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Is It All A Mirage?
Religious Freedom and False Choice in America

I. Introduction

Religion in America is often characterized as inexplicable, other-worldly, existential. In the most expansive definition religion that we can think of – no definition, religion is anything and everything. It is salvation, belief, tradition, community, faith, practice. Religion is often described by people as other-worldly, in explicable, felt. This in part, is the attraction to religion in the first place. Compounded with the word "freedom," religious freedom should indicate infinity multiplied – an ultimate, generous, expansive infinity of being, living, and state of freedom. Freedom upon freedom of understanding, protection, and equality.

And yet, looking at the history of religious freedom and Supreme Court cases provides a drastically different understanding. One in which religion and religious freedom are curtailed, limited, and actually very strictly defined to fit a Protestant-Christian norm. Religion, instead, as already previously theorized by many Religious Studies scholars is not definition-less and multifarious, but at its worst, a bastardized version of Protestantism that has come to limit the American interpretation of all of "religion." Legal freedom, is of course, different than theoretical or conceptual freedom. For example, freedom of speech does not protect violent speech or even speech that is construed as inciting violence. Children learn in school through the example of "Don't yell fire in a theater," that free speech does not mean all speech.[1] But what Supreme Court cases show is that legal freedom is not even that free in terms of religious freedom. History of Supreme Court Cases and the opinions and rulings that emerge from these

[1] Referenced by Rep. Jamie Raskin on the first day of impeachment trial (2021). Footnote on relevance of this idea?

cases come to show that there is an inherent bias that curtails the possibility of religious freedom for all.

The first time I learned the definition of "mirage," I was in a middle school science class. My teacher set up a glass of water and placed different objects behind the glass, demonstrating how the refraction of light on the water created a distorted image of the various objects. An optical illusion that was not true, but certainly appeared so at first glance. Looking at the case of religious freedom, the concept of "mirage" becomes a useful tool to understand the reality and illusory nature of religious freedom. American Religious Freedom has been offered as a protective umbrella to all Americans in cultural and historical lore. But in actuality and practice of the law, religious freedom only offers protection to a subset of norm and norm-adjacent, conforming religious group. Any other religious groups attempting to use legal means to protect their practices from the siege of discriminatory restriction or just to practice their religion is barred and read as illegible by the law.

By looking backwards into the genealogy of religious freedom to inspect the illusory quality of religious freedom, stemming from its inception to now, and at select Supreme Court cases, it is possible to limits and mirage of religious freedom. In part, this work responds to and fits into the new politics of religious freedom, a way of thinking popularized by scholars Winnifred Fallers Sullivan, Tisa Wenger, Finbarr Curtis, and many others. Sullivan's groundbreaking 2005 work *The Impossibility of Religious Freedom*, argued that religious freedom was fundamentally impossible because it operates on a definition of religion that does not apply to large swaths of people and perhaps religious protections should be sought through laws for equality rather than for religion. Wenger and Curtis detail the histories of religious freedom and show how it has been used as an oppressive weapon by various groups – mostly

powerful white, Protestant Americans – to advance local cultural and political goals, as well as international imperialistic projects. Michael McNally has also written specifically on how Protestant-based interpretation of religion have affected Native rights and life, as well as how Natives have attempted to appeal to Religious Freedom in an attempt to save their sacred ways of life. McNally's work has been extremely useful for foregrounding my interpretation of court cases relating to Natives by providing detailed and truthful accounts of Native life. Elizabeth Shakman Hurd and Anna Su have also contributed to literature disrupting religious freedom as neutral by demonstrating that religious freedom has been used as an international norm-shaper and foreign policy tool by America to control and exercise neo-imperialist tendencies in *Beyond Religious Freedom* and *Exporting Religious Freedom.* Their work, especially in unpacking the failures of religious freedom, have been foundational to my own work. However, this work also responds in part to their nihilistic and pessimistic views over religious freedom. Perhaps there is another way, for religious freedom to live up to its potential, for a democratic process, for hope.

Thus, this project seeks to examine the concept of religious freedom in the United States by looking at how the concept came to be and if free choice of religion actually exists legally or if it is just a mirage. Moreover, this project emerges as an outgrowth of classes I took with my advisor, Professor Thomas, which led me to question the definition of religion, the dominance of Protestantism in American culture and laws, and the malleability of rights in the U.S. I am interested in these questions because religious freedom is often seen as foundational to American life. It is hailed as one of the central unassailable freedoms for Americans and the reason why the Pilgrims settled North America. However, as with many things, upon closer examination, some of the promises of religious freedom look more complicated.

To provide a closer examination of religious freedoms and its promises, my research paper will proceed as follows. I begin by constructing a historical genealogy of religious freedom and looking at its conceptual and history roots, in sections I and II respectively. Next, I analyze Supreme Court cases to demonstrate how the unstable conceptual and historical roots of religious freedom play out in the law and in people's lives. Here, I also tease out the limitations and fallacies of religious freedom and show how legal precedents and opinions of court cases effectively come to define and constrain the idea of religious freedom. In the next section, I present overarching themes from my research where I have catalogued all of the Supreme Court cases related to the First Amendment and religion to see how the legal landscape has changed and served different populations over American history. Finally, I come to some conclusions about the empirical viability of "religious freedom," who the First Amendment *actually* serves, and implications for the future of religious freedom in the United States.

II. Religion is not Religion and Freedom is Not Free

Even prior to or devoid of the specific concept of "religious freedom," there were already problems with religion and freedom.

Right off the bat, there are theoretical faults with "religion." As first groundbreakingly argued by scholar Wilfred Cantwell Smith, "religion" originally comes from the Latin term "religio," and was used to describe Christianity. Smith argues that (1) the term "religion" is the result of historical processes operating in the West that "transformed what is essentially a human experience into a limited number of world 'systems," and (2) the misplaced emphasis on the *beliefs* of the world's religions "reflects the historical transformation of belief from its original

sense as performing an active role for religious practitioners into a series of propositions."[2] Thus, the term "religion" was only meant originally to describe and serve Christianity, but over time the term was transformed to a broader umbrella term to define the idea of a "great objective something." This created a theoretical construction of religion that dominated the West and places touched by colonialism that defines religion as something concerning an outside, higher power and based in personal or interior belief in this higher power through a demarcated system of ideas.

