ABSTRACT

Freedom *for*, Freedom *from*, and Freedom *of* Religion: An Analysis of Religious Liberty in Israel, France, and the United States

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This thesis analyzes the idea of religious freedom by taking a closer look at how three countries, Israel, France and the United States, have implemented the notion of separation of church and state. I propose that the separation of religion from government is not a binary issue, but has instead produced three main interpretations which we will call freedom *for*, freedom *from*, and freedom *of* religion. Within each of these countries, I examine the history, legislation and judicial decisions that have brought them to their current conceptualization of religious freedom and how these policies affect the daily lives of those living within their domain.

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FREEDOM FOR, FREEDOM FROM AND FREEDOM OF RELIGION: AN ANALYSIS OF RELIGIOUS LIBERTY IN ISRAEL, FRANCE AND THE UNITED STATES

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CHAPTER ONE

Introduction

The concept of separation of church and state is a familiar one to many worldwide. At first glance, it sounds egalitarian, as though this concept serves a worthy and noble cause in the world. It seems as though separation of church and state allows people to pursue the lofty goal of freedom of religion in their respective nations. But to what extent? Exactly how separate do law and religion need to be to ensure a balance which would grant religious freedom? On the surface, it may appear straightforward to ask that one's personal beliefs and religion be separated from the government's overall function. After all, what does an individual's practice of worshipping Allah, Buddha, or Jesus have to do with a government's core functions like trash pick-up, street sweeping, or the defense of a nation? In reality, however, the separation of church and state in both theory and practice has proven to be complex. Indeed, the role of religion and the way laws are enacted and upheld have long been intertwined and challenged. History is indeed littered with examples of these entanglements. The intricacy of this idea is also evidenced by the multitude of unique interpretations presented by nations all around the globe (Sullivan 1). The relationship between religion and the state is a central aspect of government that each country must define.

The purpose of this thesis is to go beyond mere superficial analysis of separation of church and state by examining what different interpretations of this idea look like in reality and to what extent these understandings protect an individual's right to freely

practice their own religion. My underlying goal with this thesis project addresses what Sullivan described as adding "needed texture to the glibness of much talked about religious freedom," delving deeper into the concept and offering an analysis of the application as seen across three very different countries: Israel, France, and the United States (7). Finally, it is my hope that the project presents a call to various audiences and readers to develop a more reasoned and nuanced understanding of the concept of separation of church and state.

To do so, I will first delve into the origins of the concept. I will review the language used to ascribe the origins of the ideas of religious toleration and secular government. I will discuss the conditions surrounding the origins of the concept, and illustrate how the specific investigation of the origin language offers a different perspective from what many may assume. Next, I will compare and contrast three governments where the concept of separation of church and state has been applied in different methods, and, indeed, with differing levels of success. Here I offer the contrasts between France, Israel and the United States and their understanding and implementation of separation of church and state and the religious liberty that is granted. As this analysis relies on the use of language I will demonstrate how the similarities and differences between France, Israel and the United States on this issue can be understood as granting their citizens freedom *from, for, and of* religion. Let us now turn to an overview of the historical relationship between church and state in order to fully understand the context in which each of these countries established their understandings of religion and government.

One of the earliest legal documents establishing a right to freely practice one's religion is the Edict of Milan issued in February 313 (Sordi 45). Western Roman Emperor Constantine and Emperor Licinius jointly wrote this edict changing the Roman Empire's policy on religion by decriminalizing Christianity and implementing a message of religious toleration throughout the Roman Empire. However, this declaration was not written with purely virtuous intentions, recognizing the virtue in all religious traditions. Instead, it is important to note that it is "the work of a mind formed entirely in the antique mold in the sense that he [Emperor Constantine] is convinced of the intimate connection between imperial welfare and divine power or favor. Indeed, it is probably due to this conviction and the desire to profit by it that the author grants to the Christian and other faiths the free profession and exercise of their religion" (Knipfing 500). Although this document remains an important step towards providing religious freedom, it does not truly reflect the ideas of toleration that are present in our modern discourse.

Although there would be movements and different laws passed over the next millennium, the next historical moment that holds importance for the timeline I am considering is the Magna Carta. Written in 1215, the Magna Carta marks a significant movement towards recognizing not only that the government ought to be free from religion, but that religion ought to be free from government as well (Howard 34). Article One of the Magna Carta, which is written as a list of grievances against King John, states: "First that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights

undiminished, and its liberties unimpaired." Declaring that the English Church "shall be free" was an incredibly bold statement in the context of the thirteenth century, as religion and politics were so intertwined that some scholars even say England was more "theocratic than democratic" (Ambler 50). In addition to providing the framework for the United States' statements on religious freedom, the Magna Carta reflects many features of American government, such as the theories of representative government, rule of law, and judicial review. Because of these aspects, the Magna Carta has remained an important aspect of Western culture as it explicitly laid out rights, such as religious liberty, that continue to be cherished.

Several hundred years after the Magna Carta, another key event related to the development of freedom of religion occurred with the publication of the Anabaptist's Schleitheim Confession in Switzerland in 1517. This confession serves as the most representative statement of Anabaptist principles and references two separate orders within the community: the state and the church, and advocates for greater separation between the two (Harder 64). The idea of these two separate spheres, as mentioned in the Schleitheim Confession, continued to percolate throughout societies in the sixteenth century, but did not have a definitive declaration until 1689 with John Locke's *Letter Concerning Toleration.*

In his *Letter Concerning Toleration,* John Locke advocates for separation of church and state by dividing interests into two distinct categories: civil interests and care of the soul. Civil, external interests include life, liberty, property, and the general welfare of citizens. Matters of the soul, or internal interests, involve salvation. His central

conclusion is that the government ought not involve itself in care of souls for several reasons. First, God himself does not appoint the government and does not say that they ought to be involved. Second, genuine belief is necessary for salvation, and governmental regulations cannot coerce this candid faith, but only obedience. Third, even if this coercion could persuade someone to believe, there is no way to ensure genuine salvation because governmental entities are not trustworthy judges of religious truth (Locke). This document serves as the foundation for the ideas that are familiar to many today, such as the religion clauses in the First Amendment of the United States Constitution (Walters 63).

Defining Freedom for, from and of Religion

With the foundation of these historical documents showing the evolution of the relationship between church and state on a broad scale, I will now discuss how these ideas have manifested themselves into laws and policies around the globe. Specifically, three main understandings of this relationship have come into place: freedom *for*, freedom *from* and freedom *of* religion.

Freedom for Religion

Freedom for religion is the version of religious freedom that keeps the church and state most closely intertwined. Indeed, this understanding is the view that "neither the ends nor the means of political life can be grasped apart from religion. Furthering the true religion is the end; the truths of the true religion are the ground; and the fruit of the true

religion is the means of accomplishing that end" (Zuckert). Therefore, in this view, religion is an integral part of all life that cannot be easily separated from certain actions. This goes against the ideas of John Locke, where he proposes separating all interests into either external or internal matters. Instead, the freedom for religion understanding views religion as something that is inextricably connected to those external interests. Advocates of freedom for religion believe that instead of the government staying out of religious topics (like supporters of freedom *of* religion, discussed below), part of the responsibility of the state is to encourage and facilitate the religious functions and commitments of its citizens. Here the role of the state is to identify and protect broad and pluralistic religious interests, but to stop short of favoring one religion over another. In essence, this view allows governmental preference for religion over irreligion, but not for one specific faith over another.

