



*Journal of
Religion & Society*
Supplement Series

The Kripke Center

Supplement 25 (2024)

Religion in the Public Square

Edited by Ronald A. Simkins

The Inclusivity of Religious Freedom

An Introduction

Ronald A. Simkins, Creighton University

U.S. Americans pride themselves in the many freedoms they are afforded, and few freedoms are more cherished than religious freedom. Its enshrinement in the First Amendment of the Constitution signals its importance. There, the Constitution ensures that all Americans are freely able to practice their religion (Free Exercise Clause) without interference from the state (Establishment Clause). Yet, religious freedom, and thus the role of religion in the public square, has been and continues to be one of the most contentious freedoms found in the “sweet land of liberty.” At the heart of the conflict is not the quality of the freedom but rather its scope. Although issues of religious freedom can coalesce with issues of race and politics, thus obfuscating the religious nature of the conflict—such as the bigotry and violence against Muslims in the wake of the terrorist attacks on September 11, 2001, or recent acts of antisemitism in reaction to Israel’s war against Hamas in Gaza—the religious freedom of others has been viewed by too many as an assault on their own religious freedom, as if religious freedom is a zero-sum game. The old adage “freedom for me, but not for thee”

too often applies. But such an exclusive understanding of religious freedom is contrary to the reasons for enacting the First Amendment. The religious freedom of the majority or of those who embrace and practice an official religion was not in dispute. Rather, the guarantee of religious freedom is needed by those who might believe or worship differently from those in power or favored by the majority. Because the ebb and flow of political power and the favor that comes with it may be capricious, the guarantee of religious freedom for some becomes contingent upon the protection of the religious freedom for all.

Although the First Amendment guarantees the freedom of religion, the Free Exercise Clause is not absolute, and the meaning of the Establishment Clause has taken many years to define. For example, early Mormons practiced plural marriage as part of their religion, but in *Reynolds v. United States* (98 U.S. 145 [1879]) the Supreme Court ruled that the federal government's prohibition of polygamy was not a violation of the Free Exercise Clause. The result was that the Church of Jesus Christ of Latter Day Saints changed their religion, prohibiting plural marriage in 1890, then again in 1904. Similarly, in 1944, the Supreme Court ruled in *Prince v. Massachusetts* (321 U.S. 158) that a state could force children to be inoculated, despite the objection of their parents on religious grounds. In other words, the Court found that the state has a compelling interest to protect the health of children, which in this case, outweighed religious practice. In contrast, when the U.S. Congress passed the Drug Abuse Control Act of 1965 prohibiting, among other drugs, peyote that had long been used by Native Americans in religious rituals, an exemption was made for the Native American Church. The exemption continued for many years until the Supreme Court ruled in *Employment Division v. Smith* (494 U.S. 872 [1990]) that Native Americans who use peyote in religious ceremony are not protected under the Free Exercise Clause if challenged by a compelling state interest. Thus, it took an act of Congress, in the American Indian Religious Freedom Act Amendments of 1994, to ensure that the use of peyote is legal by "an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion" (42 U.S. Code 1996a).

Whereas the Free Exercise Clause's support of religious freedom is balanced by compelling state interest, the Establishment Clause functions to limit the relationship between church and state. The state has often assisted religion—such as providing religious institutions with tax breaks and accepting the role of clergy in marriage ceremonies—and even collaborated with religion—consider the role of religious chaplains in the military or the state support of religiously affiliated institutions in adoption and healthcare. When the battle has been between different Christian denominations, the Establishment Clause has ensured that no one denomination is preferred by the state. Religious pluralism, and especially a growing population that prefers no religion, however, has complicated the definition of "establishment." Does the phrase, "In God We Trust," on U.S. currency, for example, constitute the state's establishment of religion? While the phrase does not target a particular theology or favor a particular religion, it does attest to theism generally. According to *Aronow v. United States* (432 F.2d 242 [9th Cir. 1970]), however, the judges of the Ninth Circuit Court of Appeals ruled the motto is not a violation of the Establishment Clause but a patriotic or ceremonial slogan. It is not a state sponsorship of religion. In the 1971 case of *Lemon v. Kurtzman* (403 U.S. 602), the Supreme Court laid out a three-part litmus test—the "Lemon" test—defining the circumstances under which the state may assist religion: the purpose of the

assistance must be secular; it must neither promote nor inhibit religion; and there can be no excessive entanglement between church and state (United States Courts n.d.).

Given the balancing of religious freedom in the First Clause with the avoidance of entanglement of church and state in the Establishment Clause, it should not have been a surprise that the Supreme Court removed organized mandatory prayer and Bible reading from the public schools in the conjoined landmark decision of *Murray v. Curlett* (228 MD 239 [1963]) and *Abington Township v. Schempp* (374 US 203 [1963]), even before the *Lemon* decision eight years later. And for anyone who followed the Court, it was not a surprise. By a near-unanimous, eight to one, decision, the Court ruled that such publicly-sponsored religious exercises were a violation of the Establishment Clause. But for many in the religious public, including many sympathetic politicians who tried to overturn the decision with legislation, the decision was outrageous, denying the religious faithful the ability to express their faith publicly—the decision was framed by some as a violation of their religious freedom to practice their religion in the public schools. The secular aspirations of the plaintiffs for their children to attend public schools without religious exercises—with the public focusing primarily on the atheist Madalyn Murray (O’Hair) and her sons—were deemed insignificant at best and a threat to American society at worst.