However, this definition does not accurately capture all of the things we do not categorize under the term "religion." For example, Buddhism and Native religions do not subscribe to a single entity of unquestionable and unknowing power. Indeed, Robert Ford Campany's *On the Very Idea of Religions* makes clear that to use "religion" is to map a product stemming from the Western Enlightenment onto Asian practices that do not completely translate to "religion." His case study of medieval Chinese discourse reveals that categorizing discourses like Buddhism and Taoism as "Asian religions" misattributes agency and imposes conceptual frameworks that are not typically found in Chinese texts.[3]

This of course does not mean that we as scholars or as laypeople should get rid of the term "religion" altogether, as it still does serve some utility for shared understanding and necessary simplicity amongst large populations of people. However, the biased origin of religion demonstrates that the word "religion" itself is already conditioned to describe a set of Christian norms. This biased definition of religion is only exacerbated by the fact that our legal system is

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[2] James L. Cox, "Foreward: Before the 'After' in 'After World Religions' - Wilfred Cantwell Smith on the Meaning and End of Religion" in After World Religions: Reconstructing Religious Studies, (New York, NY: Routledge, 2016), xii.

[3] Kevin Schilbrack, *Religions: Are There Any?* Journal of the American Academy of Religion 78, no. 4 (Dec 2010): 9.

handed down in part from English Common Law. For if the original law was intended to primarily protect white, English, Christian men and this forms the foundation of the American legal system – it should not be much of a surprise that the law and religious freedom are not as protective and expansive as we originally thought.

Moreover, freedom in the United States has long been conceptually unstable, uncertain, and inconsistent. From the time of the nation's founding, political leaders have espoused ideas of equality and freedom for all. The Preamble to the Declaration of Independence begins, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness…"[4] However, despite the espousal of these ideas of liberty and freedom for all and later laws "guaranteeing" freedoms of sorts through equality and civil rights – freedom has never been fully guaranteed for many populations. Various groups such as Black people and other racial minorities, Natives, women, the LGBTQ community, and others including people at the intersections of these identities have all been denied freedoms or rights throughout history.

Accordingly, religion and freedom are highly biased concepts in themselves. And when put together have created an even more unstable idea of "religious freedom." Thus, from the very beginning, religious freedom in the U.S. has *always* been malleable, disagreed upon, and lacking a singular status – essentially a mirage. Something that seems to exist but in actuality does not exist as we see it. Though this malleability of religious freedom need not be bad – indeed, perhaps it is good to have a living constitution that reflects the times and needs of the people – what actually appears when we look at invocations of religious freedom in politics is that it is

[4] https://constitutioncenter.org/interactive-constitution/white-papers/the-declaration-the-constitution-and-the-bill-of-rights

manipulated to serve certain goals and powerful actors. It is a proxy, a front, a trojan horse for other political concerns.

III. Religious Freedom as a Proxy War, from the Framers to Now

In September 2015, during Pope Francis' first visit to the United States, President Barack Obama gave a speech in the South Lawn of the White. The speech was an opportunity for the President to welcome Pope Francis, but also an opportunity to emphasize an American tradition of religious freedom and tell a story of the nation's enduring commitment to religious liberty. To tell this story of American religious freedom, Obama stated that "people are only free when they can practice their faith freely. Here in the United States, we cherish religious liberty. It was the basis for so much of what brought us together."[5] He went on to say, "We cherish our religious liberty, but around the world, at this very moment, children of God, including Christians, are targeted and even killed because of their faith."[6] Obama presented religious freedom from the time of the founding of the nation to now as immutable and unassailable. Furthermore, in this quote, Obama leans on the malleability of the religious freedom narrative to advance claims of American exceptionalism and provide a reason for neo-imperialism and intervention in the places where "children of god" are being targeted and killed.

Obama is not alone in this depiction and understanding of religious freedom. This rhetoric reaches across the aisle and across time. Everyone from President Donald to Trump to President John F. Kennedy has employed this rhetoric. In an *Executive Order on Advancing International Religious Freedom* signed on June 2nd, 2020, Trump called religious freedom,

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[5] Barack Obama, "Remarks by President Obama and His Holiness Pope Francis at Arrival Ceremony." Retrieved October 23, 2020, from https://obamawhitehouse.archives.gov/the-press-office/2015/09/23/remarks-president-obama-and-his-holiness-pope-francis-arrival-ceremony.
[6] Ibid.

"America's first freedom" and stated that "our Founders understood religious freedom not as a creation of the state, but as a gift of God to every person and a right that is fundamental for the flourishing of our society."[7] This statement is ironic considering Trump presumes a very specific understanding of religion predicated on belief in "God," contradicting the purpose of religious *freedom* for all, reaffirming the aforementioned biases in popular American understanding of what religion is (personal, God-based, belief).

As a presidential candidate in 1960, Kennedy told a group of Protestant minsters that he believes in an America "where all men and all churches are treated as equal; where every man has the same right to attend or not attend the church of his choice" and that "this is the kind of America for which our forefathers died, when they fled here to escape religious test oaths that denied office to members of less favored churches."[8] Kennedy relies on similar assumptions of religion to Trump just by invoking the idea of churches and churchgoing as the tell-tale sign of a religious body.