Chapter two of this thesis will demonstrate that, in general, Israeli policy most reflects this understanding of religious freedom. Israel is called a "Jewish, democratic State" (Liebman 13). In chapter two, I will examine what exactly is meant by this term and how closely is it connected to the Jewish religious tradition. Further, Israel allows for religion to influence its political sphere through religious political parties, funding of religious institutions, and specially appointed religious courts. The Israeli government has both Rabbinical Courts and Shari'a Courts, which are official government entities with legal authority that rule according to laws outlined in the Jewish and Muslim religious traditions, respectively (Shetreet). In these ways, I will establish that the relationship between church and state in Israel fits the freedom *for* religion model.

Freedom from Religion

Freedom from religion is essentially the antithesis of freedom for religion. Instead of viewing religion as a fundamental part of any functioning government, it views religion as an element of antiquity and promotes strict separation between the church and the state. The defining attribute of this description is that the separation between religion and government is to go so far as to allow for interference with a citizen's right to freely practice their own religion. It is important to note that in the freedom *from* standpoint the government is not hostile to religion, it is merely placing as much distance between government and religion as possible. Michael Zuckert described this view by saying the freedom from stance is "strongly separationist in a way that would constrain religion. More purely than the 'freedom of' position, adherents of 'freedom from' posit the ground and purpose of the state in completely nonreligious terms. The state has no religious tasks whatsoever." In this sense, the state is to treat its citizens as equal with disregard to religious conviction, because considering an individual or group's religious beliefs or lack thereof as a factor is completely irrelevant for the business of the state, which is entirely secular.

Chapter three of this thesis will demonstrate that, in general, France promotes this stance, advocating for strict separation between church and state and granting its citizens freedom from religion. France is an explicitly secular republic, promoting a secular policy called "Laïcité" (Arréat). In accordance with laïcité, laws have been passed dictating when and where individuals may openly express their religion. Limits have

been placed on government workers and those attending public schools, for example, in order to keep these religious convictions completely separate from government functions (Daly). By examining these laws and their effects on those living within France, I will demonstrate that France has established an understanding of religion that reflects the freedom *from* religion experience.

Freedom of Religion

Of these three interpretations that have been set forth, the most well-known understanding is freedom of religion. Freedom of religion most strongly resembles the ideas put forward in John Locke's *Letter Concerning Toleration,* that is to say that it presents a sort of dualism and also uses much of the same reasoning as Locke (Zuckert). With freedom of religion, the public has the freedom to practice their religion how they choose, without government coercion or pressure. This includes the freedom not to practice a religion if an individual chooses. At the core of this view is the notion that true religious practice must not be coerced in order for it to be meaningful, and that the state has no legitimate concern with religious belief or practice *per se*. That second part particularly captures freedom of religion's chief policy implication: "the state has no business either prescribing or proscribing any item of religious belief or practice so far as these are religious" (Zuckert). The essence of this view promotes liberalism. Tolerance and freedom from governmental intrusion are the central ideas that form this balanced view of the relationship between law and religion. While this view is the most familiar, it is also, in practice, the most challenging to implement. In order to align with the

"freedom of" understanding, a government must refrain from interacting with religion in a way that might constitute an established religion, while also refraining from limiting a citizen's right to exercise their religion in whatever ways possible.

Chapter four of this thesis will demonstrate that, in general, the United States' policy most closely reflects this version of religious freedom, as was the intent of the framers of the United States Constitution based on the First Amendment (Walpin 187). The First Amendment of the U.S. Constitution reads that "Congress shall make no law respecting the establishment of a religion or prohibiting the free exercise thereof." In this short phrase, the framers have excellently illustrated the ideas of freedom *of* religion. The United States government must both protect the free exercise of religion and avoid becoming intertwined with religion in a manner that could appear as an establishment. The implementation of these clauses has sparked an abundance of debate throughout the country's history. From congressional legislation, to Supreme Court decisions, to local policies regarding state benefits, citizens across the U.S. have wrestled with this interpretation of religious freedom and sought to find the best way to make it a reality. In chapter four of this thesis, I will look at how exactly this has been accomplished, and demonstrate why the United States exemplifies freedom *of* religion.

CHAPTER TWO

Israel: Freedom *for* Religion

In this chapter, I will discuss the relationship between church and state in Israel. I will begin by discussing what is meant by the term "Jewish State," then examine specific examples of the role religion plays in the Israeli government and the freedoms provided to its citizens. In Israel, the answer to the question of the relationship between church and state is unlike any other (Englard 185). Due to the nation's tumultuous history with roots reaching back three millennia, its lack of a constitution, and various other factors, religion in Israel is an understandably complex issue. To put it into context, it holds a unique place in history in that no other nation existed, ceased to exist, and then was created again in this manner ("The Creation of Israel" 232). This nation was reborn due to their religion and it is now known as a "Jewish State" (Liebman 13). As a result, Israel has a unique understanding of the relationship between church and state. It describes itself as a Jewish and democratic state which results in its citizens experiencing freedom *for* religion.

Israel as a "Jewish State"

In order to fully comprehend the relationship between church and state in Israel, it is necessary to first examine the meaning behind the idea of this nation being a "Jewish State." Many different conclusions can be drawn from hearing those two words. It could mean Jewish in the religious sense, the same way one would understand a "Christian

State" or a "Muslim State." Or it could have a meaning related to demographics, the same way saying "Chinese State," a "Brazilian State" or "French State" would (Liebman 13). In reality, it is best to understand Israel's self-definition as a Jewish State as a combination of both of these interpretations. In their work, *The Constitutional Law of the State of Israel,* Professors Amnon Rubinstein and Barak Medina write that "Israel is a Jewish State (or the State of the Jews or the State of the Jewish people) in the sense that it is the political framework in which the right of the Jewish people to self-determination materializes" (Rubinstein 51). The actual nation of Israel is a political entity and indeed a secular state.

However, the Jewish people know that the state of Israel was formed with the purpose of providing a home for a religious community in addition to being an ethnic and cultural nation (Englard 53). The close ties between the national identity of the Israeli people and the Jewish religious tradition can be seen in the modern political framework of the nation. Various political parties are created based on how people identify themselves in terms of their religion, such as "United Torah Judaism" or the "United Right" which tend to be more observant of the Jewish faith, versus the "Labor" party, which tends to be more secular (Schnall). In other nations, such as most European countries and the United States, any political party with blatantly religious character would not be permitted. In this sense, religion affects Israeli politics and governmental action much more than is typical for a nation without an established religion (Rubinstein). Thus, it can be concluded that, in theory, the Jewish state refers strictly to a demographic identity, but in practice, the religious interpretations of this term also ring true.

To further examine the character of the term "Jewish" in this context, it is helpful to look at the Law of Return. This law has served as the vessel through which the Israeli government has attempted to bring clarification to what is meant by the word "Jewish" in the phrase "Jewish State," by looking at the question of "Who is a Jew?" The Law of Return proclaims the right of every Jewish person to immigrate to Israel and receive Israeli citizenship, echoing the history of the nation built to provide a home for a people without a land (Edelman 91). This law serves as a foundation in Israeli jurisprudence, as it classifies who is legally viewed as a citizen, providing necessary elaboration on the determination of who legally classifies as a Jew, and whether this categorization is secular or religious in nature.

