9, 2019. <https://supreme.justia.com/cases/federal/us/584/16-111/#tab-opinion-3910083>.

The freedom of speech component is a lot simpler to grasp. The cake is determined as the artistic speech of the individual. While it may seem inconsequential, a very specific detail made this a matter of speech and artistic freedom and changed the framing of the case. Phillips claims that he would have sold them anything but a wedding cake. Brownies, cookies, a birthday cake are all on the table, it is merely the wedding component that he has an issue with. “He explained, ‘I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.’”²³ He went on to say that the specific message of the cake matters, a cake designer might refuse to make a similarly immoral cake. “If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.”²⁴ To Phillips the cake was immoral and he understood it as illegal in his state. At the time of the incident, though Craig and Mullins were having a perfectly legal out of state ceremony, but gay marriage was not legal in Colorado or under the federal government. All of this serves the ruling that was made on the grounds of freedom of speech. If we deem the cake as artistic expression then we can easily see how refusal to do a specific message is perfectly fair. For example, I would hope that people would join in defending a baker refusing to make a cake with a racist or violent message.

But this case took on the importance of why the baker might find a wedding cake for a gay couple to be immoral. Kennedy’s opinion of this case states very clearly, “The reason and

²³ *Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins*, 584 U.S. ___ (2018) L. Ed.

²⁴ *Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins*, 584 U.S. ___ (2018) L. Ed.

motive for the baker's refusal were based on his sincere religious beliefs and convictions.”²⁵ But what if this was a case about religiously based racism or sexism? A man cannot have many wives or enslave a person of color because we as a society have deemed those things as wrong and have passed laws against it. This despite the fact that historically arguments have been made to religiously justify these positions. The way the Court speaks about Phillips’ “sincere religious beliefs” highlight the influence the Court has in defining religion. Kennedy points out himself that our society is only accepting because “our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.”²⁶ But it goes without saying LGBTQ people are citizens as well, and enjoy all the same rights. When making determinations about whose rights to protect, we also have to look at those whose rights are being infringed. Sometimes we have to weigh the importance of religious freedom against the right of every citizen to life, liberty and the pursuit of happiness.

The Kennedy Court concluded that the Free Exercise Clause would, if we deem the religious conviction as legitimate and constitutional, be violated in this instance. This was a ruling on freedom of expression, so it was not necessary of the Court to make a statement about religious convictions. The Court had an opportunity here to make a statement about freedom of religion and when it pertains to discriminatory practices. But instead they chose to make this a

²⁵ *Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins*, 584 U.S. __ (2018) L. Ed.

²⁶ *Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins*, 584 U.S. __ (2018) L. Ed.

case about the artistic right of the cake baker. The conflation of these two rights means that we lose the legitimacy of one. In this case, church ordained homophobia was taken as a given and not an anomaly. What makes this a sincerely held religious belief? And why does the Court not feel that it is necessary to investigate the validity? Does investigating religious validity violate the First Amendment? How do we make determinations about religious liberty without defining what religion is? This is an inherent contradiction. There are plenty of cases in the history of the United States that delve into the question of religious legitimacy. In making decisions about religious legitimacy, the Court is making a decision, “respecting the establishment of religion.”

It is my view that this case skillfully avoided the conversation about freedom of religion that it was meant to have. Kennedy felt that the Colorado Civil Rights Commission’s view was clouded by the rights of the LGBTQ community and that they did not practice a neutrality that a court is supposed to. This is part of the reasoning for overthrowing the Colorado court’s opinion. Kennedy writes, “Phillips was entitled to a neutral decision maker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided.”²⁷ But when the Court chose to validate a religious conviction, it is no longer neutral. There are beliefs that must be protected, because there is no way to fathom how they could be considered anything other than religious. Belief in God, belief in scriptures or prayer are all personal and necessary practices that must be protected, but discrimination based textual interpretation does not have to be protected. One would hope that we would not tolerate extreme religious actions, like stoning, as a consequence to breaking

²⁷ *Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig and David Mullins*, 584 U.S. ___ (2018) L. Ed. Accessed April 9, 2019. <https://supreme.justia.com/cases/federal/us/584/16-111/#tab-opinion-3910083>.

religious custom. We have to draw a line. In this case the Court is making an assertion that the belief that homosexuality is a sin is a legitimate religious belief. This action is far from neutral. It perpetuates a narrative that is designed to continue to ostracize American citizens from religious institutions and makes a legal statement that religious based homophobia is protected under the United States Constitution by the Supreme Court.

Justice Roberts quotes the Colorado Civil Rights Commission which notably contradicts the choices of the Robert's Court:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. [from Colo. Rev. Stat. §24-34-601(2)(a) (2017)]²⁸

The Robert's Court claimed that, "Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."²⁹ But neutrality is not actually possible in these cases. The issues of free exercise must be looked at with two lenses. The first is whether the perceived free exercise infringement is in fact the exercise of religion. The second is whether the state is infringing on the First Amendment. Even when it is obvious, the act of deciding that something is religion is an act of infringement of free exercise. The very idea that the state can make those assertions means that the state is constantly and forever infringing on the Free Exercise Clause of the First Amendment. It is important to note that just

²⁸ Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins, 584 U.S. __ (2018) L. Ed

²⁹ Masterpiece Cakeshop, Ltd.; and Jack C. Phillips v. Colorado Civil Rights Commission; Charlie Craig; and David Mullins, 584 U.S. __ (2018) L. Ed.

because this belief is legitimized by the court it does not mean that it then must be a part of any one religious doctrine. But it is also important to note that the court is constantly making decisions about the nature of religion and how it is allowed to behave. The assertion by the court about what makes up a religion infringes on a religious groups ability to defend themselves. Freedom of religion exists only in conflict or tension with other rights.