The three aforementioned Presidents all employed to advance various political goals through religious freedom, demonstrating the instability of the idea. If others can use religious vehicle as a vehicle, the concept itself is hollowed out and not the myth. For Kennedy, speaking to religious freedom and treating all religious folk equally helped assuage Protestant majority fears about his identity as a Catholic and being beholden to a pope through his religion. Kennedy made various other statements about his religion on the campaign trail, as he later went on the become the first and only Catholic president of the United States, until the recent election of President Joe Biden. For Obama, espousing the singularity of American religious freedom

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[7] Donald Trump, "Executive Order on Advancing International Religious Freedom". Retrieved October 23, 2020, from https://www.whitehouse.gov/presidential-actions/executive-order-advancing-international-religious-freedom/
[8] Kennedy, J. F. (2007, December 05). Transcript: JFK's Speech on His Religion. Retrieved October 25, 2020, from https://www.npr.org/templates/story/story.php?storyId=16920600

advanced the politically motivated image of the U.S. as the premier site of worldwide freedom and assuage the rising evangelical right during his tenure. His statements undoubtedly also bring up the racially charged fake claims of his so-called Muslim identity. And for Trump, his base was made up of the evangelical right and the alignment between neo-Conservative values and the Republican Party. Reaching out to them and ensuring religious freedom and protection against the siege of "bad religion" or "bad" groups bolstered their support for him. Presidents, perhaps better than anyone, know that a myth is a powerful thing. Even if the idea itself does not exist, bolstering the myth and promise around it can drive political success and action.

Rhetoric claiming the certainty of religious freedom, promulgated by political figures throughout American history, has contributed to popular notions of religious freedom as all-encompassing, expansive, and unchanging from the time of the nation's founding. But popular and pervasive need not mean accurate. From the founding of the nation, there has never been a singular, stable idea of religious freedom even after the writing of the Constitution of the United States of America. The First Amendment to the Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Contrary to Trump and Kennedy's invocation of the framers as a politically coherent group, the framers were in disagreement and often fundamentally opposed to each other's' understanding of religious freedom.[9] Religious freedom was not even mentioned in early versions of the Constitution, only making an appearance once a bill of rights was added after heated discussions in the House of Representatives in 1789.[10] In *The Myth of American Religious Freedom,* David Sehat disrupts the classic narrative of Thomas Jefferson and James Madison

[9] David Sehat, *The Myth of American Religious Freedom*. (New York, NY: Oxford University Press, 2016), 27.
[10] Smith, 53.

working in tandem to write religious liberty into law in Virginia and then the U.S Constitution. He states that the *only* thing the two framers agreed upon was that "the state should not pay churches." Everything else was wholly unclear. There was no certainty around who or what religious liberty protected, the role of the state in this protection, what level of religiosity was allowed in the public sphere, and crucially - the tie between religion, morals, and law. What resulted was an intense political and philosophical fight over the writing of the First Amendment and subsequent ambiguity in the actual text. Sehat writes that disagreement amongst the framers and tenuous compromise made it "totally unclear" whether the First Amendment "create[d] a government supportive of religion and tolerant of unbelief" or one that supported "the secular government of the godless Constitution while tolerating religious belief."[11] Furthermore, implementation of the First Amendment was uneven and unclear. After ratification of the Constitution, various religious groups including Jews and agnostics were disenfranchised and prohibited from holding office.[12] There was no actual "freedom" and free practice of faith, let alone a "cherishing of religious liberty" at the founding of the nation.

Similarly, in *The Rise and Decline of American Religious Freedom*, Steven D. Smith disrupts the standard story of American religious freedom and pushes back against the idea of America as a place where everyone and their religion were treated equally, but he provides a different analysis than Sehat. Smith locates federalism as the driving principle behind the writing of the First Amendment. He finds that the central purpose of the First Amendment was "to reaffirm the jurisdictional status quo" which meant states had jurisdiction over "essential matters of religion" and there would simply be no national church and no interference by the national

[11] Sehat, 49.
[12] Sehat, 29.

government with the exercise of religion."[13] Essentially, individual states could decide whether they wanted established churches within their dominion and how much interaction between church and "state" they desired. But this depiction of the First Amendment as largely neutral and an attempt to *not* express any national value towards religious freedom and liberties still led to an ambiguous legal framework and implementation. Smith writes that "the same people who wrote and voted for the establishment clause promptly proceeded to behave in ways inconsistent with the principles ostensibly contained in it by supporting and endorsing and being distinctly nonneutral toward religion in a whole variety of ways" on the federal level.[14]

While their analyses vary, Sehat and Smith both come to the same conclusion: The First Amendment and what the Framers laid out for religious freedom in the United States is ambiguous whether in principle or practice. The differences between Sehat and Smith bear out the fact itself - religious freedom in the United States has always been hotly contested, disagreed upon, and lacking a singular status. The historically coherent and expansive idea of religious freedom that Presidents, political actors, and citizens alike appeal is a myth that does not exist. Rather, attempts to define and call back to a notion of an American tradition of religious freedom are projections of other political aims, whether that is justifying American neo-imperialism as in Trump's Executive Order or tying together Christian values and foreign policy as in Obama's remarks during Pope Francis' visit. Religious freedom is not a peaceful, stable right but a proxy war for competing ideas of nationhood, empire, and freedom.

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[13] Steven Smith, *The Rise and Decline of American Religious Freedom*. (Cambridge, MA: Harvard University Press, 2014), 8.
[14] Smith, 62.

IV. Democratic Tensions in the Religious Freedom Legal Landscape

Prioritizing Christian, western, belief-oriented understandings of religion that take God and churchgoing for granted, as past presidents and lawmakers alike have routinely done on the national stage, is a process not without tangible consequence. Primarily, it means that the right to religious freedom is applied unevenly. One may be granted religious freedom and its accompanying legal and societal protections if their practice of religion is first recognized by and then aligns with the largely Christian-based understanding of religion that has been baked into the United States legal system. This understanding in the law comes first from English common law and narrow conceptions of religion held by the Framers at the founding of the nation. But temporal distance from the founding and an explosion in religious, ideological, and racial diversity has not rectified the biases held at the founding. Rather, a Christian-based understanding of religion has only been further cemented into the law and processes of governance by judges, lawyers, and plaintiffs who bring their personal, imperfect, and basically discriminatory interpretations of religion into the courtroom.[15]

An example of judges bringing unstable, personal biases of religion into their decision can be found in Judge Kenneth Ryskamp and the case of *Warner v. Boca Raton*. In his decision, Judge Ryskamp stated, based on his thoughts, that protected religion must "[reflect] some tenet, practice, or custom of a larger system of religious beliefs." Throughout the case, "Ryskamp seized opportunities to confirm his own religious worldview," referencing his own understanding of the Hebrew bible and Catholic teaching. But he also held "multiple personae with respect to religion" wherein his personal beliefs on the definable religion conflicted with legal language and scholarly opinion presented to him in the case. Judge Ryskamp's certain but wavering and