While there is no standard definition of "Jewish" within this law or within a constitution, making a comprehensive solution far from available, the law has nevertheless served as an important source of discussion on this topic. The complexity of this debate rests in several unique aspects of Israeli government. First, Israel does not have a constitution, leaving much power up to both the Knesset (the Israeli parliament) and the judiciary to determine who classifies as a citizen of the nation, therefore regulating the extent of the protection of religious freedoms.

Second, on this specific issue, the Supreme Court of Israel has issued rulings that are difficult to reconcile. This topic arrived at the Supreme Court in a case named *Shalit v. Ministry of the Interior*, regarding a Jewish navy officer and his wife, who was not Jewish. Both individuals were atheists. Despite this, the couple desired to register their children as Jewish. Their claim was rejected by the Israeli Registration Office until the

Israeli Supreme Court granted their petition and agreed that the children ought to be registered as Jewish. The Court's reasoning showed that Jewish nationality rests on social and cultural attachments, and not solely religious ones. However, in 1962, in the case of *Rufeisen v. Ministry of the Interior*, the Israeli Supreme Court refused to grant Rufesien citizenship under the Law of Return. Rufeisen had been born of Jewish parents but has since converted to Christianity and become a priest. The Court reasoned that a Jew who has converted to a different religion would no longer be considered Jewish by a typical individual on the street.

In light of these rulings, an amendment was made to the law declaring, "Jew means a person who was born of a Jewish mother or who has become converted to Judaism and who is not a member of another religion" (Lerner). While this has been amended due to new DNA evidence proving paternal connection, the essence of the law remains in effect. This definition supports the notion that this identity is both ethnic and religious and cannot be easily defined as one group or the other.

How Israel provides Freedom for Religion

In accordance with its definition as a secular state, Israel provides religious freedom to the extent that every individual has the freedom to practice whatever religion he might choose. The roots of the secular state identity are found in Israel's Declaration of Independence which proposed that Israel would "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture." Although

this was not originally written as a legal text, in 1994 it was codified into law alongside the passage of the Basic Law: Freedom of Occupation to provide that fundamental rights shall be safeguarded in line with "the spirit of the principles of the Declaration of Independence." However, even then, this Basic Law did not explicitly mention any guarantees of religious liberty nor did the Knesset pass any legislation in response guaranteeing this freedom. This shows the tension between the respect towards all religions demonstrated by the Israeli government and its inherent preference towards Judaism–which is at least, understandable and at most, necessary due to its historical origins. Therefore, while freedom of conscience is indeed protected, the extent of this liberty remains rather ambiguous.

Although no legislation has been passed explicitly protecting the fundamental right of religious freedom, by looking at the current situation of various religious groups in Israel, one can get some clarification, seeing that there is a freedom of religion in a general sense. Israel has a system of officially recognized religious groups including the Jews, the Druze, the Baha'i, and the Evangelical Episcopal Church. These recognized groups receive financial support for their religious services and sites, among other benefits. However, even non-recognized religious groups possess liberty to freely practice their religion, establish religious institutions, and even enjoy certain tax benefits (Lerner). With Israel's official recognition of religious groups outside of Judaism, it is evident that freedom of conscience is protected for all religions in Israel.

While certain, non-recognized groups are not receiving the same benefits as those that are recognized, it is important to note that these advantages are not necessary for the

practice of their religion. Indeed, what is provided to officially recognized groups would not even be considered in most countries for fear of resembling the establishment of any religion. The financial support given to these religious institutions by the state is what differentiates Israel as a nation that demonstrates freedom *for* religion. The groups that are not recognized and are not receiving financial benefits still enjoy the same liberties that are given to religious institutions in a typical nation that does not have an established religion (Englard 193). The benefits granted to officially recognized groups establish that Israel views religion itself as an inherently good item that ought to be encouraged.

The future progression of religious liberty in Israel is ambiguous and difficult to define. In the book, *Secularism on the Edge: Rethinking Church-State Relations in the United States, France, and Israel,* the authors write that:

> To militant secularists, Israel appears to be turning more and more religious, while to the religious factions, Israelis are more and more secular! The ultra-Orthodox still view Zionism as a corrupt ideology and Israel as a sinful state despite the fact that they receive concessions from the state that no other democratic country in the world would make (Secularism).

One example that supports the view that Israel is moving towards a less religious, more secular political position is the government's laws pertaining to the observance of the Sabbath. Since Israel's founding in 1948, it has been the status quo that businesses close from sundown Friday to sunset Saturday in observation of the Jewish Sabbath. In 2017, the Supreme Court of Israel upheld local bylaws allowing 160 grocery and convenience stores to remain open on the Jewish Sabbath, marking a landmark shift in policy. Israeli politician, Elazar Stern, said that in this instance the government had once again forced the High Court to decide on matters of the character of Israel as a Jewish *and* democratic

state, stating that "It is a good thing there are judges in Israel" (Lior). Up until this recent ruling, the Sabbath, with an obvious religious foundation, remained an obligatory day of rest mandating the closing of businesses, activities, and services.

While this decision marked a large step in the relationship between church and state in Israel, it is also important to note its narrow application. This specific case was justified by citing the proportionality of the laws, looking at the individual's rights, character, and interests in Tel Aviv, where the bylaws originated (Lior). Conservative figures in Israel, such as Interior Minister Aryeh Deri, considered this decision "a serious blow to the holy Shabbat and the character of the Jewish people" (Staff). Meanwhile, more progressive leaders, such as Zehva Galon, the leader of Israel's Meretz Party, say this ruling marks an "important ratification of the authority of Tel Aviv's residents to decide by themselves in a democratic way and of the authority of the municipality to pass bylaws in response" (Staff). Nevertheless, because of its narrow application, many secularists are disappointed that the decision did not go further in disposing of these religion-based laws from society in Israel (Lior). By looking at this example, we can see how both the religious zealots and secularists can be disappointed, supporting the statement from *Secularism on the Edge.* While this provides an exception from the implementation of laws originating strictly from the Jewish tradition, it is also quite narrowly tailored and does not guarantee a broad protection of religious freedom for those who wish to perform business on the Sabbath.

Having discussed the freedom *of* religion provided, it is essential to examine the fact that Israeli citizens are not provided with freedom *from* religion. The Israeli legal

system is fraught with traditions that can be explained only by its close ties to the Jewish religion. A prominent example of this is the establishment of Rabbinate. The Rabbinate and religious courts are official governmental agencies with legal authority in Israel. The Rabbinical Courts have specially charged judicial functions laid down by state law, which include exclusive jurisdiction over marriages. The decisions of the courts are subject to judicial review by the Supreme Court to ensure they remain within the proper use of its functions. These courts are also the supreme religious authority for Judaism in Israel (Shetreet). By looking at these facts, it is clear that Israel is not an entirely secular state in that it allows religion to closely interact with government functions. The establishment of a religious body such as this, which rules on the basis of *Halakha*, as an official government agency proves that the Jewish religion is deeply intertwined in the political system of Israel. While citizens have the freedom to believe whatever they choose and exercise those beliefs, it is evident that their lives will remain greatly influenced by the Jewish religious traditions.