Amicus Briefs: How do we understand the decision?

The amicus curiae briefs filed on behalf of both the petitioner and the respondent continue to show the complex narratives that connect the Supreme Court's rulings and narratives and the evolution of the First Amendment. The Family Research Council's amicus brief outlines how integrated and connected these narratives of the First Amendment are. An organization, that is notably anti-LGBT, utilizes the notions of the divergence from freedom of religion and freedom of speech that are at play in this case. When discussing the Colorado statute that made the initial decision in favor of the Colorado Civil Rights Commission, the Family Research Council said, "Some argue the law is necessary for LGBT persons to achieve equality and access to public goods and services. That rabbit trail diverts attention from the issues at the heart of this case: liberty of conscience, integrity, free speech, and religion."³⁰ The importance of this is that LGBT rights are being placed as separate from religious freedom. The amici in this brief frame this case as one no longer about LGBT people but rather about these integral ideals to religion and its components. This then becomes about who has a right to freedoms and in what context. Liberty of conscience, integrity, free speech and religion are all rights available to all people

³⁰ Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, No. 16-111, slip op. at 2 (June 4, 2018). <https://supreme.justia.com/cases/federal/us/584/16-111/#tab-opinion-3910083>.

regardless of religion or sexual orientation. The division between LGBT rights and other rights, even those which apply to LGBT people, is an important step in creating a new dialogue of discrimination. It goes without saying, LGBTQ individuals are citizens too.

The Family Research Council amicus brief argues that Phillips was expressing his conscience. “The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from owning a public business.”³¹ This argument by the amici briefs frames Phillips as the victim. This does two things. First, the idea of conscience is now associated with religion. Wording it in a way that means that it is meant to be understood under the Free Speech Clause, not freedom of religion. Freedom of conscience is now not about a specific religion or text but rather about the idea that a man is entitled to freedom of thought and religion happens to be a source of conscience. “Freedom of thought is closely linked to conscience. Individuals hold the right to adopt a point of view “and to refuse to foster . . . an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. at 715.”³²

The Family Research Council’s amicus brief wants this case to be about religion but not solely about religion, because though the religion is protected, it is subjective. This then becomes about what makes up a person’s conscience and how the court cannot determine what is unconscionable to the individual. “Colorado may not like or agree with Petitioner’s viewpoint, but the Constitution demands that courts protect his freedom to “decide for himself... the ideas and beliefs deserving of expression, consideration, and adherence... Government action that...

³¹ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111, slip op. at 2 (June 4, 2018).

³² *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111, slip op. At 2 (June 4, 2018).

requires the utterance of a particular message favored by the Government, contravenes this essential right.”³³ The issue here is that the government must make decisions about morality and conscience everyday. Our laws are based on our morality and our morality, for many, is based in religious foundations. Society, therefore, determines the collective conscience.

Courts make determinations about conscience, both to settle the collective conscience and to protect the individual conscience. The origins of conscience are deeply rooted in religion.

“After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions.”³⁴ It is clear in this moment that the amici briefs are referring to conscience from a religious point of view. The choice of wording is in the hope that the Court will understand that this is an issue of free of speech rather than religion, because conscience can be held by both believers and nonbelievers. While the court may have been careful to portray that this is an issue of freedom of speech, the main function remains the same. Conscience is only moral when it is placed in the bases of right and wrong independent of outside information. When you place the ideas of abortion and marriage into the idea of conscience, you step outside the conscience and go to the origin of the issue, which is often linked to religious ideas and values.

Amicus briefs are not always about the outcome of the trial but rather how the precedent set by the outcome of the trial. When it comes to the Supreme Court of the United States it is not just who wins the decision but how that decision comes about and the precedent that it sets.

³³ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111, slip op. at 10 (June 4, 2018).

³⁴ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111, slip op. at 13 (June 4, 2018).

Understanding how the law is interpreted comes from these cases. This is why the amicus briefs of church-state scholars do not wish to make an argument about freedom of speech, but only the Free Exercise Clause. They state clearly that they do not care about the importance of this case in a free speech context, but rather that if this case wins on the grounds of free exercise. They are worried that a new and scarier understanding of free exercise may come about.

They submit this brief to explain that Petitioner's claim under the Free Exercise Clause is at odds with precedent and principles of religious liberty in a pluralistic society. Accepting his novel theory would result in far-reaching and harmful consequences. Amici make no arguments as to whether Petitioner is entitled to succeed under the Free Speech Clause. If it were, this would soon become a nation in which "each conscience is a law unto itself, or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."³⁵

Religion is a unique thing. It informs both the personal and the public. Religion is, therefore, extremely difficult to understand and to regulate. The amici in this case want the understanding of religion to not allow for discrimination. The responsibility of the government to not infringe on religion should not take precedent when discussing instances of discrimination. An example would be religious discrimination. The ability to discriminate against someone is not a religious right. More importantly, allowing religious freedom to be a means to discriminate is equally problematic. "Protecting groups against discrimination is not the same as giving only certain groups a constitutional right to discriminate whenever their religion so instructs."³⁶ We all have to abide by the rules of the Constitution, regardless of whether or not we think it is right or conflicts with religion. The ideals of this nation are not set to make everyone happy, though they

³⁵ "Charlie Craig And David Mullins V. Masterpiece Cakeshop - Church-state Scholars," ACLU, 1, accessed April 10, 2019, <https://www.aclu.org/legal-document/charlie-craig-and-david-mullins-v-masterpiece-cakeshop-church-state-scholars>.