[15] Sullivan, W. (2005). *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press, 92-93, 97, 104, 136.

all personal definitions of religion resulted in tangible implications for the plaintiffs in the Warner case. The acts and of the plaintiffs, described by Winnifred Sullivan as "folk religion" or "lived religion," were "determined" by Judge Ryskamp to be not religious in nature and thus not protected by the Florida Religious Freedom Restoration Act. Though the case was decided at the federal district court level rather than at the Supreme Court level, Judge Ryskamp's personal influence over the legal definition of religion and who deserves religious freedom protections is evidence of a larger pattern of a bias in religious freedom governance that is reproduced by the law itself, but also individual actors.

In turn, these actors with immense legal, political, and societal power execute decisions that prioritize some religious communities and their rights over others. This hierarchy of being and protection is the antithesis of democracy. Even more concerning is that this hierarchy of religion aligns with and reproduces other hierarchies of citizenship, race, and sexuality. How does a democratic nation where "all men are created equal" contend with legally sanctioned hierarchies that result in different rights for different classes of Americans?

This Christian, western, belief-based bias is borne out in the empirical data of Supreme Court cases concerning religion and religious freedom over the years. In all of the landmark court cases from the start of the Court's litigation focus on religious freedom in the mid 20th century to the present day, only a handful of cases involve minority, non-Christian religions like the Native American Church. The handful of landmark cases with religious minorities is dwarfed almost five-fold by cases protecting Christian religions or non-establishment claims. This trend can be applied to the larger history religious freedom claims in the Supreme Court – only a very small minority of cases concern minority religions. These cases include *Heffron v. International Society for Krishna Consciousness, Lyng v. Northwest Indian Cemetery Protective Association*,

Church of the Lukumi Babalu Aye v. City of Hialeah, amongst a couple others. That landmark cases and the structure of religious freedom legal interpretation is shaped by cases largely involving Christian religions is deeply concerning for present and future understandings of religious freedom. When religious freedom precedent is defined primarily through the lens of Christian religion, the scripture and belief-based understanding of religion is only further reproduced as the dominant, valid, and most accessible form of religion. Furthermore, what religious freedom protection could and should look like is truncated and stunted, removing what accommodations for religious minorities look like out of the national conversations and imagination. Legal practitioners – past, present, and future – scholars, and Americans alike cannot imagine constitutional protections and are instead inundated with attempts to stereotype or criminalize religious minorities.

What does this data suggest? That either (1) minority religions are generally well-protected in the religious freedom arena, receiving legal and physical space to carry out their religious traditions and not needing to appeal to legal remedies or (2) biased understandings of religion are so prevalent in the legal system that minority religions are not even recognized by the state at a basic legal level and unable to bring suit for greater protections or rectifying injustices. The latter circumstance seems to hold true. To be considered religion, eligible for religious freedom protections, and reach the level of the Supreme Court, religious minorities must pass through various levels of scrutiny by individuals and the systems. These levels include district courts, circuit courts, and finally the Supreme Court, with individual judges and lawyers at every level bringing in and substantially implementing their personal views of religion. These personal views of religion may not include non-scripture-based practices or wearing a veil or animistic beliefs or bodily alternation. If practitioners of minority religions cannot even make

themselves known to the court system and access institutional channels to address legal grievances, let alone be fully protected under the claims of the Constitution — the mechanisms of democracy in the United States are failing American citizens. Before the Supreme Court can even attempt to carry out due justice to the Constitution and the religious freedoms it protects, the entire American judicial system must ensure that everyone is able to simply *access* and be seen by the institution itself.

V. ***The Failures of Religious Freedom***

In the first part of this project, I demonstrated the conceptual and historical inconsistencies of religion, freedom, and religious freedom and set the stage for how religious freedom is a mirage. In the second part of my research project, I will now focus on (1) the tension between the promises of the First Amendment and the actual biased results found in Supreme Court case rulings and (2) how these court cases create limited conditions for protection under First Amendment and how they dictate the religious choices presented to Americans. What I aim to ultimately show is that Americans are told they have options and choices when it comes to their religion, when in reality, they do not – essentially the creation of false choice.

To address the failures of religious freedom, I will first look at the case of Lyng v. Northwest Indian Cemetery Protective Association. A Supreme court case that was argued in 1987 and decided in 1988 under the Rehnquist Court. The case details are as follows: in 1982, the U.S. Forest Service intended to pave through the Chimney Rock area of the Six Rivers National Forest in California and harvest the trees. The tribes in this area, namely the Yurok, Karuk, and Tolowa, considered this forest sacred land and integral to their religious practice. Their practices depended on the privacy, silence, and undisturbed nature of the setting – which the Forest Service's plans completely disrupted.

As a result, the Native tribes, as well as supporting Native organizations filed suit that the planned road violated their First Amendment right to Free Exercise of Religion. And if the road were built, they could no longer practice their religion. The Court decision held 5-3 that the Forest Service was free to harvest the lands and pave the road, and that there was no violation of Free Exercise of religion because the inability to practice Native religion was only secondary and not an *overt* penalization of their belief.

Justice Sandra Day O'Connor wrote for the opinion for court majority, acknowledging that the U.S. Forest Service's plans would "interfere significantly with private person's ability to pursue spiritual fulfillment according to their own religious belief."[16] The opinion also stated that "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[17] And that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."

Furthermore, the Court opined that there is no overt penalization of Natives for their beliefs and moreover, they are *not* denied benefits enjoyed by other citizens – so the Forest Service plans could continue constitutionally.