An example of how the country's close association with religion greatly influences the lives of the citizenry is the Israeli system of marriage. There is no civil marriage in Israel, instead individuals may choose between a religious marriage or simply a civil union (Cortellessa). Even then, religious marriages are only considered legal if they take place within the confines of a recognized religious institution and follow the guidelines of their respective religious law. So, Jews, Muslims, Druze, and Christians may all legally marry within their religion. It is important to note that these marriages and family issues are handled within religious, government-established courts, like the

Rabbinical Courts. In addition to these Jewish courts, there also exists Islamic courts known as Sharia Courts, Druze Courts, and Christian Courts (Shetreet). Each of these courts have control over issues of marriage and divorce within their religious population. If, however, an individual does not belong to a similar religious group with its own religious hierarchy or chooses an interfaith marriage, it will not be legally recognized (Cortellessa).

In his article "State and Religion: Funding of Religious Institutions - The Case of Israel in Comparative Perspective," Shimon Shetreet criticizes Israel's strong connection between church and state. On the topic of marriage, he writes "The legislature's choice of an exclusive form of religious marriage violates freedom of marriage, and also freedom of religion, because it obliges the couple to get the services of a religious agency in its most intimate hour" (Shetreet). Because of this system, every individual is subject to religious authority in matters of marriage and divorce, even against his will. This constitutes an absence of freedom *from* religion, placing all citizens under the confines of religious institutions and prohibiting certain marital rights to those who do not fall within the boundaries of a recognized religious institution. In Israel, it remains true that within the marriage institutions, citizens' freedom of conscience is protected as they are not forced to believe or even act in a manner consistent with these religious laws. However, this disagreement may indeed cause them to sacrifice certain personal rights.

A second example demonstrating that Israel presents an experience of religious freedom that most closely correlates to a freedom *for* religion experience is the controversy surrounding the Temple Mount—a site holy to Muslims, Jews and

Christians. As a sacred place for three of the world's major religions, the site is administered by the Muslim Waqf, Israeli, and Jewish laws. While entry to the site is allowed for individuals of all religions, Christian and Jewish prayer or displays of religion are strictly prohibited (Ring). Thousands of Muslims pray on the Mount each Friday, but the same right is not granted to those identifying with other religions. Certain restrictions regarding the site also apply specifically to Jews under *Halakha,* due to the exceptionally unique nature of the Temple.

The Supreme Court dealt with the issue and a sort of *modus vivendi* was achieved, permitting universal access but prohibiting public prayers by Jews. In 1990, a Commission of Investigation into the events that took place on the Mount on October 8 submitted a report highlighting the special sensitivity of this issue" (Lerner). Restrictions such as this would be viewed as unequal in most western nations, as they grant different protections to individuals of differing religions. On the other hand, it is also true that other nations are not tasked with the same role of overseeing a site as sacred as the Temple Mount and all of its complex history and significance to so many of the world inhabitants. With this context in mind, the regulations may be more reasonable and demonstrate that religion in Israel cannot be easily compared to other nations around the world.

In general, religious freedoms and basic rights are protected in Israel. The religious rights of various institutions are respected and individuals are provided with the liberty to choose what they believe and act in accordance with their choice. Nonetheless, there is not a complete separation between church and state in Israel. Due to this

connection between church and state is it possible that outsiders may view some of the norms, laws, or cultural practices as restrictive in nature. This leaves us with a country where freedom from religion is not secured, while absolute religious liberty is not fully present. While the Israeli government is not within the bounds of the general view of religious liberty, as described by documents such as the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the unparalleled history of this "Jewish and democratic" nation suggest that it is a country so unique that adherence with these views may not be feasible. Because of this, Israel exists as a country that provides freedom for religion.

CHAPTER THREE

France: Freedom *from* Religion

In this chapter, I will discuss the relationship between church and state in France. I will begin by providing background on how religion has interacted with the government throughout the country's history, then examine the current policies in France and their effects. France is an explicitly secular country, that is to say that the government and the church are to be completely dissociated in all respects. Article 1 of the French constitution reads "*La France est une République indivisible, laïque, démocratique et sociale*," formally stating that France is a secular republic. This constitutional secularism has been given the name "*Laïcité*" (Daly). But, the idea of laïcité goes far beyond the simple prevention of an established state church. Indeed, while most western nations insist on separation of church and state, France does so "more militantly than any other," which will be demonstrated in this chapter (Astier). As a result of this policy of laïcité and the adoption of laws in strict accordance with it, France has created a society that provides its citizens freedom *from* religion.

Religious Foundations in France

French secularism comes from a long history of a turbulent relationship between government and religion. In its earliest stages, before the Ancien Régime, the French Monarchy maintained a close relationship with the Catholic Church and was even

considered “the eldest daughter of the Church” (Arréat). The Catholic Church played a significant role in the daily lives of French citizens ranging from owning large swaths of land, a significant role in education and control of schools, even reaching as far as hospitals and elements of health care. The Catholic Church’s role in the lives of citizens continued like this for hundreds of years, until Protestant ideas were introduced by Martin Luther in France in the early 1500s, and tensions began to grow (Horne 77). In 1535, Catholic authorities officially declared the teachings of Luther as “heresy,” opening up a wave of persecution that culminated in the French Wars of Religion, which took place at the end of the 1500s (Daly).

In these wars, millions of lives were lost as the powerful French Catholics battled the Protestants, called Huguenots, over the ideas of toleration and religious diversity (Horne 84). By 1584, Henry IV of France became the presumptive heir of the French throne, but could not assume his title due to his religious status as a Huguenot. Eventually, to end the conflict, King Henry IV converted to Catholicism in order to assume his title, famously declaring “Paris is well worth a Mass” (Horne 106). Once in power, Henry IV issued the Edict of Nantes. This provided that Huguenots would receive basic rights of freedom of conscience, fighting against their persecution and opening the door for conversations regarding tolerance and secularism in France for the first time (Joutard). Unfortunately, this approach did not last long, as the Edict of Nantes was quickly revoked in 1685**.** Despite this, the Edict of Nantes still remains an important aspect of French history, as it provided true religious freedom for the first time (Rothrock). After the Edict’s revocation, religious freedom was not again protected until

the time of the French Revolution with the enactment of the Declaration of the Rights of Man and Citizen of 1789, which has remained intact to this day, being part of the Constitution of France's Fifth Republic (Outram).

The deep, complex history of France has certainly shaped its policies regarding religion today. To go from a government so deeply attached to religion that it provoked wars to, now, a completely secular state, is a massive change. While this turbulent history is a feature that sets France apart from the other two countries discussed in this thesis, not every aspect of the country has undergone such immense change. Indeed, the one principle that has remained central throughout French history is the idea of community, known in France as, *fraternité* (Féher). The French history of republicanism promotes a sense of unity among its citizens, whether it be through the unified religion of Catholicism or through strict secularism in the public sphere. Either way, it is clear that the French mindset prioritizes full and equal participation in the public sphere on the basis of shared values and allegiances to a larger whole—the state instead of a personal religion.

Here we see a distinct difference in the approach of France to that of the policies enacted by the United States. The U.S. seems to pride itself on the promotion of individual rights, even when in the face of sacrificing a sense of communal unity. The United States also has the separation of church and state, however, in America the emphasis is on government protection of personal religious rights. In the upcoming chapter I will provide greater details and contextual information supporting the approach to religion in the U.S., however, here it is important to highlight the difference between

the U.S. and France, because in France there is a much stronger separation in order to promote security and community. Here we see that although France has held differing views on the interaction between church and state throughout time, the nation has continually emphasized a sense of *fraternité* that is distinctive from the U.S. and other nations that exercise a separation of church and state. In the following section I highlight the foundations of *fraternité* and how it relates to laïcité.