³⁶ "Charlie Craig...Church-State Scholars," ACLU.

are entitled to the pursuit of happiness, but rather to ensure that everyone has that opportunity. Not liking that you have to show respect or even acknowledge a group of people does not mean that it is unconstitutional. The Amici of Church-State Scholars speak about the Constitution, saying, “While nearly everyone disagrees strongly with at least a few of these rules, we abide by them for the sake of creating a society in which people of many faiths, backgrounds, and world-views can co-exist in peace.”³⁷ Opening up the ideals of this nation to those of various backgrounds is part of what makes the the American Constitution so revolutionary, it is designed to include a diverse group of people. Religious pluralism means that we must not allow one religion’s belief to harm or disrupt the practice of others. Religious freedom cannot mean valuing one religion over another, even if that bias is built into the very foundation of the idea of religious freedom in the United States.

The distinctions between law and religion are important for thinking about religious favoritism. The court must ensure that they are not making law based on religious tradition. Inadvertently, by protecting religious rights, just because someone says that their actions are religiously based, you run into the problem of protecting non-religious acts under the guise of religion. “There are many reasons why this Court has taken a narrow view of ecclesiastical exceptions to generally applicable law. These considerations would all fall by the wayside if private persons could render any conduct ecclesiastical by declaring it so within the terms of their own faith. That is not the law.”³⁸ The problem is not necessarily just what makes something a religion but how to determine religious legitimacy. The act of determining what is religiously

³⁷ "Charlie Craig...Church-State Scholars," ACLU.

³⁸ "Charlie Craig...Church-State Scholars," ACLU.

legitimate is avoided in the decision of Masterpiece Cakeshop, but this aversion is not always easily made.

Reynolds vs the United States of America: Understanding the Individual as both a Religious and Political Body

An example of a case that made a determination about how religion can be practiced is Reynolds vs. United States which was decided in 1879. The case, over a hundred years old now, has not been overturned, even though it is a case that clearly determines how religion can be practiced. Reynolds vs the United States is not just a case about religion but about the culture that religion creates and sustains. The case involves a member of the Mormon Church and his polygamous relationships. In 1878, George Reynolds, was convicted on the charge of bigamy under the Federal Morrill Anti-Bigamy Act after marrying a second wife, while still legally married to his first wife. Reynolds challenged the act saying that the federal law violated his freedom of religion. According to Reynolds, it was part of his religious duty to marry multiple women and that the federal law was violating his First Amendment right to freedom of religion. The court ruled in favor of the federal statute and upheld Reynold's conviction. This ruling determined that polygamy and bigamy would not be part of any religion, at least when it came to its legal practice. This case is interesting because the Courts rules against the act of polygamy because it is seen as their social duty and that the very act of having multiple wives is an act against the social order. Here polygamy is viewed as the immoral, which is deeply ironic given that the very basis of many religions is a guidepost for morality.

The decision by the Court says, “Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation....Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”³⁹ This determination means that the Court is making a decision about religious practice based on the good of the whole of society. We see this often, with various social, cultural and religious acts discontinued in the name of morality, justice or the social good. This applies to laws regarding gender, race and sexual orientation. These ideas help to perpetuate that not only do we have a society where we are free to express certain ideals but we also have a society where we can continue to pursue those ideas free from the profane and the immoral. The idea of polygamy, in the eyes of the Court, was not conducive to the type of society that the United States was meant to be. So then, if our court places their rulings with an emphasis on the moral or immoral, then how do they make these decisions without religion? Is religion not a guiding factor in most people's moral compass? Almost every person can recall the golden rule, “Treat others how you wish to be treated.” But few make the connection to one of God’s commandments, “Love thy neighbor as thyself.” We live in a world that is inseparably tied to religion and religious ideology. Though we make law about religious ideology all the time. The Bible, Torah and Qur’an all have texts about marriage, women, slaves, trading, business, building roads and taxes, among other things. While we don’t always tie these decisions to

³⁹ "Bill of Rights Institute" [Reynolds v. United States (1879)], last modified April 9, 2019, <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/reynolds-v-united-states-1878/>.

religion it remains that it is difficult to separate the two. The law does not have to be directly about religious action in order to dictate it.

Before I continue the discussion of the dichotomy of public and private and how it manifest in the individual as both a believer and as a citizen, it is important to note a distinction that is made often in these cases which is that of the difference between action and thought. It is one thing to believe that it is your religious duty or your obligation to God to marry more than one woman but it is a completely another thing to actually go about marrying more than one wife. Action it what makes something illegal. The government cannot regulate or make rulings about your thoughts, no matter what they are, they can only make rulings about what you do about those thoughts. You may think about murder often put until you begin to plan a murder or commit murder, you have not done anything illegal. This distinction is extremely important when discussing religion because the question has to be asked whether you must be allowed the action when it comes to religion. Is the mere act of believing something enough, or do you have to act on that belief?

Religion has numerous laws that very few practitioners still follow, including restrictions, for example, on whether or not you can wear blended fabrics or plant two different crops in the same field. There is no U.S. law saying that you can only wear a cotton blend, and you reserve the right to choose what you wear because that is governed by freedom of expression. But the same is not true of some of these other topics. Marriage is a legal act, but it is also a deeply religious one often officiated by a religious leader, but always including the signing of legal contract. Before we had the legal systems to track marriage and allow for tax exemptions, marriages, unions, polygamy, monogamy and polyamory occurred. The difference between a

restriction on marriage and restriction on fabric is cultural. We see certain relationships as impure, unjust, immoral or plain gross. Reynolds, therefore, is not just breaking the law but breaking the social norm that helps to bind our society together. Often, our culture determines what is moral.