> "The affected individuals here would not be coerced by the Government's action into violating their religious beliefs; nor would the governmental action penalize the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens."[18]

What this opinion ends up demonstrating is how religious freedom in the U.S. fundamentally misunderstands what the Native practice as their "religion." And as a result, the law only protects

[16] https://www.law.cornell.edu/supremecourt/text/485/439
[17] Ibid.
[18] Ibid.

dominant religious groups that conform most closely to the mold of Christianity. The Natives in this case still have access to other benefits of religion that others do, but that is fundamentally not how they practice their religion and so those benefits have lesser meaning. The Natives in this case do not just want protection from religious compulsion or access to places of worship – i.e. benefits that other citizens already maintain access to. What they want is the land and the preservation of its sacredness, because *that* is their religion. The land is not a secondary religious practice used for "spiritual fulfillment" as Justice Day O'Connor insinuates, it is necessarily the religion itself.

More flagrant is the court's statement that it cannot accommodate *particular* or "every" citizen. This statement suggests the elimination of protections for religious minorities simply because they are not the dominant numerical population. Justice Day O'Connor's legal opinion is actively others religious minorities and punishes them for not conforming to dominant practices. Natives and their religion are made to be "particular" and not normal or more explicitly they are denied protections because they are not like Christians or Jews or even Muslims in that they do not practice in a building with a piece of scripture. But what is the point of democracy and free exercise, if it does not serve the vulnerable, the minority, those most in need of protection and representation?

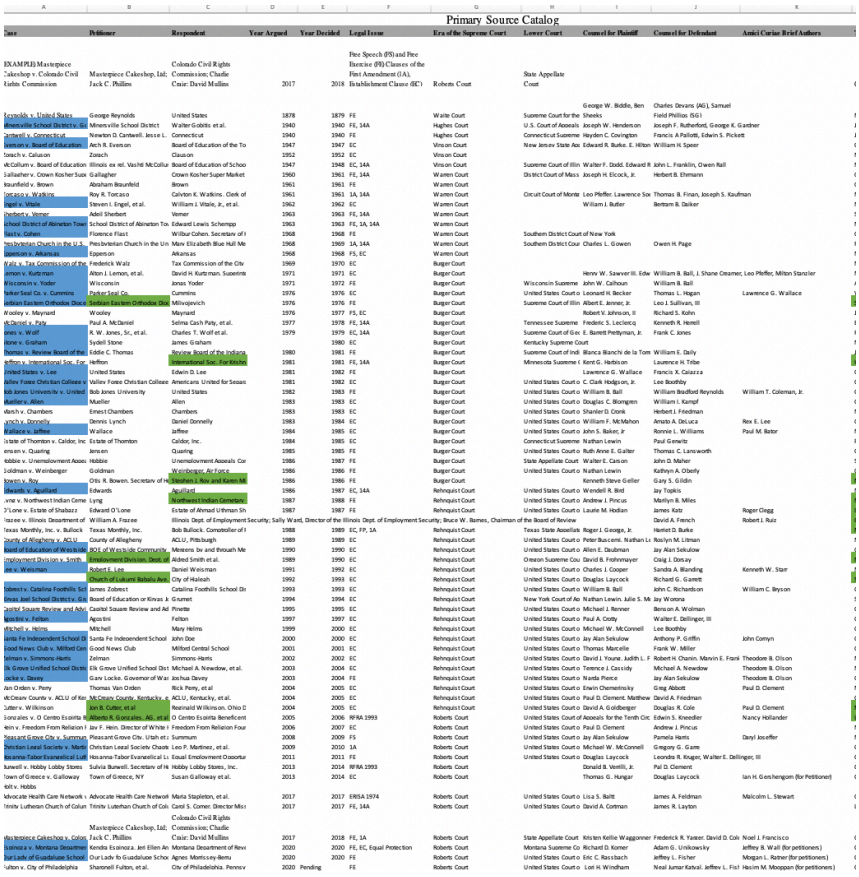
Furthermore, while I understand that there must be a stopping point somewhere and that every single thing cannot be protected, just as free speech does not protect speech that incites violence, it does not make sense why cutting off Native religions from protection seems to be the stopping place. In this case, there is no clear threat by Native religion to other citizens or governmental order.

Finally, the Court's opinion argues that there is no *overt* penalization of Natives for their belief, meaning they are not criminalized or imprisoned for exercising their belief, so if we take the Court at face value, then there must be that *nothing* unconstitutional is going on. The Court says "do not worry, Natives still have the choice to practice their religion freely. And so there is still freedom to religion." But by paving the land and harvesting the trees, the court has completely eliminated the choice to even practice Native religion. Although the Court says you have your choice to free religion theoretically, they have eliminated the choice *physically*. There is no sacred area for practice and ritual, and thus there is no choice available to exercise native religion. Meaning that there is not *actually* freedom of religion and freedom of religious exercise. Thus, this constitutes a false choice in religious freedom – choices are presented as accessible to Americans, when in reality, they are already previously foreclosed or do not even exist at all.

Through this court opinion, we can already see how religious freedom is actually limited very limited legally and only serves a certain population, rather than a democratic population.

VI. Larger Trends in the Religious Freedom Legal Landscape

This example case also reflects some larger trends in my research, namely that there seems to be an inherent bias in the law towards Christianity which makes it hard for minority religions to attain protections and rights. Just looking face-value at a catalogue of religion related cases from the history of the Supreme Court (demonstrated by the figure below), we see that the cases involving minority religions (highlighted in green) are few and far between.