Practical Effects of Laïcité

Important Legislation

Laïcité was implemented in France with the passage of the 1905 Law on the Separation of Churches and State, which officially established France as a secular state. The law was centered on the principles of state neutrality towards religion, religious freedom for its citizens, and defining the public powers of the church. While this serves as the foundational law that officially established laïcité in the French government, the laws passed following this have shown how this policy has been practically implemented in France. The two most prominent practical laws that impact the daily lives of those in France today were passed in 2004 and 2010.

First, the French Law on Secularity and Conspicuous Religious Symbols in Schools, passed in 2004, prohibits all religious signs or symbols from being worn in public primary and secondary schools. The items prohibited by this law are, among others, yarmulkes worn by Jewish students, religious coverings worn by Muslims, and cross necklaces worn by Christians. It is important to note that this law only applies to a

subsection of schools within France. First, it is applicable only in public schools, meaning that private or religious schools may still operate with full expression of religious affiliation. Second, this law only applies to primary and secondary levels of schooling. The primary and secondary schools in France encompass education from ages as young two through eighteen or whenever an individual has finished lycée, which is the French equivalent of high school in the United States (Daly). These distinctions are important to understand for the justification and reasoning of this law, which will be discussed later in this chapter.

Next, the Law of 2010 prohibits covering one's face in any public space. Specifically, this means that a person cannot cover the face with the aid of a mask, a hood, or an Islamic veil. The religious coverings that were made illegal in this law include the burqa, which completely hides the body, including the eyes behind a mesh fabric, and the niqab, which covers the face to show only the eyes. Here, it is not the religious sign that is challenged by the legislature, but rather the concealment of the face that results from it. The hijab, which masks the hair but leaves the face shown, therefore does not fall within the scope of this measure (Korteweg). While the law of 2010 has an explicit security-oriented motivation, the fact remains that effects of this law prohibit Muslim women from practicing an element of their religion. Technically speaking, it is a law that stands by the principle of equality because it holds all citizens, and even foreign tourists, to the same standard–no one has the right to cover his or her face in a public place. But, unfortunately, this still has only a great effect on Muslim citizens and their religious freedom.

In the following pages I will discuss the Law from 2010 and how the passage and enactment of that law has impacted the Muslim population in France as well as the responses from France's two most recent Presidents in order to illuminate how the law operates as an example of freedom *from* religion in particular ways. Next, I will move to a discussion of the Law from 2004. Here I consider how the rationale for banning religious symbols, particularly in the educational setting, shows France's laws to be exemplars of freedom *from* religion in these two occasions.

The Law of 2010

In France, Islam is the second most popular religion (André). However, this Muslim majority has not always been present in the country. France has recently seen an increased influx of Muslim immigrants crossing its borders. With the new arrival of Muslim immigrants in recent years, primarily coming from Arab nations, the French vision of secularism has been called into question. The effects of recent immigration across several countries in Europe has had a considerable impact on the relationship between the church and the state specifically within France. As such, France is in a challenging situation in responding to Muslim immigrants regarding how to best protect their freedom of religion, while maintaining both the strong secular nature of the republic and its national security.

With the passage of the 2010 law, the French parliament was forced to confront this question head-on. First, it is important to reiterate that this law prohibits only certain types of religious face coverings, which are worn by a minority of Muslim women within

France. Further, according to Islamic legal tradition, the women wearing the prohibited coverings are typically fundamentalists ("Burqa"). The effect of this law on Muslim women was taken into account, as it undeniably influences the practice of their religion in their daily lives. However, the parliament also considered the stated motivation of this law, which was safety-oriented and purely secular in nature (Arréat). The concerns that motivated this law largely began with statements from French President Nicolas Sarkozy in June 2009, declaring that religious face coverings were "not welcome" in France, reasoning that a law banning these veils would uphold France's secular principles and would enforce the ideals France has "of a woman's dignity" (Ismail). After these bold statements, the French parliament began drafting the bill that has now become the famous Law of 2010.

Meanwhile, the parliamentary debates on this law reveal that its passage in essence came down to national security concerns with individuals covering their face in public spaces (Ismail). There have been several recent attacks the Islamic extremist groups have taken credit for in France: Charlie Hebdo, the attacks in Paris in 2015, the attack during Bastille Day in Nice, etc. The attack on the headquarters of the French satirical newspaper, Charlie Hebdo is particularly relevant here. Charlie Hebdo is known as being extremely secularist, frequently mocking Christianity, Judaism, and Islam. In response to content depicting the prophet Muhammed in degrading poses, al-Qaeda even added Charlie Hebdo's director of publication to their most wanted list (Leveque). Eventually, this tension culminated in 2015 with a shootout at its headquarters in Paris. As a result of these incidents and others like it, the French government was forced to

make a choice on how to respond. In a speech on the theme of democracy in the face of terrorism, former French President François Hollande declared that he wanted to defend "the idea of France" and not change any fundamental principles because of terrorism (Terrorism). In saying this, Hollande took a strong position, advocating to remain consistent with the ideas of religious freedom for all individuals, even in the face of terrorism. Further, in this statement Hollande reminds France of the importance of the principle of fraternité, which is inextricable from the "idea of France" mentioned in his statement.

Current French President Emmanuel Macron's response or lack thereof to recent attacks, specifically in the wake of the incident in Trèbes, has been the subject of much controversy. In March, 2018, a young man hijacked a car in Trèbes, killing the passengers and shooting at four police officers in the act. He then proceeded to enter a supermarket, leaving multiple casualties along his way, where he held at least one individual hostage and demanded the release of a known terrorist in return (Dewan). To end this situation, French policeman Arnaud Beltrame voluntarily traded places with one of the civilian hostages. Unfortunately, his choice to trade places resulted in his death (Dewan). Macron's response to this attack applauded the heroism of Beltrame, but remained silent on how this incident would affect French policy or what changes would be taken to prevent similar events from occurring in the future (Rubin). The opposition says Macron's silence is because of his ignorance about the matter, while others say that he is a man of action, not words, and that his actions show his character (Pietralunga).

Over the course of his time in public office Emmanuel Macron has been discreet on the broad topic of religion in France. He is equally quiet on his own opinions regarding the question of the place of Islam in France and its links with the Republic. It is indeed a sensitive subject that poses many difficult questions. Because of these reasons, Macron chose to leave these laws in place to protect the security of France, although they may harm individual rights (Terrorism).

The Law of 2004

Similarly, there is a neutral, beneficial motivation for the 2004 law that specifically pertains to religious symbols in public schools. The state wants children to have autonomy so that they can distance themselves from repressive families or teachers, giving them the freedom to choose their own religious beliefs (Jamet). The ban on wearing religious paraphernalia allows these children to discover themselves at school, without the influence of others' opinions. Because of this, there are tougher laws in schools that deal with the wearing of religious symbols. School is the only place where this expression of religion is prohibited. The law of March 2004 on religious signs in schools stipulates that "the wearing of signs or clothing by which pupils openly manifest a religious affiliation such as the Islamic veil, whatever the name given to it, the kippah or a cross of in an obvious dimension is forbidden" (Jamet). The prohibition of wearing religious symbols also applies to staff, teachers, and administration officials throughout the educational system.