Marriage is a union that helps to organize and define our society. “This was in part, the Court held, because marriage was a most important feature of social life: ‘Upon it [marriage] society may be said to be built. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law.’”⁴⁰

Marriage is a unique fixture of our society because it is capable of transforming (i.e., biracial marriage, gay marriage, property laws, marital rape laws, etc.) but can only transform when society is ready for it. In a recent Gallup Poll it was found that Americans are more and more accepting of polyamorous relationships. From the 1990s to 2011 the number of Americans that were okay with polyamorous relationships grew from one in ten to one in five. “And while academic research finds that covert polygamous marriages do exist in the U.S., they are uncommon and are largely confined to some immigrant Muslim groups and Mormon sects that have broken away from the mainstream church.”⁴¹ And growing from this trend is a new understanding of how polygamous marriage can exist. “Prior to 2011, polygamy was defined as being when “a husband has more than one wife at the same time.” Beginning in 2011, this

⁴⁰ “Bill of Rights.”

⁴¹ Andrew Dugan, “Moral Acceptance of Polygamy at Record High -- But Why?,” *Gallup*, July 28, 2017, accessed April 10, 2019, <https://news.gallup.com/opinion/polling-matters/214601/moral-acceptance-polygamy-record-high-why.aspx>.

definition became gender-neutral, instead identifying polygamy as when "a married person has more than one spouse at the same time."⁴² All of this is to say that the understanding of marriage is changing. In fact, I would not be surprised if polygamy was the next great marriage debate.

However the issue is not whether polygamy should be legal but rather about whether religion determines the legality. Who determines whether religion is a valid reason to break or, at least, challenge the law? We must remember Reynolds did, in fact, break the law. In the end, the final decision was based on just that, the act of breaking the law and that religion cannot be an excuse for breaking the law. "The Court concluded that people cannot excuse themselves from the law because of their religion. 'Can a man excuse his [illegal] practices... because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances....'"⁴³ This rationale follows that of the Masterpiece Cakeshop in a very direct way.

The Reynold's ruling is a ruling based on two principles. First, marriage is a moral and legal act. Marriage licensing, taxes, and related matters are structured, implemented and integral to governing. This reality drains the act of marriage of its religious component. Religion is therefore something that you have to impose on marriage. If you would like a religious service, or if you would like a religious ceremony without the legal benefits that is your prerogative, but the moment you seek the legal component, it becomes the state's business. This case highlights the way that Reynolds himself embodied both a private desire to marry in the practice of his faith

⁴² Dugan, "Moral Acceptance."

⁴³ "Bill of Rights."

and the public need to regulate marriage for taxation and census purposes. This action marks the beginning of Reynold's illegal action.

Second, religion is not a reason to avoid the law. Freedom of religion allows you the right to express your religion but not necessarily the right to have that religion be formally recognized in the public or legal sphere. The separation that comes with this understanding of freedom of religion plays with the very nature of the debate in the case of the Masterpiece Cakeshop. Phillips refused to make a cake for a gay couple and won on the grounds that his cake was protected under freedom of expression. This means that his religion was the reason that he won, even under the guise of speech.

So What Does All This Mean?

In both cases the religious act has to be defined; whether belief or action, it has to be deemed some form of legitimate religious belief or practice. In both cases the court does just this. This is the first way that we begin to see an infringement on freedom of religion, it should not be a court who decides faith, but rather the individual or the sacred body. In both cases laws based on how society is meant to operate allow for a discussion about whether a religious act is valid, or at least subject to protections under religious freedom. Freedom of religion is therefore subject to court understanding of religion and how it operates. The problem we then see is that religion does not actually operate in these rules that have been decided by the courts. Religion is deeply individual, communal, and cultural and just because the majority deems a practice wrong or immoral, does not mean that it is not a legitimate religious belief. The practice may, however,

infringe on the law. Respecting the rights of the citizens requires that religion must be limited, which in turn means that there is no such thing as pure religious freedom.

Moreover, the logic used to make these determinations in court is not always consistent. The very nature of these rulings means that they constantly have to be contextualized. The precedent each case sets is subject to case specifics and the social, political, and cultural climate of the United States. Like most cases context is key but defining religion is part of that contextualization. The very act of defining means that the court is able to continually set new precedents. Each time they are able to infringe further on the practice of freedom of religion or to let religion run free.

The constant relationship between protecting and defining that exists in the court creates a complex dynamic with our notions of separation of church and state. Does this not hinder or at least alter the understanding of separation of church and state? What does it mean when morality is deeply connected to a religious idea? When does it stop being a religious belief and begin becoming a secular ideal? Does that transition matter if it remains a part of some people's religious doctrine? What does it mean that religion has its own rule code and often its own legal system? All of these questions must be answered if we are going to operate in a system that recognizes freedom of religion.

Chapter Three: There is No Such Thing as Freedom of Religion

In the first two chapters we explored how the relationship between church and state in the United States is complicated. The divisions that we have come to understand are not always that strong or even present. The complexity of the individual as a political being and a religious being, the inability of the court to make a decision in favor of religious freedom without defining religion, therefore violating the First Amendment, and the necessity to regulate legal actions that can be related to the religious, like marriage, child care, sexuality or vaccinations all complicate the idea of freedom of religion. The *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* case and *Reynolds v. United States* highlight this complexity and the various ways that the division of church and state is violated and our ideal of freedom of religion is threatened.

To understand how we have maintained some religious freedom, even if it is only in theory and not in true practice it is necessary to look at how religious freedom is being protected. While it may be true that true religious freedom is inconsistent with the American democratic process and with politics in general, it is still an integral part of our Constitution and the integrity of the American dream. When you put some time into thinking about religious freedom it becomes clear that often the biggest proponents of religious freedom are not religious persons themselves. The idea that the biggest defenders of religion are not believers may seem shocking but it is often true. This understanding, however, like many of the things about religion in the United States is based on the idea of Christianity equated with “religion.” When polled about the religious debate around the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* case, it was evident that republicans were in favor of religious freedom. “The shift was most noted among republicans, with 73 percent of those polled saying wedding vendors should be

permitted to refuse services based on religious belief. Only 27 percent of Democrats said vendors should be permitted to do as much."⁴⁴ But this case, it seems would be different if the actions were done under another religion's customs or teachings.