Primary Source Catalog

Case	Petitioner	Respondent	Year Argued	Year Decided	Legal Issue	Era of the Supreme Court	Lower Court	Counsel for Plaintiff	Counsel for Defendant	Amici Curiae Brief Authors	
EXAMPLE) Masterpiece Cakeshop v. Colorado Civil Rights Commission	Masterpiece Cakeshop, Ltd; Jack C. Phillips	Colorado Civil Rights Commission; Charlie Cnair: David Mullins	2017	2018	Free Speech (FS) and Free Exercise (FE) Clauses of the First Amendment (1A). Establishment Clause (EC)	Roberts Court	State Appellate Court				
Reynolds v. United States	George Reynolds	United States	1878	1879	FE	Waite Court	Supreme Court for the	George W. Biddle, Ben Sheeks	Charles Devans (AG), Samuel Field Phillips (SG)		
Minersville School District v. Gobitis	Minersville School District	Walter Gobitis et al.	1940	1940	FE, 14A	Hughes Court	U.S. Court of Appeals	Joseph W. Henderson	Joseph F. Rutherford, George K. Gardner		
Cantwell v. Connecticut	Newton D. Cantwell. Jesse L.	Connecticut	1940	1940	FE	Hughes Court	Connecticut Supreme	Hayden C. Covington	Francis A Pallotti, Edwin S. Pickett		
Everson v. Board of Education	Arch R. Everson	Board of Education of the To	1947	1947	EC	Vinson Court	New Jersey State Ap	Edward R. Burke. E. Hilton	William H. Speer		
Zorach v. Clauson	Zorach	Clauson	1952	1952	EC	Vinson Court					
McCollum v. Board of Education	Illinois ex rel. Vashti McCollu	Board of Education of Schoo	1947	1948	EC, 14A	Vinson Court	Supreme Court of Illin	Walter F. Dodd, Edward R	John L. Franklin, Owen Rall		
Gallagher v. Crown Kosher Sup	Gallagher	Crown Kosher Super Market	1960	1961	FE, 14A	Warren Court	District Court of Mass	Joseph H. Elcock, Jr.	Herbert B. Ehrmann		
Braunfield v. Brown	Abraham Braunfeld	Brown	1961	1961	FE	Warren Court					
Torcaso v. Watkins	Roy R. Torcaso	Calvton K. Watkins. Clerk of	1961	1961	1A, 14A	Warren Court	Circuit Court of Monta	Leo Pfeffer. Lawrence Sol	Thomas B. Finan, Joseph S. Kaufman		
Engel v. Vitale	Steven I. Engel, et al.	William J. Vitale, Jr., et al.	1962	1962	EC	Warren Court		William J. Butler	Bertram B. Daiker		
Sherbert v. Verner	Adell Sherbert	Verner	1963	1963	FE, 14A	Warren Court					
School District of Abington Towr	School District of Abington Tov	Edward Lewis Schempp	1963	1963	FE, 1A, 14A	Warren Court					
Flast v. Cohen	Florence Flast	Wilbur Cohen. Secretary of I	1968	1968	FE	Warren Court	Southern District Court of New York				
Presbyterian Church in the U.S.	Presbyterian Church in the Un	Mary Elizabeth Blue Hull Me	1968	1969	1A, 14A	Warren Court	Southern District Cour	Charles L. Gowen	Owen H. Page		
Epperson v. Arkansas	Epperson	Arkansas	1968	1968	FS, EC	Warren Court					
Walz v. Tax Commission of the	Frederick Walz	Tax Commission of the City	1969	1970	EC	Burger Court					
Lemon v. Kurtzman	Alton J. Lemon, et al.	David H. Kurtzman. Superinte	1971	1971	EC	Burger Court		Henry W. Sawyer III. Edw	William B. Ball, J. Shane Creamer, Leo Pfeffer, Milton Stanzler		
Wisconsin v. Yoder	Wisconsin	Jonas Yoder	1971	1972	FE	Burger Court	Wisconsin Supreme	John W. Calhoun	William B. Ball		
Walker Seal Co. v. Cummins	Parker Seal Co.	Cummins	1976	1976	EC	Burger Court	United States Court o	Leonard H. Becker	Thomas L. Hogan	Lawrence G. Wallace	
Holy Trinity Eastern Orthodox Diocese	Holy Trinity Eastern Orthodox Diocese	Milivojevich	1976	1976	FE	Burger Court	Supreme Court of Illin	Albert E. Jenner, Jr.	Leo J. Sullivan, III		
Wooley v. Maynard	Wooley	Maynard	1976	1977	FS, EC	Burger Court		Robert V. Johnson, II	Richard S. Kohn		
McDaniel v. Paty	Paul A. McDaniel	Selma Cash Paty, et al.	1977	1978	FE, 14A	Burger Court	Tennessee Supreme	Frederic S. Leclercq	Kenneth R. Hemell		
Jones v. Wolf	R. W. Jones, Sr., et al.	Charles T. Wolf et al.	1979	1979	EC, 14A	Burger Court	Supreme Court of Geo	E. Barrett Prettyman, Jr.	Frank C. Jones		
Stone v. Graham	Sydell Stone	James Graham		1980	EC	Burger Court	Kentucky Supreme Court				
Thomas v. Review Board of the	Eddie C. Thomas	Review Board of the Indiana	1980	1981	FE	Burger Court	Supreme Court of Indi	Bianca Bianchi de la Tom	William E. Daily		
Heffron v. International Soc. For	Heffron	International Soc. For Krishn	1981	1981	FE, 14A	Burger Court	Minnesota Supreme (	Kent G. Herbison	Laurence H. Tribe		
United States v. Lee	United States	Edwin D. Lee	1981	1982	FE	Burger Court		Lawrence G. Wallace	Francis X. Caiazza		
Valley Forge Christian College v	Valley Forge Christian Colleae	Americans United for Separ	1981	1982	EC	Burger Court	United States Court o	C. Clark Hodgson, Jr.	Lee Boothby		
Bob Jones University v. United	Bob Jones University	United States	1982	1983	FE	Burger Court	United States Court o	William B. Ball	William Bradford Reynolds	William T. Coleman, Jr.	
Mueller v. Allen	Mueller	Allen	1983	1983	EC	Burger Court	United States Court o	Douglas C. Blomgren	William I. Kampf		
Marsh v. Chambers	Ernest Chambers	Chambers	1983	1983	EC	Burger Court	United States Court o	Shanler D. Cronk	Herbert J. Friedman		
Lynch v. Donnelly	Dennis Lynch	Daniel Donnelly	1983	1984	EC	Burger Court	United States Court o	William F. McMahon	Amato A. DeLuca	Rex E. Lee	
Wallace v. Jaffree	Wallace	Jaffree	1984	1985	EC	Burger Court	United States Court o	John S. Baker, Jr	Ronnie L. Williams	Paul M. Bator	
Estate of Thornton v. Caldor, Inc	Estate of Thornton	Caldor, Inc.	1984	1985	EC	Burger Court	Connecticut Supreme	Nathan Lewin	Paul Gewirtz		
Jensen v. Quaring	Jensen	Quaring	1985	1985	FE	Burger Court	United States Court o	Ruth Anne E. Galter	Thomas C. Lansworth		
Hobbie v. Unemployment Appeal	Hobbie	Unemployment Appeals Cor	1986	1987	FE	Burger Court	State Appellate Court	Walter E. Carson	John D. Maher		
Goldman v. Weinberger	Goldman	Weinberger, Air Force	1986	1986	FE	Burger Court	United States Court o	Nathan Lewin	Kathryn A. Oberly		
Bowen v. Roy	Otis R. Bowen. Secretary of H	Stephen J. Roy and Karen M	1986	1986	FE	Burger Court		Kenneth Steve Geller	Gary S. Gildin		
Edwards v. Aguillard	Edwards	Aguillard	1986	1987	EC, 14A	Rehnquist Court	United States Court o	Wendell R. Bird	Jay Topkis		
Lyng v. Northwest Indian Cemet	Lyng	Northwest Indian Cemetery	1987	1988	FE	Rehnquist Court	United States Court o	Andrew J. Pincus	Marilyn B. Miles		