Further evidence for this motivation is that "the law does not call into question the right of pupils to wear discrete religious signs," but only those that are clearly visible to other students (Jamet). This serves as evidence that the law was passed without malicious intent, but merely in an attempt to preserve the independence of young students. Indeed, the French government is, through this law, giving students freedom from religious influence, which ties back to the central French idea of *fraternité.* Although students may internally disagree with their colleagues on matters of religion, outward disagreement leads to a lack of unity and may affect the independent thoughts of another. This law is the quintessential example of how a government embodied the idea of providing its citizens freedom *from* religion.

Conclusion

Despite these commendable motives, the fact remains that a limitation is placed on French citizens with the enactment of these laws. Eoin Daly writes of this issue and how its related to the broader ideas of laïcité, saying:

> The assumed contrast between French-republican secularism and Anglo-American liberalism has therefore centered both on laïcité's perceived preclusion of any legal classifications or criteria constructed directly on religious grounds, and its attendant presumption that equal citizenship in the secular republic precludes the exemption of religiously-motivated activities from secular, generally applicable laws...precluding the use of religious beliefs as a basis with which to gain exemption from the rules governing the relationship between private individuals and public authorities (Daly).

In the American mindset, an individual's right to freely express his religion ought to be respected in as many instances as possible. There are exceptions, as no rights are absolute, but, in general, the First Amendment's guarantee to freely exercise one's

religion is highly prioritized. In France, this is not the case. There are many more exceptions for when a person may not express his religion as he or she chooses to do because of the prioritization of other factors such as national security or the autonomy of students.

The laws of both 2004 and 2010 show that the French idea of Laïcité, in practice, grants its citizens freedom *from* religion. The church-state relationship in France is rooted in an expansive history, going from an explicitly Catholic nation in the past to currently promoting strict secularism. A specific example that shows the intricacies of laïcité is the relationship between the French government and the vast population of Muslim individuals.

The French government has reacted to recent terror incidents with laws that limit the freedom of certain Muslim women in the name of security, protecting the public from religious extremism. However, the leaders of France hope to maintain the "idea of France" by deciding how to better respond to this dangerous situation. In addition to security concerns, wearing an Islamic veil represents other concerns for the French. Many believe that it is a sign of oppression of women, and they refuse to support a right to wear a niqab or a burqa because they do not support the idea behind it. Additionally, in schools, the French strive for greater autonomy for children, and achieve this by prohibiting religious symbols from public schools. When students arrive at school, they must uniquely express themselves without displaying links to their individual family traditions or religion. Therefore, it is prohibited to wear religious symbols at school. In

these ways, the French government has chosen to provide its citizens freedom from religion, in order to advance other motives such as national security and *fraternité.*

CHAPTER FOUR

The United States: Freedom *of* Religion

Thus far we have looked at two nations, Israel and France, who demonstrate relationships between church and state that grant their citizens freedom *for* and freedom *from* religion, respectively. Among modern nations that claim to provide religious freedom, these two approaches seem to be at the opposite ends of the spectrum. In review, Israel presents a view that religion is a necessary aspect of government and France approaches religion as something that must be absolutely and completely separate from government, even if this means infringing on the religious expression of individuals. Now, I will examine the unique relationship between church and state in the United States of America and will demonstrate that this view serves as a middle ground between Israel and France, providing freedom *of* religion, thus offering a proposed middle point to balance the spectrum of ways that countries across the globe engage with religion through laws and public policies. In order to illustrate my point I will first look at the historical and legal foundations that define religious freedom in America before offering an analysis of selected United States Supreme Court cases highlighting how those principles have been applied.

Foundations of Religious Freedom in America

Understanding the American experience of religious liberty and the meaning attached to it today must start with history. This history is vital for grasping how religion and the state interact in the United States because it is proof that there is "no one story of law and religion in U.S. history, and thus no one side in the broader church–state debate can rely on this history without first choosing which 'history' it will rely on" (Harvey). With this being said, several aspects of this nation's historical relationship with religion cannot be ignored, starting with the very beginning.

Indeed, a number of the colonists who founded the United States came with the intent of escaping religious persecution by state-affiliated churches such as the Roman Catholic Church and the Church of England (Stewart). For example, the individuals aboard the Mayflower were Puritans seeking to be free of legal restrictions on religion and religious harassment from the British government (Head 23). The Mayflower Compact, which was the first document establishing self-government in the New World reads:

> "IN THE NAME OF GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King *James*, by the Grace of God…Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*…"

The text of the Mayflower Compact serves as evidence demonstrating that some of the first colonists arrived in the New World with religious intentions. The civil unrest surrounding religion in England fueled the desire of America's forefathers to establish a country in which the separation of church and state and the freedom to practice one's faith without fear of persecution was guaranteed (Stewart).

While many of America's most prominent founders were strong supporters of this principle, there remained a great deal of opposition. This controversy was created because many political leaders at the time believed, as reflected in the Northwest Ordinance of 1787, that "religion, morality, and knowledge are necessary to a good government and the happiness of mankind." This quote demonstrates that some individuals viewed religion as a necessary aspect of government and the prospect of separating the two did not appeal to them. It is also important to note the origin of this quote. It was taken from the Northwest Ordinance, an official act passed by Congress under the Articles of Confederation. Because of this, we can see that this opinion was not simply held by a few religious fanatics, but that the entire Congress at the time agreed upon this language enough to pass the Ordinance into law. This belief hinges on the idea of the government promoting religion, and would, by extension, promote freedom *for* religion. At the same time, others, such as Thomas Jefferson, took a strong stance against religion in government, advocating a "wall of separation" between the two, which would most likely result in a freedom *from* religion stance (Hutson 775). The United States presents a complex view of church-state relations, primarily due to this ongoing, lively debate regarding how to best protect religious freedom with respect to the nation's history.

The two main American figures who shaped the debate on religion at the time of the nation's founding were Thomas Jefferson and James Madison. They also relied heavily on the ideas expressed in John Locke's *Letter Concerning Toleration,* which was discussed in the introduction to this thesis. As a reminder, John Locke's position is that

interests must be divided into two distinct categories: internal and external concerns. Internal concerns, such as religion, are the business of private individuals and institutions, like the church. External concerns, like national security, must be dealt with by public, governmental institutions. The distinction between these two categories is an essential aspect of church-state relations in the United States.

Jefferson's great effect on this issue within the U.S. can be seen in his coining of the term "wall of separation," which has been referenced in countless legal documents and is widely known across America. Jefferson also wrote the Virginia Statute for Religious Freedom in 1777, which served as a forerunner for the United States Constitution's First Amendment. In it, Thomas Jefferson proposed the following:

> Almighty God hath created the mind free...That to compel a man to furnish contributions of money for the propagation of opinions, which he disbelieves is sinful and tyrannical...therefore...no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion (Jefferson)

In this document, Jefferson outlines the ideas of freedom of conscience and the ability to be completely independent from all promotion of religion if he chooses.