Favoritism for Christian ideals and rights, however, is not surprising. For example, a similar right to what is sold in commerce is the right to congregate with your community. In 2010 there was a proposal to build an Islamic community center called Park51/Cordoba House project in close proximity to Ground Zero, the sight of the 9/11 tragedy. There was anger, despite the fact that a large Islamic community was already meeting and actively practicing their faith in a makeshift mosque in close proximity to the same location as the proposed multipurpose community center. 61% of Americans polled said that they did not want the center to be built.⁴⁵ The fact that the community center was going to be run by an Islamic group was the basis of most Americans apprehensions. In fact, it was often called on news networks a "mosque" when it was not intended to be a mosque at all. Moreover, Muslim communities deserve, just as much as the Christian community, to have a community center. Religion should not be a reason that a group cannot participate in community action, regardless of the location. The double standard in the United States toward religion could be because of our religious make up. As stated in Chapter 1, the United States' population is 70.6% Christian, 5.9% are members of a non-Christian faith and 22.8% of the nation is non-affiliated according to a Pew Research poll.

⁴⁴ Yonat Shimron, "Poll suggests religious freedom push is having an effect," *National Catholic Reporter*, August 6, 2018, accessed April 9, 2019, <https://www.ncronline.org/news/people/poll-suggests-religious-freedom-push-having-effect>.

⁴⁵ Altman, Alex. "TIME Poll: Majority Oppose Mosque, Many Distrust Muslims." *TIME*, August 19, 2010. Accessed April 9, 2019. <http://content.time.com/time/nation/article/0,8599,2011799,00.html>.

The majority of Americans are Christian and so it is easy for religion, in most communities, to mean Christianity in practice so outside faith traditions may seem unnecessarily complicated.

Religious pluralism in the age of the Founding Fathers was greatly based on Christianity as well. The opening words of the Declaration of Independence give credit for the founding of the United States of America to God, saying, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator⁴⁶ with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Much of the conflict of the religious groups during this period laid within Christian communities. “Around the time of the Revolutionary War, most American Christians belonged to Anglican, Congregationalist, or Presbyterian groups.”⁴⁷ For example, the conflict lying with the Anglican communities at the time was in their need to pledge allegiance to the King of England as part of the tradition of the Anglican church.⁴⁸ Christianity was and is simply an ingrained part of the ideology of America. We see this often. “America the Beautiful” is often found in church pew hymnals both then and now. Religion even found its way onto Benjamin Franklin’s original design for the seal for the United States of America, which depicts the parting of the Red Sea by Moses as he saves the Israelites.⁴⁹

⁴⁶ The choice of the word “Creator” was greatly deliberated over when writing the constitution.

⁴⁷ Mayo, Maria. "Religion in America on July 4, 1776." *Huffington Post*, December 6, 2017. Accessed April 9, 2019. https://www.huffpost.com/entry/religion-in-america-on-july-4-1776_b_3542203.

⁴⁸ Mayo, "Religion in America."

⁴⁹ Mayo, "Religion in America."

The Christian influence that permeates the United States of America not only manifests in the federal government but in local and state governments. “All but four state constitutions – those in Colorado, Iowa, Hawaii and Washington – use the word “God” at least once. The constitutions in Colorado, Iowa and Washington refer to a “Supreme Being” or “Supreme Ruler of the Universe,” while Hawaii’s Constitution makes reference to the divine only in its preamble, which states that the people of Hawaii are ‘grateful for Divine Guidance.’”⁵⁰ This language is even present in how many states understand and choose their political candidates. Seven states, including Maryland, Arkansas, Mississippi, North Carolina, South Carolina, Tennessee and Texas have language in their respective constitutions that suggest or directly enforces a policy that individuals who do not believe in God cannot run for office. While these laws may no longer be enforced, there have been no legal amendments to their validity.⁵¹ The presidential inauguration still includes, a national prayer, laying hands on what has often been a bible or bibles, and the words “So help me God” are used as a frequent refrain at the end of a swearing in ceremony, and often with clergy members present. In fact at the 2017 presidential inauguration of President Trump there were 6 clergy members present.⁵² Most of the clergy present were from Evangelical Protestant branches of the Christian church. There were also two clergy from the Catholic and Jewish faiths. So we come to understand that the faith traditions central in these

⁵⁰ Aleksandra Sandstrom, "God or the divine is referenced in every state constitution," *The Pew Research Center*, accessed November 27, 2018, <http://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/>.

⁵¹ Sandstrom, "God or the Divine."

⁵² Jeff Diamant, "6 Facts About Faith and the Inauguration," *The Pew Research Center*, January 19, 2014. Accessed November 27, 2018. <http://www.pewresearch.org/fact-tank/2017/01/19/6-facts-about-faith-and-the-inauguration/>.

national ceremonies are often restricted to just Christian and Jewish faiths. This, of course, due to the cultural and arguably bias if not bigoted climate of the United States, which excludes Islam.

If the intent is not true separation, then why and how has this become such an integral part of the culture and identity of the United States of America? Why is it commonly used? Even when that phrasing does not even appear in the Constitution itself. In arguments about violations of the First Amendment we often hear the term “separation of church and state.” We are more religiously diverse than ever but that does not mean that there isn’t a bias toward or favoritism for one particular tradition. More than that, what does that mean for the atheist, agnostic or unaffiliated populations in the United States of America, which is steadily growing?

What about Atheism?