More recently, when the Supreme Court struck down all state bans on same-sex marriage with *Obergefell v. Hodges* (576 US 644 [2015]), some Christians interpreted the decision as a threat to their religious freedom. Kim Davis, for example, a clerk of Rowan County, Kentucky, refused to issue marriage licenses to same-sex couples, citing her religious beliefs—forcing her to fulfill a requirement of her government job would violate her religious freedom. She eventually relented by allowing someone else in her office sign the licenses. In another case, a baker in Lakewood, Colorado, refused to make a wedding cake for a same-sex couple based on his religious beliefs. Colorado’s Civil Rights Commission found the baker’s actions discriminatory, but the Supreme Court overturned that decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (584 US ____ [2018]) based on a technicality—that the commission did not employ religious neutrality. The decision did not address the larger issues of religious freedom. The U.S. Conference of Catholic Bishops (USCCB) has repeatedly opposed same-sex marriage and legislation that would protect same-sex marriage, both before and after the Supreme Court decision, on the grounds of religious freedom, among other reasons. Although no legislation has ever required clergy to perform same-sex marriages, nor does it seem that such legislation would be constitutional given the Establishment Clause, that has not stopped the bishops from arguing against the religious freedom of others—that same-sex couples can share in the blessing of marriage—based on their own religious freedom (Pew Research Center 2009; Smith 2012; Crary 2022).

The essays in this volume explore the public role of religious freedom. They have their origin in the annual symposium of the Kripke Center for the Study of Religion & Society at Creighton University, held February 16–17, 2023, on the occasion of the sixtieth anniversary of the Supreme Court’s decision in *Murray* and *Schempp*. In the first two essays, Thomas Aiello and Bryan Le Beau examine the controversies flowing out of the *Murray v. Curlett* decision and especially the role and legacy of Madalyn Murray (O’Hair). Todd Salzman and Michael Lawler focus on the role of the USCCB in using the claim of “religious liberty” to combat the acceptance and recognition of same-sex relationships, while subverting the doctrine of the

well-formed conscience. These essays are followed by two historical studies. In the first, Dulcinea Boesenberg examines Paul's argument in 1 Corinthians regarding meat sacrificed to idols: his argument is essentially that not all freedoms should be exercised; the freedom of some may result in the detriment of others. Julia Fleming uncovers the complicated history of the "privilege of the forum," where clerics and other ecclesiastical persons were exempt from trial in secular courts. In these cases, the religious freedom of some has led to a host of unintended consequences.

The remaining essays of this volume address the larger role of religion in the public square. Tom Jeannot analyzes the general bias against religion that is becoming characteristic of the public square with the "atheism of the masses" and expressed in academic, professional philosophy. Four essays shift the focus of religion in the public square away from the United States to foreign contexts, where the separation of church and state is neither instituted nor prominent. Samantha Senda-Cook presents a first-hand analysis of the Asian Rural Institute in Tochigi, Japan, where interfaith dialogue functions to mediate an international group of people learning how to grow food sustainably. Similarly, Rebecca Bartel and Katerine Alejandra Duque Duque consider how religion functions to construct new public squares in the wake of the 2016 Peace Accords in Columbia, providing the moral imperatives for new social relations and economic practices. Jay Carney and Kathleen Smythe present essays on the contribution that religion has made to the public square in several African nations and draw out relevant insights for the U.S. public.

The final contribution to this volume is an extended review essay of Martin Hägglund's ambitious book, *This Life: Secular Faith and Spiritual Freedom* (2019). Hägglund links religion in the public square to the social conditions that produced and thus the alienated forms of life under capitalism. By offering an immanent critique of religion and capitalism, Hägglund offers a new political vision of freedom based on a secular understanding of ourselves as finite beings. Theodore Dedon, Tom Jeannot, Patrick Murray, and Jeanne Schuler present philosophical and theological responses to Hägglund's critique and vision.

Bibliography

- Crary, David. 2022. "Faith groups split over bill to protect same-sex marriage." AP News (November 16). <https://apnews.com/article/religion-relationships-gay-rights-marriage-a6d9a92c4a5cda6e4b977f516a9a71a7>.
- Hägglund, Martin. 2019. *This Life: Secular Faith and Spiritual Freedom*. New York: Anchor.
- Pew Research Center. 2009. "A Clash of Rights? Gay Marriage and the Free Exercise of Religion" (May 21). <https://www.pewresearch.org/religion/2009/05/21/a-clash-of-rights-gay-marriage-and-the-free-exercise-of-religion>.
- Smith, Derek. 2012. "Does Same-Sex Marriage Threaten Religious Freedom?" Bill Track 50 (May 10). <https://www.billtrack50.com/blog/social-issues/civil-rights/does-same-sex-marriage-threaten-religious-freedom>.
- United States Courts. No date. "First Amendment and Religion." <https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion>.