O'Lone v. Estate of Shabazz	Edward O'Lone	Estate of Ahmad Urhman Sh	1987	1987	FE	Rehnquist Court	United States Court o	Laurie M. Hodian	James Katz	Roger Clegg	
Frazee v. Illinois Department of	William A. Frazee	Illinois Dept. of Employment Security; Sally Ward, Director of the Illinois Dept. of Employment Security; Bruce W. Barnes, Chairman of the Board of Review		1989	FE	Rehnquist Court	United States Court o	Peter Buscemi, Nathan L	Roslyn M. Litman	Robert J. Ruiz	
Texas Monthly, Inc. v. Bullock	Texas Monthly, Inc.	Bob Bullock. Comptroller of t	1988	1989	EC, FP, 1A	Rehnquist Court	Texas State Appellate	Roger J. George, Jr.	Harriet D. Burke		
County of Allegheny v. ACLU	County of Allegheny	ACLU, Pittsburgh	1989	1989	EC	Rehnquist Court	United States Court o	Peter Buscemi, Nathan L	Roslyn M. Litman		
Board of Education of Westside	BOE of Westside Community	Mergens by and through Me	1990	1990	EC	Rehnquist Court	United States Court o	Allen E. Daubman	Jay Alan Sekulow		
Employment Division v. Smith	Employment Division, Dept. of	Alfred Smith et al.	1989	1990	EC	Rehnquist Court	Oregon Supreme Cou	David B. Frohnmayer	Craig J. Dorsay		
Lee v. Weisman	Robert E. Lee	Daniel Weisman	1991	1992	EC	Rehnquist Court	United States Court o	Charles J. Cooper	Sandra A. Blanding	Kenneth W. Starr	
	Church of Lukumi Babalu Aye	City of Hialeah	1992	1993	EC	Rehnquist Court	United States Court o	Douglas Laycock	Richard G. Garrett		
Zobrest v. Catalina Foothills Sc	James Zobrest	Catalina Foothills School Di	1993	1993	EC	Rehnquist Court	United States Court o	William B. Ball	John C. Richardson	William C. Bryson	
Kiryas Joel School District v. Gr	Board of Education or Kiryas J	Grumet	1994	1994	EC	Rehnquist Court	New York Court of Ap	Nathan Lewin. Julie S. Mo	Jay Worona		
Capitol Square Review and Adv	Capitol Square Review and Ad	Pinette	1995	1995	EC	Rehnquist Court	United States Court o	Michael J. Renner	Benson A. Wolman		
Agostini v. Felton	Agostini	Felton	1997	1997	EC	Rehnquist Court	United States Court o	Paul A. Crotty	Walter E. Dellinger, III		
Mitchell v. Helms	Mitchell	Mary Helms	1999	2000	EC	Rehnquist Court	United States Court o	Michael W. McConnell	Lee Boothby		
Santa Fe Independent School Di	Santa Fe Independent School	John Doe	2000	2000	EC	Rehnquist Court	United States Court o	Jay Alan Sekulow	Anthony P. Griffin	John Comyn	
Good News Club v. Milford Cen	Good News Club	Milford Central School	2001	2001	EC	Rehnquist Court	United States Court o	Thomas Marcelle	Frank W. Miller		
Zelman v. Simmons-Harris	Zelman	Simmons-Harris	2002	2002	EC	Rehnquist Court	United States Court o	David J. Young. Judith L. F	Robert H. Chanin. Marvin E. Frank	Theodore B. Olson	
Elk Grove Unified School Distri	Elk Grove Unified School Dist	Michael A. Newdow, et al.	2003	2004	EC	Rehnquist Court	United States Court o	Terrence J. Cassidy	Michael A. Newdow	Theodore B. Olson	
Locke v. Davey	Gary Locke. Governor of Was	Joshua Davey	2003	2004	FE	Rehnquist Court	United States Court o	Narda Pierce	Jay Alan Sekulow	Theodore B. Olson	
Van Orden v. Perry	Thomas Van Orden	Rick Perry, et al	2004	2005	EC	Rehnquist Court	United States Court o	Erwin Chemerinsky	Greg Abbott	Paul D. Clement	
McCreary County v. ACLU of Ke	McCreary County, Kentucky, e	ACLU, Kentucky, et al.	2004	2005	EC	Rehnquist Court	United States Court o	Paul D. Clement. Matthew	David A. Friedman		
Cutter v. Wilkinson	Jon R. Cutter, et al	Reginald Wilkinson, Ohio D	2004	2005	EC	Rehnquist Court	United States Court o	David A. Goldberger	Douglas R. Cole	Paul D. Clement	
Gonzales v. O Centro Espirita B	Alberto R. Gonzales, AG, et al	O Centro Espirita Beneficent	2005	2006	RFRA 1993	Roberts Court	United States Court of	Appeals for the Tenth Circ	Edwin S. Kneedler	Nancy Hollander	
Hein v. Freedom From Religion I	Jay F. Hein. Director of White I	Freedom From Religion Four	2006	2007	EC	Roberts Court	United States Court o	Paul D. Clement	Andrew J. Pincus		
Pleasant Grove City v. Summun	Pleasant Grove City, Utah et a	Summum	2008	2009	FS	Roberts Court	United States Court o	Jay Alan Sekulow	Pamela Harris	Daryl Joseffer	
Christian Legal Society v. Marti	Christian Legal Society Chapte	Leo P. Martinez, et al.	2009	2010	1A	Roberts Court	United States Court o	Michael W. McConnell	Gregory G. Garre		
Hosanna-Tabor Evangelical Luth	Hosanna-Tabor Evangelical Lu	Equal Employment Opportur	2011	2011	FE	Roberts Court	United States Court o	Douglas Laycock	Leondra R. Kruger, Walter E. Dellinger, III		
Burwell v. Hobby Lobby Stores	Sylvia Burwell. Secretary of He	Hobby Lobby Stores, Inc.	2013	2014	RFRA 1993	Roberts Court		Donald B. Verrilli, Jr.	Pal D. Clement		
Town of Greece v. Galloway	Town of Greece, NY	Susan Galloway et al.	2013	2014	EC	Roberts Court		Thomas G. Hungar	Douglas Laycock	Ian H. Gershengorn (for Petitioner)	
Holt v. Hobbs											
Advocate Health Care Network v	Advocate Health Care Networl	Maria Stapleton, et al.	2017	2017	ERISA 1974	Roberts Court	United States Court o	Lisa S. Blatt	James A. Feldman	Malcolm L. Stewart	
Trinity Lutheran Church of Colun	Trinity Lutehan Church of Col	Carol S. Comer. Director Miss	2017	2017	FE, 14A	Roberts Court	United States Court o	David A. Cotman	James R. Layton		
	Masterpiece Cakeshop, Ltd;	Colorado Civil Rights Commission; Charlie									
Masterpiece Cakeshop v. Color	Jack C. Phillips	Cnair: David Mullins	2017	2018	FE, 1A	Roberts Court	State Appellate Court	Kristen Kellie Waggoner	Frederick R. Yarger. David D. Cole	Noel J. Francisco	
Espinoza v. Montana Departme	Kendra Espinoza. Jeri Ellen Ar	Montana Department of Rev	2020	2020	FE, EC, Equal Protection	Roberts Court	Montana Supreme Co	Richard G. Komer	Adam G. Unikowsky	Jeffrey B. Wall (for petitioners)	
Our Lady of Guadalupe School	Our Lady fo Guadalupe Scho	Agnes Morrissey-Berru	2020	2020	FE	Roberts Court	United States Court o	Eric C. Rassbach	Jeffrey L. Fisher	Morgan L. Ratner (for petitioners)	
Fulton v. City of Philadelphia	Sharonell Fulton, et al.	City of Philadelphia. Pennsv	2020	Pending	FE	Roberts Court	United States Court o	Lori H. Windham	Neal Jumar Katyal. Jeffrey L. Fisl	Hasim M. Mooppan (for petitioners)	