While Jefferson is America's strongest voice against the establishment or endorsement of any one particular religion in our burgeoning country, James Madison proved to be the strongest defender of religion playing an active role in an individual's lives and the state allowing for that to occur. When we look at Madison's writings, the argument for freedom *of* religion begins to emerge. Madison's most prominent writing on the subject is his "Memorial and Remonstrance Against Religious Assessments," which

he writes in support of the Virginia Statute on Religious Freedom, making fifteen arguments as to why religious liberty is necessary as a fundamental right (Madison). Among these arguments, Madison emphasizes the separation of public, civil interests with private, religious issues, echoing the ideas of John Locke's *Letter Concerning Toleration.* Madison argues that we have a private duty to our creator that ought not to be interfered with by the state because reasoning on religious matters is unique, with the authority being God, not man. Further, this separation does not take power away from the church, but actually protects it from civil intertwining that corrupts religion. This reasoning demonstrates the balanced approach of freedom *of* religion, where the church and state remain separate but the ability to freely practice one's own religion is not undermined.

Analysis of U.S. Supreme Court Cases

The simplicity of the First Amendment has left much room for interpretation by the Supreme Court and lawmakers, leading to a wide range of understandings and practical implications for those living in the United States. The actual text of the famous religion clauses of the First Amendment to the Constitution provide "Congress shall make no law respecting the establishment of a religion or prohibiting the free exercise thereof." The first section of this, prohibiting the establishment of a religion, is called the Establishment Clause. The second section, protecting the free exercise of such a religion, is called the Free Exercise Clause. For decades, legal scholars, judges, and everyday

citizens have attempted to interpret these clauses and come to a concrete conclusion on the meaning of them.

In *Zorach v. Clauson,* the United States Supreme Court upheld as constitutional a "released time" program for public schools, giving students freedom to leave their school during the day to attend religious instruction elsewhere. In the majority opinion of this case, Justice William O. Douglas wrote that this policy violated neither religion clause of the First Amendment and that there was "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence" (*Zorach v. Clauson* 343 US 306). Justice Douglas famously reasoned that ruling otherwise would place disbelief over belief, thereby establishing a religion of secularism. This ruling clearly differentiates United States policy from a freedom *from* religion standpoint, where secularism is advanced by the government for fear of promoting religion.

Further, there is a tension between the two religion clauses provided in the First Amendment. This tension gets at the heart of what it means for a nation to exhibit freedom *of* religion. An example that demonstrates why it is often difficult to reconcile both the Establishment Clause and the Free Exercise Clause is the use of military chaplains in the United States. On the one hand, a military chaplain is a public individual, serving at the pleasure of the President and being funded by taxpayer dollars. On the other hand, this individual is explicitly religious, performing the work of a divine being and serving as the representative of a religious tradition (Drazin 8). Those opposed to the use of military chaplains argue that it is a violation of the Establishment Clause to use

government funding to support a person whose purpose is religious in nature, dangerously resembling the state-sponsored churches that the founder of the United States sought to escape and violating Jefferson's view that "no man shall be compelled to frequent or support any religious worship" (Jefferson). Those in favor of these chaplains assert that it is the only measure ensuring that men and women serving in the military are guaranteed the ability to freely practice their religion, even when deployed to unfamiliar places, and reflects a unique aspect of United States history (Drazin 10).

The Second Circuit Court of Appeals upheld the use of military chaplains as constitutional in *Katcoff v. Marsh.* In this case, the majority ruled that this was not a violation of the Establishment Clause of the First Amendment, reasoning that the Free Exercise Clause "obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved to areas of the world where religion of their own denominations is not available to them." While the United States Supreme Court has never directly ruled on this topic, several justices have discussed this prominent issue while writing opinions for other cases regarding the separation between church and state. For example, Justice Potter Stewart wrote in his dissent for *Abington School District v. Schempp*:

> Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

In this description, Justice Stewart articulates the difficulty in enacting both the religion clauses of the First Amendment and demonstrates the complexity of church-state

relations in the United States. Because of this complexity, stemming from the desire to maintain freedom to exercise your own religion while simultaneously keeping religion distant from government functions, the United States exhibits freedom *of* religion.

Practical Effects

Of the three experiences of religious freedom, the 'freedom of' view is undoubtedly the most difficult to maintain when dealing with practical issues (Zuckert). To show how the United States has implemented this view, I will now look at a second grouping of Supreme Court cases in order to demonstrate how the judiciary has interpreted the religion clauses of the First Amendment throughout its history.

The first US Supreme Court case to address religious liberty was on the topic of polygamy, an issue that has sparked much debate (Lieberman 123). In 1878, the Court heard *Reynolds v. United States,* a case which addressed the complaint of the Church of Jesus Christ of Latter-Day Saints regarding the practice of polygamy. The plaintiffs asserted that the Morrill Anti-Bigamy Act, which criminalized polygamy as a practice in all federal territories, was unconstitutional and violated their ability to freely practice their religion, where plural marriage is sometimes practiced.

The Court held that the federal anti-bigamy statute does not violate the Free Exercise Clause of the First Amendment for several reasons. First, this is dealing with a criminalized action, and the Court finds criminal intent present for all those attempting to marry more than one individual, even if they claim religious sanction. This emphasizes the idea that exemptions to criminal laws cannot be allowed because of religion. Again,

because of the criminal nature of the law, the burden is on the Church of the Latter Day Saints to show that there exists no rational basis for the Act. Next, the Court proves that it does indeed pass this rational basis test, providing a Lockean argument. Marriage is an interest to the government, therefore it is public in nature and may be regulated by the legislature. Further, the Court declares that bigamy—the act of marrying someone while you are legality already married-- is "subversive to good order" so Congress may legislate against the practice, whether religious or not.

Although the Court's decision has continuously been upheld, strong opposition was provided at the time of the ruling. George Q. Cannon, a representative of the territory of Utah wrote in response to the *Reynolds* decision:

> Our crime has been: We married women instead of seducing them; we reared children instead of destroying them; we desired to exclude from the land prostitution, bastardy and infanticide. Let the world know the facts.... Let it be published to the four corners of the earth that in this land of liberty, the most blessed and glorious upon which the sun shines, the law is swiftly invoked to punish religion, but justice goes limping and blindfolded in pursuit of crime (Larson)

Cannon's words demonstrate the difficulty of the issue of true separation between church and state. While the Court claims that this is a governmental interest, one that Locke would classify as "external," there remains a deep connection to religious activities, showing that there is no simple dichotomy between these two spheres (Locke).

Perhaps the most important case in the United States regarding law and religion jurisprudence is *Employment Division v. Smith.* This case resembles *Reynolds,* in the fact that it is concerning religious exemptions to a criminal law. This case involves two members of the Native American Church who were fired from their jobs at a drug

rehabilitation clinic for using peyote, a hallucinogenic, as part of their religious ceremonies. The two were denied unemployment benefits by the state of Oregon because they were fired due to their own "misconduct." Following the denial of unemployment benefits, the pair sued claiming that their First Amendment right to freely exercise their religion had been violated. In 1990, the Supreme Court heard this case.

In a 6-3 decision, the Court ruled that it is not unconstitutional for a state to deny unemployment compensation when an individual has been fired for using drugs, even for religious purposes. Justice Antonin Scalia authored the majority opinion and reasoned that because this is a neutral and generally applicable law, the Court cannot provide exemptions for indirect burdens, citing *Reynolds.* Because it is neutral and generally applicable, this case does not trigger strict scrutiny, meaning that it is held to a lower standard in order to remain constitutional. Justice Scalia posits that if the Court were to make an exception in this case, it would open the possibility to countless other exemptions to criminal statutes, leading to a state of anarchy, and deeming "each conscience a law unto himself" (*Employment Division v. Smith* 494 U.S. 872).