But what about atheism? Europe has an atheist tradition that is often underappreciated. Slavoj Zizek, in an article for the New York Times, wrote “But where was modern Europe's most precious legacy, that of atheism? What makes modern Europe unique is that it is the first and only civilization in which atheism is a fully legitimate option, not an obstacle to any public post.”⁵³ The Enlightenment brought about some of the most amazing things that the world has seen, including non-religious thought, atheistic ideas and morality without religion or God. “Atheism is a European legacy worth fighting for, not least because it creates a safe public space for believers.”⁵⁴ Atheist are often some of the greatest defenders of religious freedom because they themselves believe something that is often seen as something that makes them inferior. They

⁵³Slavoj Zizek, "Defenders of the Faith," *The New York Times*, March 12, 2006, accessed April 9, 2019, <https://www.nytimes.com/2006/03/12/opinion/defenders-of-the-faith.html>.

⁵⁴ Zizek, "Defenders of the Faith."

want to protect their right not to believe as well as others right not to believe. In fact, according to a Pew Research poll Americans are less likely to vote for a Presidential candidate that is atheist than for a Christian. But, “About half of Americans (53%) say it is not necessary to believe in God to be moral, while 45% say belief in God is necessary to have good values, according to a 2014 survey.”⁵⁵ This shift in the idea of what defines one’s moral compass also tests how we are able to handle issues of religious freedom. Many of the arguments against Reynolds vs. The United States of America were moral as well as religious, thinking about what is moral defines rights and religion can interfere with rights as well as support them.

The complexity that is often discussed in the battle for religious freedom is the diversity of opinions and their basis. Religion is a deeply personal thing and it often conflicts with similarly complex and personal things such as marriage. In the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* case the conversation about which rights are more important and which priorities, that of religious person or gay person that we choose to make. “Respect for others beliefs as the highest value can mean only one of two things: either we treat the other in a patronizing way and avoid hurting him in order not to ruin his illusions, or we adopt the relativist stance of multiple ‘regimes of truth,’ disqualifying as violent imposition any clear insistence on truth.”⁵⁶ Atheist individuals, though perhaps capable of having a neutrality when talking about religious freedom are not exempt from this debate over the “regimes of truth.”⁵⁷

⁵⁵ Michael Lipka, "10 facts about atheists," *The Pew Research Center*, June 1, 2016, accessed April 9, 2019, <https://www.pewresearch.org/fact-tank/2016/06/01/10-facts-about-atheists/>.

⁵⁶ Zizek, "Defenders of the Faith."

⁵⁷ Zizek, "Defenders of the Faith."

When talking about religious freedom, the idea of religious extremist or fundamentalist often comes up. Slavoj Zizek writes, in his article, “Fundamentalists do what they perceive as good deeds in order to fulfill God's will and to earn salvation; atheists do them simply because it is the right thing to do. Is this also not our most elementary experience of morality? When I do a good deed, I do so not with an eye toward gaining God's favor; I do it because if I did not, I could not look at myself in the mirror. A moral deed is by definition its own reward. David Hume, a believer, made this point in a very poignant way, when he wrote that the only way to show true respect for God is to act morally while ignoring God's existence.”⁵⁸ Slavoj Zizek’s argument is not an uncommon one especially amongst those who might be considered “nones” which means that they have no specific religious affiliation or do not associate with any one religion. In fact one fifth of America’s population today does not identify with a specific religion, with the statistic rising among young adults under 30 where the figure is closer to one third of the population.⁵⁹ It is important to note that morality is an issue that is important to understanding not just religious freedom, but understanding why our laws operate the way they do. Slavoj Zizek is making a point about the ability to be an atheist or a none and still maintain a moral compass. I think that Slavoj Zizek, however, is making a small, but ultimately important generalization about religion. Religious persons are not just acting morally for fear of God’s wrath or “gaining God’s favor” but because of the principles and lessons of texts and tradition. Many religious texts are made up of parables, and the purpose of parables is to teach people how to act, not just how to gain God’s favor. While this may seem like a small difference, the

⁵⁸ Zizek, "Defenders of the Faith."

⁵⁹ "'Nones' on the Rise," *The Pew Research Center*, October 9, 2012, accessed April 10, 2019, <https://www.pewforum.org/2012/10/09/nones-on-the-rise/>.

consequences of the thought processes are important. Religion deserves to be protected but it also is a part of what deeply informs morality for many. Even when we don't want to admit it, moral principles that are accepted as universal are often found in religious teachings.

There is a possible way of understanding morality without the understanding of Abrahamic faiths. There is an idea that human rights are the world's secular morality. The Bill of Rights is in many ways the United States' way of understanding the concept of human rights and many of the rights guaranteed by the Bill of Rights are found in the Universal Declaration of Human Rights laid out by the United Nation. If human rights are then seen as this secular unifying body, that we see human rights as a universal truth, then how is that not part of religion? Moreover, why is protecting religion so important as part of this universal truth? Does that not mean that the need for religion is a universal truth or merely a required right for all people?

Part of the tension that lies with religion and politics, that makes it something that requires protection, is that it is hard for some to separate their politics from their religion. Religion in some cases is an ethnic or cultural background or intrinsically intertwined with it. While understanding how to be moral without religion is important, the tension often emerges when that is not an option. Many people have religious reasons for the way they vote; and many issues on the political stage are related to religious ideas and customs. When we look at religion as not just a right or not just a practice but as a facet of what makes someone who they are, it is easier to see the many ways that religion is incapable of being removed from politics. Religion is not removed from politics neither in practice by the government nor from the person as citizen.