Furthermore, since most of the landmark cases concerning religion involve Christian religions, the structure of religious freedom legal interpretation is shaped and defined by Christianity. This is deeply concerning because dominant religious norms are only further reproduced and made valid as the law of the land. So religious freedom as a tool to protect the rights of all, and especially the minority, only ends up being useful for the majority.

There is immense resonance between my findings and the greater realm of politics as well. For example, the passing of Burwell v. Hobby Lobby, allowed the Christian religious majority to get protection for their views on contraception and life through the claim of religious freedom– in turn affecting the livelihood and reproductive rights of numerous others. This is another example of how the law foreclosed choices for another type of minority by empowering and protecting only the religious majority.

Even more recently, during the Capitol insurrection in January 2021, Christian imagery abounded. Under the guise of free religious exercise, Christian rhetoric and imagery were used to advance numerous other political concerns. As seen in the Insurrection at the Capitol, those who fit the norm are empowered with the tools of freedom and religious freedom. But when that same freedom should be applied to others, they are called domestic terrorists. This is of course not to say that all Christians act or believe or behave in a certain way, but that the failures of religious freedom have allowed certain forms and displays of religion to be sanctioned and legally protected. While others are completely erased and eliminated. Furthermore, this protection of mainly the religious majority has made it easier for other political concerns that may or not be related to religion to hide behind the claim of religious freedom.

VII. Where Do We Go From Here?

My tentative conclusion to my research question of "does religious freedom actually exist and do we have free choice in religion," is "no." There is an immense bias in the concept and practice of religious freedom, which leads to its failure and the removal of choice for individuals at the margins of definition.

But while this conclusion is useful for our understanding of religious freedom in the United States, it is not the most optimistic or as useful for a political practice perspective. While some scholars have argued for the abandonment of religious freedom and moving perhaps towards protections for equal rights under different terminology and laws, I am not sure if I would agree. I think there is still hope in the concept of religious freedom. If the law is malleable and shaped in one way, perhaps it can be changed again and shaped in another way. For the better and towards more democratization.

And most importantly, I think this is a hopeful point for the intersection of the academy and practice, which is always a concern for scholars in how our research grows and informs public life. I think a broader, more expansive understanding of religion in the legal system and in the minds of lawyers, judges, and public servants is necessary. This understanding of religion that shows how people in America actually practice religion and live religious or non-religious lives can come from the academy. Furthermore, the humanities can help inform policymaking rather than only the policy think tanks and public servants who are too immersed in the bureaucracy of Capitol Hill who inform policy now.

After a long year where it sometimes seems as though the whole world has changed through dark and seemingly hopeless times; I would like to find hope in scholarship, because I think in a way the hope of intersectional humanities and social science work are what makes scholarship so important and generative– it shows us that phenomena are not always new and that they are not always endless and that humans live beautifully complex lives that are not always easily legible and defined….but that there are always paths forward.