However, the majority still affirms there may be no ban on belief and no prohibition on religious actions *because* they are religious, constituting a direct ban. A direct ban is any prohibition on religious actions that intends to curb an individual's exercise of religion. This remains unconstitutional. A Supreme Court case that demonstrates this is *Church of Lukumi Babalu Aye v. City of Hialeah.* In this case, the Court dealt with local prohibitions on possession of animals with the intent to sacrifice or slaughter, carving out exemptions for state-licensed individuals such as butchers. While

this law may on its face appear secular, the Court determined that, in reality, this law was exclusively affecting those who were practicing the religion of Santeria, which involves animal sacrifice. Because of this, the law amounted to a direct ban on religious activity, and was determined unconstitutional (*Church of Lukumi Babalu Aye v. City of Hialeah* 508 US 520). What the Court dealt with in the case of *Employment Division v. Smith*, however, was a neutral law with a secular purpose that incidentally burdened a religious practice. The *Employment Division* case is unique in that it involves a certain situation where the statute or program is neutral and generally applicable, therefore there may be restrictions to the Free Exercise Clause.

Controversy erupted in the wake of the *Employment Division* decision to such an extent that the U.S. Congress deemed it necessary to pass a law in response; the Religious Freedom Restoration Act. This act required that if a law burdens the free exercise of a sincerely held religious belief, strict scrutiny is triggered, meaning that it must meet the highest standard to remain constitutional. In order for a law to pass the standard of strict scrutiny, it must demonstrate a compelling state interest and be narrowly tailored, meaning that there is no other way to achieve this state interest without burdening religious freedoms. In *Boerne v. Flores,* the Supreme Court ruled that this Act does not apply to states, but solely to laws enacted by the federal government.

While the United States policy on the specific topic of religious exemptions to criminal laws has been turbulent throughout time, other religious exemptions have remained consistent. Several cases have been decided with rulings that uphold the idea that religious nature may not be used as disqualification for state privileges or benefits.

Some of those cases include: *Rosenberger v. Virginia, Good News Club v. Milford, McDaniel v. Paty*. In *Rosenberger,* the Court held that the University of Virginia violated the Free Speech and Free Exercise Clauses by denying a Christian magazine staff equal resources as given to the other publishing organizations on campus because of the content of their words. In *Good News,* Milford School District in New York was found to have unconstitutionally discriminated against religious clubs by refusing to allow them to meet after hours, simply because they were religious. In *McDaniel,* the Court declared unconstitutional a statute that denied ministers the ability to hold a seat as a delegate to the Tennessee Constitutional Convention. Each of these cases suggest that it is unconstitutional to view individuals or organizations differently in the eyes of the law solely based on their religious nature.

These examples of how religious actions interact with legislation demonstrate the delicate balance that the United States places between the two religion clauses. On the one hand, the U.S. aims to provide freedom of religion for all individuals, preserving this right that is so closely held by our founders. On the other hand, rule of law must remain, and the government must not allow religion to impact its policy too greatly for fear of violating the establishment clause. In the end, this fragile impartiality leads to a view that is in the middle of the road, granting what we call freedom of religion.

CHAPTER 5

Conclusion

"While we are contending for our own liberty, we should be very cautious not to violate the conscience of others, ever considering that God alone is the judge of the hearts of men, and to Him only in this case are they answerable" ("The Papers of George Washington"). In this excerpt, George Washington aptly describes the essence of religious liberty. It is a freedom that many nations strive to achieve, cautiously hoping that by providing this liberty to one group, they are not violating the beliefs of others. The second half of this quote gets at the spirit of this principle: the idea that the church and the state ought to be separated as there are certain, private interests for which the government cannot be the judge. Many nations around the globe have tried to implement these ideas, and no two interpretations look the same (Sullivan 1). However, there are three main understandings of religious freedom that have emerged.

My thesis has attempted to explain each of these three views of religious freedom, which we have called freedom *for,* freedom *from* and freedom *of* religion. In order to best grasp these concepts, I first discussed a general history of religious liberty on a global scale. I looked back at the Edict of Milan which was the first documented official paper granting a right to religious freedom (Sordi), the Magna Carta which has served as the foundation for civil rights questions throughout the western world (Howard) and John Locke's *Letter on Toleration* which brilliantly outlined the distinction between the

private and public sectors, among others (Walters). These documents serve as the backdrop for modern interpretations of religious liberty. It is essential to understand the timeline of religion/state issues in the earliest times in order to place modern debates on the subject into context.

With this history in mind, I then looked to modern nations and how they have come to their understandings of religious freedom. I proposed that the separation of religion from government is not a binary issue: either a nation has an established religion or does not. Instead, through my research, I demonstrated that the separation of religion from the government is a proposition that is far from simple, and that nations without an established religion can still vary greatly in their interpretations of religious liberty. Specifically, Israel, France and the United States have each exemplified policies that fit the ideas of freedom for, from and of religion.

Israel exhibits freedom for religion because it keeps religion closely intertwined with the government, while still maintaining its status as a secular nation. While Israel does not have an established religion, it is considered a "Jewish State," which is far from easily defined (Liebman 13). This definition has both religious and ethnic meanings, and one or the other cannot be easily eliminated for use in this context. Further, Israel allows for religion to interact with its government in ways that other nations, such as France or the United States, would not allow. For example, the institution of marriage in Israel is a strictly religious practice and is legally granted through religious courts such as the Jewish Rabbinical Courts or the Muslim Sharia Courts (Shetreet). This example shows

how in certain respects religion is favored over irreligion, and religious individuals or institutions receive benefits that secular entities are not eligible to receive.

France has implemented a policy that is entirely unique from that of Israel, promoting an approach that is classified as freedom from religion. In France, religion is kept separate from the government to institute an entirely secular state with a policy that is called "Laïcité." In accordance with the ideas of laïcité, France has enacted laws that place limits on when individuals may wear outward expressions of religion, such as Muslim headscarves, Christian crosses, or Jewish yarmulkes (Arréat). These limits are meant to promote *fraternité,* which encompasses the French idea of unity throughout the nation. In addition to these provisions, the famous law 2010 prohibits an individual from covering his or her face in public spaces for reasons of national security (Daly). These examples of French policies show that first, the French prioritize unity and allegiance to the state over issues of individual religious expression and second, that national security will be preserved even when it requires the sacrifice of religious free exercise. In these ways, France has kept religion at a far distance from government action and has aligned with a "freedom from" religion experience.

Finally, the United States has promoted the policy of freedom of religion, which marks a middle ground between the two previous understandings. Freedom of religion closely resembles the ideas of John Locke, in that it advocates for dualism, separating between internal and external interests. This view advances a sort of liberalism, encouraging religious belief or disbelief to remain completely disassociated from the government. In the United States, the First Amendment of the Constitution advocates for

this view, stating that the government must refrain from establishing a religion or infringing on a citizen's right to freely exercise his or her own religious convictions. The implementation of this policy has been far from simple, and has given rise to dynamic debates on the issue for hundreds of years. While the First Amendment continues to be debated today, by looking at the Supreme Court decisions and legislation in place regarding religious liberty, it is evident that the United States most closely aligns with the freedom *of* religion standpoints.

While each of these three nations grant religious freedom in the sense that they do not have an established religion and they grant their citizens freedom to practice whatever religion they might choose, they have each enacted these principles in very different manners, showing that religious freedom is not easily defined and may, in reality, look entirely different in nations that appear on the the exterior to be quite similar.

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