Separation of church and state is an American ideal. It simply means that government should not rule over religion and that religion should not rule over the government. The

limitation of rule, however, does not mean that the two cannot influence one another. The wall of separation that Jefferson speaks about in his 1801 letter, is the intent of this idea, that neither government nor religion should govern or determine the other.⁶⁰ Instead it is to support the freedom of thought. Religion is uniquely based in thought, not only in action, this means that in order to protect the individual from tyranny, the individual must have freedom of thought, freedom of belief. In order to better understand the separation of church and state, we must understand and except that this not a wall set in stone, but rather a permeable membrane that frees the individual from tyranny.

Church and state division is not the only thing that makes up freedom of religion but it is an important part of protecting it. Protecting the division of church and state or at least attempting to preserve or uphold it means that freedom of religion still has a chance. Though many would argue that we do not have a division between church and state and that we never have. What are the complexities of the individual being citizen and religious person? When this happens, we understand that one person can be linked to two separate moral centers and two different perceptions of how to be.

So when we define religion we define what it means to be religious. We saw this with the Masterpiece Cakeshop case where the Court in effect stated that believing that gay people are sinful or that homosexuality is a sin is a valid religious belief. As we work to define religion or as we attempt to define the citizen, including the LGBT citizens of America. When we try to define America, or define the expression of rights we get caught in grey areas. In the case of the Masterpiece Cakeshop, we have to consider both the rights that the gay couple are guaranteed as

⁶⁰ James Lankford and Russell Moore, "The Real Meaning of the Separation of Church and State," *TIME*, January 16, 2018, <http://time.com/5103677/church-state-separation-religious-freedom/>.

citizens and the rights guaranteed to Phillips as a religious citizen. What grey areas are made, even as we continue to try and make distinctions? The gray areas exist within the individual itself, religion is individual and so is its expression.

When thinking about all these complexities, the question remains, why do we care? How can we manage a pluralistic society when so many Christian, and largely protestant, ideals dictate who we are and how we understand religion? How can we encourage pluralism while protecting moralism? Are morality and religion deeply intertwined? Can or do we need to separate our secular morality and our religious morality?

Religious freedom needs to be defined to answer these questions. I think that the only way to accommodate religious freedom is to allow religion to be defined by the practitioner. But this is impossible. How can we know that someone isn't using religion to get out of crime? What if religion demands us to break the law? Freedom of religion can be defined. Freedom of religion is the ability to practice a religion without restraint. But that definition cannot exist in a society that regulates how one manages children, marriage, schooling, taxes, property or commerce. This inability to both regulate the citizen and respect all religions is the reason I maintain that there is no such thing as freedom of religion.

These decisions are part of the fabric of our new pluralistic and modern society. Modernism is cited as the main reason that religion in the past years has seen a decline. "Modernization theory holds, further, that contact with modern institutions inevitably erodes traditional religious sentiments. Modernization is built upon the notion that people can understand nature and master it through science and technology."⁶¹ This means that religion now

⁶¹ Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's Press, 1987), 4.

has to understand how to interact not just with law but with changing understandings of religion. America's unique religious landscape creates a complex web of culture, religious duty and religious dogma. "Whereas most countries are dominated by a single religious group that may well receive financial support from the state, the American religious pattern has been accurately described as pluralist."⁶² This pluralism has grown out of the intent of our Founding Fathers. We have a nation that encourages freedom of religion and therefore we have more than 35 Christian denominational families, 124 "Other" religions and 127 "New Age" religions.⁶³ Diversity in religious thought contributes to the marketplace of ideas, and through that contribution we are able and, in fact, we must engage with religion in a whole new way. A phenomenal example of this religious diversity is seen at LGBTQ pride marches all over the country every year. In these marches we can see reconciling congregations and religious groups who share in prayer and communion before marching in support of their LGBTQ fellow children of God. And on the other side of the fence, or in this case the police barricade, there are religious groups holding signs that say things like "God Hates Fags," such as the Westboro Baptist Church protests.

There is diversity even within religions, even within denominations. "Not having the luxury of a monopoly, the American churches have deliberately attempted to adapt to social realities and, in the process, have cultivated skills and qualities that almost certainly have contributed to the persistence of religious attachment."⁶⁴ This religious attachment means that religion is no longer just a faith or a belief but it is an identity. Private practice is no longer

⁶² Wald, *Religion and Politics*, 5.

⁶³ "All Religions and Denominations in the US," *ProCon.org*, last modified October 24, 2008, <https://undergod.procon.org/view.resource.php?resourceID=000068>.

⁶⁴ Wald, *Religion and Politics*, 16.

enough, your personhood is now tied to your faith and how you act it out. The danger here then comes when your actions violate the constitution or law.

It is important to note that though true freedom of religion is impossible, that does not mean that it is something that we shouldn't strive for. Religion is something that we choose to fight for because it is so important to so many people. Religion is part of community, cultural, ethnicity, identity and person. Many rights exist in this conundrum, human rights all in some way contradict other rights. The hope is that we have systems that aim to protect as many rights as possible.

Conclusion

There is no such thing as freedom of religion. Even after all of the research, time and thought put into this project, this idea remains a controversial one. Understanding or accepting that there is no such thing as freedom of religion is a difficult thing to do, and I still find myself wanting to hold on to the hope that freedom of religion is working. The concept itself is so deeply ingrained in the identity of the United States. We want it to be true because we act as if it is, and in that action make it a reality. It is easy to do that when the nation exists in such a limited understanding of religion. Throughout this whole project, I have neglected to point to what must be said when talking about religion in the United States. I have mentioned the Christian majority in the United States but I haven't directly said the impact that has on our understanding of religious freedom. The Protestant Christian roots of the nation and the current influence of Christianity make the United States effectively a Christian nation. The United States, therefore, inadvertently has a national religion. Neglecting to point to the fact that we have an indirect national religion and that religion influences every decision that we make would be a great oversight in a discussion about freedom of religion.

Part of the reason that I say there is no such thing as freedom of religion is that when we talk about religion we are often talking about Christianity and not all religion. The exclusionary practice of the United States means that religion is not free but that certain religions are free. Christianity has come to define what most of the country understands as religion. Religion has, in some cases, lost its plurality and come to mean the Christian doctrine. Therefore as long as Christianity is not threatened, there seems to be no problem with the freedom of religion, because there is no active way that religion is being impeded. The inherent paradox that the idea

of freedom of religion creates is the only hindrance to freedom of religion, not the freedom of the American religion.

The public sphere and the private sphere, as discussed in chapter two, are only an issue if the action you do in the public sphere is a threat to the public peace or law, but if your actions are accepted, because Christianity is widely accepted, then you won't run into that problem. The individual may never understand the divide between the public and private practice of religion as long as their public practice keeps the existing status quo and follows the law. If this is the case then there is no need for legal action or for the court's involvement. The issues that come up with public versus private action are shown most greatly when the private practice goes against the perceived ideals of the nation or violate the rights of other persons. The danger that lies with a Christian nation is that the ideas and practices of Christian denominations vary greatly. Not all Christians are against the LGBTQ community, so when people argue that they can discriminate on the basis of faith, they then have to prove what kind of Christian they are. The ambiguity that exists within the Christian faith means that, even in a Christian nation, religion is constantly being redefined. The redefinition or limiting of religion by the courts is, in any case, an act of infringement.

It is impossible to protect the practice of freedom of religion without infringement. This paradox means that freedom of religion is constantly contradicting itself. The paradox that is created traps the individual inside or outside the boundary of religion. While there is a difference between the use of the Free Exercise Clause and the Establishment Clause, they both are dependent on the creation of the boundary between church and state and the definitions that lie in the establishment of religion or the practice of religion. In writing about this need for defining

religion, I challenged myself to create my own barrier and to see what lies within the boundary as I saw fit. I quickly found that my understanding of religion and religious practice was far too broad and could lead to various issues. I hold the firm belief that the individual has the right to make a determination about what their religion is and how they practice it. But this opens up the very discussion about rights that the Masterpiece Cakeshop case engages. Marriage, specifically gay marriage, interracial marriage, polygamy, are all issues that would be both protected and targeted if religious freedom was protecting any religious ideas that someone comes up with. People refusing to vaccinate their children could lead to a new health epidemic. The religiously based choices of a few would then sacrifice the health of the whole. The right to equal education, as established by *Brown v. The Board of Education*, could all be threatened by the religious convictions of a minority. It would be impossible to constantly have to weigh the importance of the broad boundary of religion that I have drawn and the importance of protecting the rights of all citizens.

Throughout history, religion has been used as a license to discriminate. Since the beginning of the United States, religion has been a defense for slavery, for preventing religious suffrage, and for keeping segregation. Recently, the conversation has turned to the LGBTQ community and, unfortunately, Masterpiece Cakeshop was just a piece of the puzzle. All of these instances highlight the dangers of both prioritizing religious freedom over the freedoms of other people and of leaving the definition of religion so open that things, such as hate crimes, could conceivably become forms of religious expression. Violence and hate are things, that unfortunately, we have to separate from religion. We do this by creating the boundary and

defining what is religion and what is not. The definition of religion comes from the courts, we piece together a definition as the court decisions are made.

The Supreme Court is the place that these tensions are highlighted, and the precedent set by their decisions constantly influences the way that the rights of all citizens are recognized. Take my grandfather's understanding of *Engel v. Vitale*, he perceives the fact that state-sanctioned religious prayer and expression is no longer a requirement in schools to be an attack on his religious freedom. But, in reality, it is merely the act of drawing the larger boundary that is needed in order to include everyone and their religion in the United States. The feeling of attack my grandfather has is real, often when you have a privilege, and then it is taken away, it feels like an attack on your rights. But rights are not the same as privilege. The precedent set by *Engel v. Vitale* is not one of discrimination against Christian prayer but rather the advocacy for religious prayer, individual and pluralistic. *Engel v. Vitale* did not limit my grandfather's ability to practice religion but rather, encourages the practice of religion for a myriad of other groups that exist in America. The act of inclusion, the push for plurality, is the thing that reinforces the power of freedom of religion in the United States.

We have established that Christianity operates as America's unofficial religion, but that does not mean that these infringements aren't real. Diversifying these understandings and cultural norms may not mean that we have complete freedom of religion, but it does mean that the boundary that we have drawn can grow a little bit. The goal of checks and balances is to include as many people in our rights a humanly possible, while maintaining restrictions on government. And unfortunately, we have to infringe in order to do this. The act of drawing a larger boundary means to make decisions with respect to the establishment of religion. But as we

have seen, the act of infringing is often the act of practicing religious freedom. Changing the definition of religion, which I have established is inherently infringing on the establishment of religion, is also the way that the state is allowing the practice of religion. So saying that there is no such thing as freedom of religion does not mean that religious freedom isn't practiced but rather that it is practiced in a way that is inherently contradictory.

Plurality is the drawing of the boundary wide enough to include as many religions and practices as possible. The goal is to draw this boundary as inclusive as possible without the violation of other rights, such as the rights to life, liberty and the pursuit of happiness. The search for plurality and the inclusive world that it creates is increasingly important. We have to protect plurality as fiercely as humanly possible because it is our last attempt at dismantling the "license to discriminate." Having more options for religious inclusion means that there are fewer hindrances to the enactment of freedom of religion. When we are able to experience plurality at its finest, or when we are able to envelop all religion in our practice of freedom of religion, we are able to utilize the system of checks and balances with a precedent set that emphasizes all religion and the rights of all. Freedom of religion is part of the unique fabric of the United States, so understanding how it is limited, hindered or simply operates is an important part of understanding how rights operate.

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